

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

ORIGINAL APPLICATION NO. 559 of 2013

Thursday this the 30th day of June, 2016

CORAM

Hon'ble Mr. Justice N.K.Balakrishnan, Judicial Member
Hon'ble Mrs. P. Gopinath, Administrative Member

S. Attakoya, S/o Pookoya (late), aged 53 years
Executive Engineer (under suspension)
UT of Lakshadweep, residing at Government
quarters, Type V, No.5, Kavalarathi,
UT of Lakshadweep.

...Applicant

(By Advocate Mr. M.R.Rajendran Nair (Senior) with Advocate Mr. M.R.
Hariraj)

Versus

1. Union of India represented by the Secretary to Government of India, Department of Urban Development, New Delhi- 110 001.
2. Administrator, UT of Lakshadweep, Kavarathi-682555.
3. Director, Services, UT of Lakshadweep, Kavarathi-682555.
4. Union Public Service Commission, represented by its Secretary, Dholpur House, Shajahan Road, New Delhi-110 001.

.....Respondents

(By Advocates : Mr. S. Radhakrishnan for R 2&3
Mr. Thomas Mathew Nellimootil (rep) for R4
None present for R1)

The above application having been finally heard on 07.06.2016, the Tribunal on 30.06.2016 delivered the following:

ORDER

Per: Justice N.K. Balakrishnan, Judicial Member

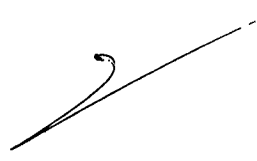
The applicant has approached this Tribunal for quashment of the sealed cover procedure adopted by the respondents and to direct them to consider the applicant for grant of promotion to the cadre of Superintending Engineer with effect from the date on which he became eligible for the same with all consequential benefits. The applicant also seeks to set aside Annexures A3 and A8. As per Annexure A3 the UPSC informed that since the applicant was placed under suspension w.e.f. 27.4.2012 he cannot be considered for the post of Superintending Engineer on adhoc basis as directed by this Tribunal. It was further stated that the applicant can be considered for regular promotion to that post with sealed cover procedure as per the extant instructions of DOP&T on the subject. The Administration was also directed to communicate to the applicant the below 'bench mark grading' giving him time to represent against the same. Annexure A8 is the order dated 17.4.2013 as per which the request made by the applicant, who was under suspension for up gradation of below mark grading in his ACRs for the period from 6.5.1998 to 31.3.1999, 1.4.2000 to 31.3.2001 and 1.4.2001 to 31.3.2002 was rejected.



2. Shorn of the details the case pleaded by the applicant can be stated as under:

The applicant commenced his service as Junior Engineer. He was granted promotion to the post of Executive Engineer on adhoc basis by order dated 21.4.1998. Litigations were there seeking regular promotion to the post of Executive Engineer. He was granted regular promotion w.e.f. 7.3.2001. When vacancy of Superintending Engineer (SE) arose in Lakshadweep Public Works Department (LPWD) the applicant made a request to consider him for promotion reckoning his adhoc service in the cadre of Executive Engineer. That was turned down. As per Recruitment Rules, the applicant was qualified. Since his request was turned down he filed OA 559/2012. That was partly allowed declaring that the adhoc service of the applicant is liable to be treated as qualifying service. Hence the respondents were directed to consider the applicant for promotion in the existing vacancy. That was confirmed by the Hon'ble High Court and also by the Hon'ble Supreme Court. The applicant was put in charge of Superintending Engineer. He was later posted as Director Lakshadweep Water Supply, Sanitation and Sewage Board on deputation. Apprehending that he would be reverted, and compelled to work in a lower post, he approached this

Tribunal by filing OA 662/2009. That OA was allowed as per order dated 12.8.2011. It was found that the prolongation of the proceedings started as long back in 1999-2000 and it was not attributable only to the respondents. It was directed that the UPSC should hold a DPC and that the respondents herein should make available all the records. The fact that no disciplinary proceedings was pending in April 2003, when applicant was eligible and in 2007 when the proposal was sent to UPSC were directed to be considered. It was further held that if regular promotion cannot be granted, the adhoc promotion as SE must be considered. Even thereafter, the applicant was not given promotion as SE, even on adhoc basis. Hence the applicant filed MA 145/2012 seeking implementation of Annexure A2 order. Thereafter a charge memo was issued to the applicant alleging misconduct during 2006-2008. Since there was an attempt to keep the applicant away from SE post, he filed OA 211/2012. Holding that it was an order of transfer the Tribunal did not intervene and the OA was dismissed. He then filed OP (CAT) 1363/2012 before the Hon'ble High Court. The High Court directed to maintain status quo. While so the applicant was suspended from service. He then filed OA 348/2012. That OA was also dismissed. Challenging the same OP (CAT) 2216/2012 was filed.

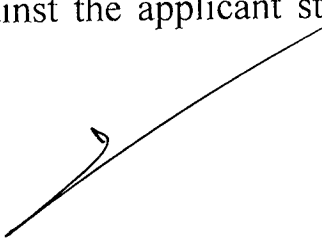


That OP was disposed of directing the respondents to consider the representation made by the applicant against his suspension order. That representation was rejected by the respondents. Challenging the same OA 68/2013 was filed by the applicant, which is pending. The 4th respondent filed a statement to the effect that adhoc promotion cannot be considered since the applicant was under suspension and it directed the Administrator (2nd respondent) to intimate the applicant the "below bench mark" grading in the ACR. The first respondent communicated the 'below bench mark' grading to the applicant vide letter dated 22.8.2012 (Annexure A4) to which Annexure A5 representation was given by him. Again Annexure 7 representation was also given by him. Refusal on the part of the respondents to deny the applicant even adhoc promotion is illegal and arbitrary. The grading 'below the bench mark' in the ACR is discriminatory. Based on the earlier order passed by this Tribunal, the applicant was entitled to be considered for promotion to the post of SE w.e.f 2003, on the date of eligibility, since no disciplinary proceedings or criminal case was then pending against the applicant. Subsequent events cannot be a reason for keeping the promotion under sealed cover. The applicant, is therefore, entitled to be considered for promotion. The disciplinary proceedings, criminal

case and suspension were all brought about only to defeat the legitimate claim of the applicant. The fixation of pay and allowances and payment of arrears are to be regulated at least by grant of adhoc promotion. Thus the applicant has filed this OA seeking the reliefs as afore stated.

3. Respondents 2 and 3 the Lakshadweep Administration (Administrator and Director (Service)) filed reply statment contending as follows:

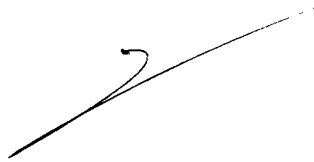
The applicant who is an employee of LPWD holding the post of EE/SE-in-charge has been placed under suspension for his involvement in four criminal cases registered by the CBI (ACB) under the Prevention of Corruption Act. 1988 and also under Indian Penal Code. The post of SE, LPWD fell vacant on 1.7.2002 due to the retirement of Shri A.M.Kasmikoya who was promoted to the post as recommended by the UPSC. The applicant filed OA 662/2009 against the delay in considering his promotion to the post of SE. That OA was disposed of directing the UPSC to hold a meeting of the DPC to consider promotion of the applicant as per rules and instructions on the basis of available records as expeditiously as possible. If non closure of the proceedings against the applicant stands in the way of regular



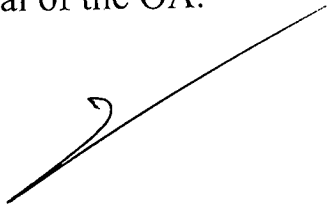
promotion, ad hoc promotion of the applicant was directed to be considered. Based on the above direction, a detailed proposal was submitted to UPSC as per Annexure R2(a). While the matter was being considered by UPSC on the recommendation of CBI, Cochin Branch, the applicant was placed under suspension by the competent authority Administrator, UT of Lakshadweep under Rule Rule 10(1) of CCS (CCA) Rules due to his involvement in four criminal cases registered by CBI (ACB Branch)Cochin under Prevention of Corruption Act vide Annexure R2(b). As per Govt. of India instructions, the promotion will have only prospective effect from the date when the DPC is held and hence the request of the officer for retrospective promotion cannot be acceded to. Further, in accordance with the instruction contained in DOP&T OM No. 21011/1/2010-Estt(A) dated 13.4.2010 the request for up gradation of his ACR could not be considered and that was communicated to him vide Annexure R2(c) dated 17.4.2013. As per Recruitment Rules for the post of Superintending Engineer of LPWD the method of recruitment is by promotion, failing which transfer on deputation vide Annexure R.2(d). In the case of recruitment by promotion it is to be made from the post of Executive Engineer with 5 years regular service in the grade rendered after appointment. At the



time of occurrence of vacancy, the applicant had not fulfilled the required length of regular service in the feeder cadre. Therefore, the authority could not consider the applicant's request for promotion. While disposing of the Writ Petition filed by the respondents against the order in OA 559/2002 it was clarified that the applicant was working as Executive Engineer, even though on ad hoc basis and if that service is taken into consideration he had a service of Executive Engineer for 5 years and he is educationally qualified also. Hence the proposal for filling up the post of Superintending Engineer in the prescribed format was forwarded to UPSC. But the UPSC rejected the proposal due to non receipt of the requisite documents. The suspension of the applicant was timely reviewed and extended by the duly constituted review committee under the Chairmanship of Joint Secretary (UTL), Ministry of Home Affairs, Government of India. His suspension was extended for a further period. UPSC considered the proposal for filling up the post of SE in the prescribed format as per the order passed by this Tribunal in OA 662/2009. Since the applicant was placed under suspension w.e.f. 27.4.2012 he could not be considered for promotion to the post of SE. The UPSC informed that the applicant's case can be considered for regular promotion to the post and



the same could be put in sealed cover as per the DOP&T instructions on the subject. The applicant was directed to be intimated about the below bench mark grading in the ACR. The applicant submitted his reply/representation (Annexure A5). The reviewing officer had by then retired from service on superannuation and hence the comments of the retired officers were not required to be obtained vide OM dated 13.4.2010 - Annexure R2(c). The Administrator being the competent authority, after careful examination, decided that there is no reason to interfere with the grading of ACR for the period from 1998 to 2011 vide Annexure A8. Thus the case of the applicant is kept in sealed cover as he is under cloud from vigilance angle. While disposing of OA 662/2009 this Tribunal directed the administration to make a proposal to UPSC to consider the promotion of the applicant as per rules and instructions. The respondents were given liberty to repatriate the applicant from the post of Project Director, LDWSSB after implementing the above direction. As directed by this Tribunal a detailed proposal for promotion to the post of Superintending Engineer was submitted to UPSC on 29.11.2011. Annexure A3 order issued by the UPSC is in accordance with the rules. Therefore, Respondents 2&3 prayed for dismissal of the OA.



4. The 4th respondent filed reply statement contending as follows.

UPSC is an advisory body set up under Article 315 of the Constitution of India and they have a constitutional obligation to ensure that all the selections made for regular appointments to the services/posts of the Union of India, as falling under the purview of the Commission, are made strictly in accordance with the relevant rules including the statutory Recruitment Rules and the relevant instructions issued by the Government of India from time to time. As per the Recruitment Rules, the post of SE shall be filled by promotion, failing which by transfer on deputation. For promotion, Executive Engineer (Civil) with 5 years regular service in the grade rendered after appointment thereto on regular basis and possessing a degree in Civil Engineering of a recognized University or equivalent is required. All DPCs held by the aegis of the Commission are held strictly following the guidelines/instructions issued by the Govt. of India and as amended from time to time and also on the various other essential inputs/recruitment/service rules, number of vacancies to be filled, vigilance clearance certificate/statement of penalties, if any, imposed on the officers etc. The DPC should assess the suitability of the

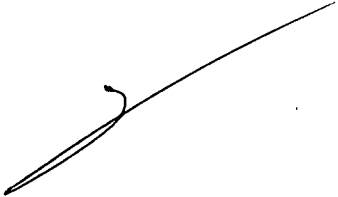
Government Servants coming under the circumstances mentioned in OM dated 14.9.1992. The assessment of DPC including unfit for promotion and grading awarded shall be kept in a sealed cover. Even for granting adhoc promotion the following aspects; namely, the whether promotion of officer will be against public interest, whether the charges are grave enough to warrant continued denial of promotion, whether there is no likelihood of the case coming to a conclusion in the near future and whether the delay in finalization of proceedings, departmental or in a court of law, is not directly or indirectly attributable to the Government servant concerned are matters to be considered. The DOP&T circular dated 13.4.2010 stipulated that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPC contain final grading which are below the bench mark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation. It directs as to how the competent authority has to consider the representation of the employee against the below bench mark grading. The applicant was promoted on regular basis to the post of Executive Engineer with effect

from 7.3.2001 only. In OA 559/2002 this Tribunal declared that his adhoc service also should be treated as qualifying service. The proposal of the UT Administration remained under correspondence due to deficiency and eventually the proposal was returned by the then Secretary, UPSC. The applicant was appointed as Secretary, Lakshadweep Building Development Board and later he was appointed as Project Director LDWSSB on deputation basis. The details of three disciplinary cases pending against the applicant were furnished along with the DPC proposal dated 12.12.2007. In view of the fact that the applicant was placed under suspension the applicant could not be considered for adhoc promotion. However his case was considered and the recommendation of the DPC was kept in sealed cover as per the extant guidelines/instructions.

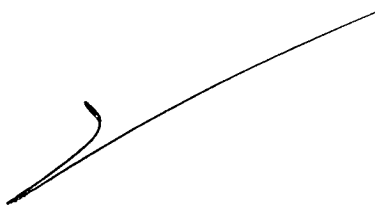
5. A rejoinder was filed by the applicant refuting the statements made in the reply statement.
6. Heard the learned counsel for both side and we have also gone through the pleadings and records produced by the parties.
7. The points for consideration are whether the sealed cover proceedings adopted by the UPSC is illegal and whether the respondents should be directed to grant promotion to the applicant to

the post of Superintending Engineer and whether he is entitled to get consequential benefits as well.?

8. It is vehemently argued by the learned senior counsel appearing for the applicant that it is not now in dispute that since the adhoc service was directed to be considered for promotion, the applicant became entitled to be promoted to the post of SE in 2003. In OA 559/2012 it was held by this Tribunal that the adhoc service rendered by the applicant is liable to be treated as qualifying service and so the applicant is entitled to be promoted to the post of SE in 2003 itself. Had the right thing been done at the right time then certainly the applicant would have been promoted as SE, it is argued. The subsequent events cannot take away the accrued right of the applicant and as such according to the applicant, in the light of the direction issued by this Tribunal, he should be granted promotion with effect from 2003 itself. It is also pointed out by the applicant that there was no disciplinary proceedings pending in April 2003 when the applicant was eligible for promotion nor in 2007 when the proposal was sent to the UPSC. It is also not in dispute that the Tribunal had earlier directed that if regular promotion cannot be granted, at least the respondents should consider granting adhoc promotion to the applicant as SE.



9. It is vehemently argued by the learned senior counsel for the applicant that it was specifically held by this Tribunal in Annexure A2 (OA 662/2009) which was decided on 12.8.2011 that UPSC should hold meeting of the DPC to consider promotion of the applicant as per rules/instructions on the basis of available records as expeditiously as possible. A DPC was convened accordingly but they followed sealed cover procedure, since there were criminal cases pending against the applicant. It is vehemently argued by the learned senior counsel for the applicant that the position as stood in April, 2003 should have been considered, rather; the subsequent event should not have weighed with the authority concerned to deny promotion to the applicant. But it is pointed out by the respondents that though they were directed to consider the position as it stood in April, 2003, it is nowhere stated that the pendency of criminal proceedings cannot be taken into account at all. It was only stated by this Tribunal that if the applicant is found fit for regular/adhoc promotion it should be made from the date he was holding the additional charge of SE for payment of arrears of pay, salary and allowance and his seniority as SE should be counted from 6.5.2003. Similarly it was held that if the applicant is found fit for promotion to the post of SE it should be done from the due date with

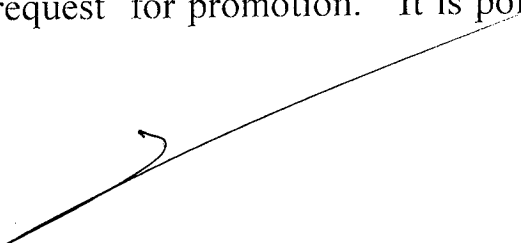


all consequential benefits. Therefore, according to the respondents, if only the applicant is found fit for promotion, the question of granting promotion would arise. Similarly if only the applicant is found fit for regular promotion, it would be effective from the date of holding the charge of SE.

10. Alleging non-compliance of the aforesaid order, applicant filed MA 145/2012 which was closed by this Tribunal since the respondent had already considered the case of the applicant and the UPSC had declined the same. Hence the MA was closed subject to the right of the applicant to challenge the proceedings of UPSC. This also according to the respondents would show that there was no positive direction to grant promotion to the post of SE. The respondents were only directed to consider the claim of the applicant. When DPC for promotion to the post of SE was convened, in the light of Annexure A2 order passed in OA 662/2009, it was found that the ACRs for the period 6.5.1998 to 31.3.1999, 1.4.2000 to 31.3.2001 and 1.4.2001 to 31.3.2002 were found to be below the bench mark grading. Hence as per letter dated 22.8.2012 (Annexure A4) the applicant was directed to submit his representation, if any, to which Annexure A5 representation dated 23.8.2012 was given making a request that the below bench mark

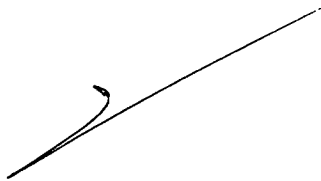
grading may be upgraded at par with bench mark for the next promotion.

11. It is pointed out by the respondents that, even Annexure A7 the letter sent by the applicant to the Administrator of UT of Lakshadweep, shows that there were four CBI cases pending against the applicant pertaining to supply of excess material set at Kavarathi, Agarthi and Androth and also supply of petroleum products. Besides, there were departmental proceedings in connection with the construction of residential quarter of District Judge at Kavarathi and also in connection with residential quarter of EE LPWD Kalpeni and also two other departmental cases. The fact that those cases are pending trial cannot be lost sight of, the respondents contend. The fact remains that while the matter was being considered by the UPSC, the applicant had been placed under suspension by the Administrator Lakshadweep Administration under Rule 10 of CCS (CC) Rules 1965. It is pointed out that even at that point of time the applicant was involved in 4 criminal cases registered by CBI (Anti Corruption Bureau) under Prevention of Corruption Act, 1988 and the Indian Penal Code. Those relevant factors cannot be simply ignored by the UPSC while considering the request for promotion. It is pointed out by the



respondents that the CBI cases were initiated in 1998 itself and that, as usual for completion of investigation in such cases it will take several years and only thereafter the charge sheet could be filed. It is not disputed that the charge sheets were laid against the applicant before the Special Judge for CBI cases, Ernakulam and those cases are pending. But the strenuous argument advanced by the applicant is that those charge sheets were only filed long after 2003 and so, those aspects cannot be looked into at all and that considering the position as in 2003, the applicant should be granted promotion. This submission has been taken strong exception to by Shri S.Radhakrishanan, the learned counsel for respondents 2&3 pointing out the relevant rules.

12. The learned senior counsel for the applicant would submit that based on the submission made on behalf of the applicant, an order was passed by this Tribunal to produce the sealed cover and to open the same. True, an interim direction was made by this Tribunal. Pursuant to the direction so issued, the respondents produced the sealed cover. It was opened by us and again it is kept in sealed cover. Since the DPC found the applicant fit for promotion, the respondents are bound to promote the applicant as SE, it is contended by the applicant. This submission is also resisted by the learned counsel for the respondents.



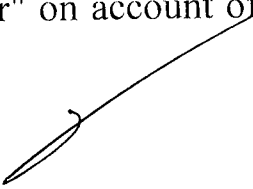
It is pointed out that even if the sealed cover was directed to be opened that will not in any way affect the ultimate decision to be taken in the matter, since the decision would ultimately depend upon the eligibility and entitlement of the applicant for promotion. That is to be decided when the matter is ultimately taken up for consideration. But the recommendation itself is only subject to his securing clearance in the vigilance case stated therein. The question whether sealed cover procedure is to be adopted, when departmental proceedings are pending and whether the Tribunal could pass an interim order that the employee be considered and promoted to the departmental post was considered by the Hon'ble Supreme Court in *Union of India Vs. Tejinder Singh - (1991) 4 SCC 129* where it was held:

"4. The appeal is accordingly allowed and the impugned order passed by the Central Administrative Tribunal directing the Union of India, Ministry of Finance to consider the respondent for promotion to the post of commissioner of Income tax, level II, is set aside, While setting aside the impugned order of the Tribunal we would like to record that the Tribunal had no jurisdiction whatever while dealing with a petition to quash the contemplated departmental enquiry against the respondent, to make an interim order of this nature. We are also not satisfied as to the correctness of the view expressed by the Tribunal that a contemplated departmental inquiry or pendency of a departmental proceeding cannot be a ground for withholding consideration for

promotion or the promotion itself. We are not aware of any rule or principle to warrant such a view. As at present advised, we do not subscribe to the view expressed by the Tribunal."

13. Therefore, relying upon the dictum laid down by the Supreme Court it is submitted by the learned counsel for respondents that the Tribunal has no jurisdiction to issue an order directing consideration for promotion of the applicant to the next higher post, when charge sheets were filed against the applicant for offences under the Prevention of Corruption Act. .

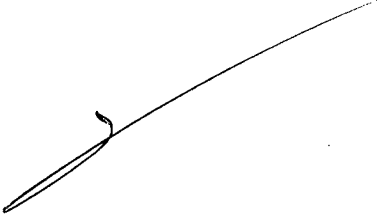
14. The oft quoted decision in *Janakiraman – 1991 (4) SCC 101* has also been referred to by the learned counsel for the respondents. It was held therein that consideration of an employee for promotion, selection grade, crossing of efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of any preliminary enquiry or criminal investigation but the "Sealed Cover Procedure" can be resorted to if a charge-sheet has been issued or the departmental proceedings are pending or the employee has been placed under suspension. It was also laid down therein that if on a consideration of the name of the delinquent employee, the recommendations of the Departmental Promotion Committee were kept in a "Sealed Cover" on account of the pendency of departmental



proceedings, the "Sealed Cover" could be opened only in the case of complete exoneration of the employee from all charges and notional promotion could be given to him only from the date on which his juniors were promoted. But if any penalty is imposed on the employee in disciplinary proceedings, the "Sealed Cover" is not required to be acted upon and his case for promotion is to be considered in the usual manner by the next Departmental Promotion Committee. The fact that there are four cases registered by the CBI for offences under the Prevention of Corruption Act and in two cases charge sheets have already been filed and those cases are pending before the Special Judge CBI Court and that disciplinary inquiries are pending is not in dispute. It was so mentioned in the order of suspension dated 27.2.2012 as well. Hence the learned counsel for the respondents would submit that the sealed cover procedure adopted by the UPSC is perfectly legal.

15. It is vehemently argued by the learned counsel for the applicant that the right of being considered for promotion is a fundamental right and that cannot be denied by the dilatory tactics adopted by the respondents. Right to be considered for promotion is obviously different and distinct from the right of promotion. Even if

disciplinary proceedings were initiated against an employee and those are pending on the date on which other employees are considered for next higher post, the delinquent employee, if he is similarly circumstanced like other employees and if he is also eligible he has a right to be considered for promotion to the next higher post alongwith other employees, the applicant contends. In such cases his name cannot be omitted for consideration along with other employees because of the pendency of the departmental proceedings or criminal prosecution and an employee cannot be denied this right at the interlocutory stage of departmental proceedings as he is still to be found guilty on the basis of evidence produced against him at the time of those proceedings, it is further contended. Thus till the charges are established his right to be considered cannot be defeated as he is not under the cloud of being guilty but is only suspected to be guilty, submits the learned senior counsel for the applicant. Consideration for promotion along with other eligible employees is to be done so as to give the right available even to a delinquent employee. Once his name is considered for promotion, the recommendation of the DPC is required to be kept in a sealed cover, obviously for the reason that if the employee is ultimately found not guilty and the charges set out against



him are not established, he may have to be promoted immediately to the next higher post - See also the observation made by the Supreme Court in *State of MP Vs. J.S. Bansal - 1998(3) SCC 714* at para 13.

16. In two cases the CBI had already filed charge sheet against the applicant herein and those two cases are pending trial before the Special Judge's court for CBI Cases. Pursuant thereto the applicant has been placed under suspension. The contention that the sealed cover procedure should not be resorted to by the UPSC is found to be devoid of any merit. The sealed cover can be opened on complete exoneration of the employee from all charges. Hitherto, complete exoneration of the applicant from all charges was not ordered and as such the question of granting him promotion now would be totally ignoring the procedure to be followed in such cases. If ultimately the applicant is exonerated of the charges levelled against him, he would be entitled to get notional promotion from the relevant date.

17. Following the decision of *Tejinder Singh* and *Janakiraman* (supra) it was held by the Hon'ble Supreme Court in *State of MP Vs. JS Bensal and another* (supra) as under:

14. In view of the law laid down by this Court in *Tejinder Singh's case* and *Jankiraman's case* (supra) and in view of the service Rule/Executive instruction relating to "Sealed Cover Procedure", Departmental

Promotion Committee, in such a situation, would be well within its right to place its recommendations in the "Sealed Cover" so that the "Sealed Cover" may be opened on the conclusion of the Departmental proceedings and recommendations contained therein may be given effect to without delay. An interim order, therefore, that the "Sealed Cover" be opened and the recommendations of the Departmental Promotion Committee for the promotion of the delinquent officer may be given effect to even during the pendency of the departmental proceedings, subject to its final result, is not usually or always or as a matter of course, granted. This rule can be departed from only in exceptional cases depending upon the circumstances of a particular case having regard to the fact that integrity, honesty and sincerity are the hall-mark of public services under the Union or the State and that efficiency of administration depend upon the effort made by persons holding public offices to serve the country and the Nation with devotion and an attitude of sacrifice without any iota inkling of "self service".


(underlined to lay emphasis)

When that is the legal position adumbrated by the Apex Court the plea that the applicant should be granted promotion despite the order of suspension and ignoring the pendency of two criminal cases filed against him under the provisions of Prevention of Corruption Act, and ignoring the departmental action taken against him which according to the respondents is about to be finalized soon, is totally bereft of any merit.

18. The next point that arises for consideration is whether the interim order passed by this Tribunal directing the respondents to

produce the sealed cover and which has been later opened by us would alter the position and whether on that ground justify the claim for promotion? The plea put forward by the applicant that since the sealed cover has already been opened and as it has been found that the applicant has been recommended to be promoted to the post of SE, the applicant is legitimately entitled to be promoted to the post of Superintending Engineer cannot be accepted, since the view so taken by the Hon'ble Supreme Court in *State of Punjab Vs. Chamanlal Goyal -- (1995) 2 SCC 570* was not followed by the Hon'ble Supreme Court in *State of MP Vs. JS Bansal – (1998) 3 SCC 714* in view of the dictum laid down by the three judges bench decision in *Janakiraman's case* cited supra. The dictum laid down in *Janakiraman's case* has been followed by the Supreme Court in *Union of India and other Vs. Sangram Keshari Nayak - (2007) 6 SCC 704*, *Union of India and others Vs. A.N Moahanan - 2007 (5) SCC 425*, and *Union of India Vs. Mihir Kumar Bandhopadhyay and others - 2009) 16 SCC 329*. *Para 21 and 22* of the judgment in *JS Bansal's case (supra)* can be profitably quoted here to understand the correct legal position; it reads:

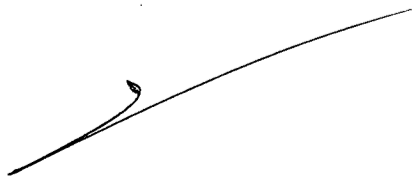
“21. Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the State of Madhya Pradesh



has contended that in view of the law laid down by this Court in Jankiraman's case, the judgment passed by Tribunal cannot be sustained particularly as the charges against the respondent relate to financial irregularities, two of which are recent in time and cannot be said to be stale. It is also contended that the allegation of malice made against the State Government is still at the initial stage of mere assertion which is unsubstantiated and cannot be treated even as laying down a foundation for any interim relief. Dr. Singhvi also contended that part of the evidence on behalf of the State has already been recorded by the enquiry officer and the enquiry proceedings would be completed within the time frame fixed by this Court provided the respondent cooperates in those proceedings

22. Having regard to the facts and circumstances of the instant case, we are firmly of the view that the Tribunal was not justified in passing the impugned order that the "Sealed Cover" be opened and the recommendations of the Departmental Promotion committee be given effect to. The "Sealed Cover Procedure" was rightly adopted by the Departmental Promotion Committee and there was no reason to interfere with that procedure."

Going by the afore quoted dictum laid down by the Supreme Court there can be no doubt that the sealed cover procedure adopted by the UPSC is perfectly justified. The question of consideration of the applicant for promotion would arise only on completion of the criminal proceedings/disciplinary inquiry as the case may be and only if the employee is completely exonerated of the charges levelled against him. Though the request made by the applicant based on Bansal's case was



turned down by the Supreme Court and directed that the departmental proceedings be completed within a period of four months provided the respondents therein, namely the employee cooperates. The facts dealt with in *J.S Bensal* and the dictum laid down by the Supreme Court in that decision are applicable to the facts of this case as well.

19. The learned counsel for the respondents has also referred to certain paragraphs in the text book - Swamy's Compilation of CCS (CCA) Rules. He has referred to paragraph 17 of the general orders relating to promotion, etc. (page 234 of the said book) which reads:-

“(17) Promotion/Confirmation of officers under suspension or against whom disciplinary / criminal cases are pending - The procedure and guidelines to be followed in the matter of promotion of Government servant against whom disciplinary / Court proceedings are pending or whose conduct is under investigation have been reviewed carefully. Government have also notice the judgment, dated 27.8-1991 of the Supreme Court in *Union of India, etc. v. K.V. Janakiraman, etc.* [AIR 1991 SC 2010]. As a result of the procedure to be followed in this regard by the authorities concerned is laid down in the subsequent paragraphs of their guidance.

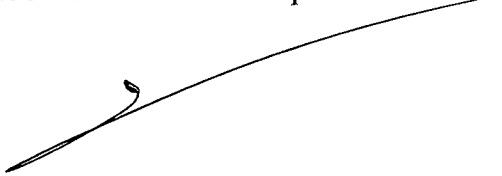
2. Cases to whom sealed cover procedure applicable - At the time of consideration of the cases of Government servants for promotion, details of Government servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:-

- (i) Government servants under suspension
- (ii) Government servants in respect of whom disciplinary proceedings are pending; and
- (iii) Government servants in respect of whom prosecution for criminal charge is pending.

2.1 Procedure to be followed in respect of those under cloud- The Departmental Promotion Committee shall assess the suitability of the Government servants coming within the purview of the circumstances mentioned above along with other eligible candidates without taking into consideration the disciplinary case / criminal prosecution-pending.


The assessment of the DPC including 'Unfit for Promotion', and the grading awarded by it will be kept in a sealed cover. The cover will be superscribed 'Findings regarding suitability for promotion to the grade/postin respect of Shri(name of the Government servant). Not to be opened till the termination of the disciplinary case/criminal prosecution against Shri'. The proceedings of the DPC need only contain the note "The findings are contained in the attached sealed cover." The authority competent to fill the vacancy should be separately advised to fill the vacancy in the higher grade only in an officiating capacity when the findings of the DPC in respect of the suitability of a Government servant for his promotion are kept in a sealed cover."

Note 2.1 of paragraph 17 quoted above would make it amply clear as to what is the procedure to be followed if criminal prosecution or disciplinary proceedings are pending against the officer whose eligibility for promotion is considered by the DPC. It is stated that the same procedure as mentioned earlier should be followed in the subsequent DPCs also, till the disciplinary proceedings/criminal prosecution/investigation pending or contemplated against the government servant concerned is concluded. Further, it is clarified that on conclusion of the disciplinary case/criminal prosecution or investigation which results in dropping of allegation or complaint against the government servant, the sealed cover/covers shall be opened. In case the government servant is completely exonerated, the due date of his promotion shall be determined with reference to the position assigned to him in the findings kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the



basis of his position. Therefore, it is pellucid that if at the time of holding of the DPC there was a disciplinary proceedings/criminal prosecution against the government servant then the sealed cover procedure is to be followed. Here, admittedly, when the DPC was convened, there were criminal prosecutions and disciplinary proceedings pending against him. In two cases, charge sheets were laid and they were pending before the Special Judge for CBI cases for offences punishable under the Prevention of Corruption Act and also for offences under the Indian Penal Code.

20. Para 3.1 in page 236 of the aforesaid book says that if any penalty is imposed on the government servant as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings in the sealed cover/covers shall not be acted upon. His case for promotion must be considered by the next DPC in the normal course and having regard to the penalty imposed on him. Therefore, the contention that since the applicant was eligible for promotion in the year 2003, the subsequent events should be totally ignored or eschewed from consideration cannot be accepted- especially because the FIR was registered and investigation was in progress even in 1998. It is worthwhile to note that even during the



year 2003, the matter was under investigation by the CBI. The very fact that the investigation was pertaining to offenses punishable under the Prevention of Corruption Act 1988 would show the gravity of the same. That is not something to be ignored by the authority concerned. It is pointed out that if the government servant was under suspension even consideration or desirability of giving the government servant ad-hoc promotion would not arise in view of sub-para 5 (page 236).

21. Sub-para 7 of paragraph 17 (see page 238) deals with the government servant who is recommended for promotion by the DPC. Para 7 of O.M. No. 22011/4/91-Estt.(A) dated 14.09.1992 reads as follows:-

“A Government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in Para.2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this O.M, will be applicable in his case also.

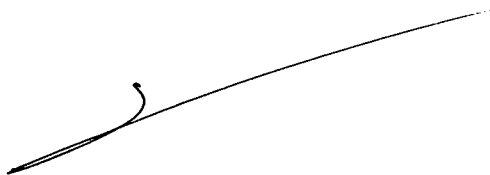
22. It was held by the Hon'ble Supreme Court in *Delhi Jal Board v. Mohinder Singh - JT 2000(10) SC 158* as follows:-

“The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry

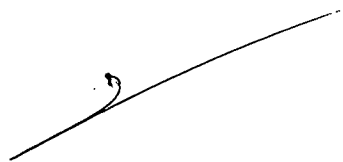
exonerating the officers would have to be given effect to as they obviously relate back to the date on which the charges are framed. The mere fact that by the time the disciplinary proceedings, in the first inquiry ended in his favour and by the time the seal was opened to give effect to it, another departmental inquiry was started by the department, would not come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection.”

But here it is not a case where another departmental proceedings or another court proceedings was initiated subsequent to the convening of DPC. Even as on the date of convening of the DPC criminal prosecution and disciplinary inquiry were pending against the applicant.

23. What has been clarified as per the Office Memorandum dated 14.09.1992 would also make it clear that a government servant who was recommended for promotion by the DPC but in whose case any of the circumstances mentioned in para 2 referred to above arise after the recommendations of the DPC are received, but before he is actually promoted, such government servant will be considered as if his case had been placed in a sealed cover by the DPC. It is further emphasized that such a government servant shall not be promoted until he is completely exonerated of the charges laid against him. The stipulations contained in the said O.M (referred to above) are applicable to his case also.



24. The decision of the Hon'ble Supreme Court cited supra (J.S.Bansal) is a complete answer to the procedure to be followed in the case where sealed cover was opened as ordered by the Tribunal. It was specifically held by the Supreme Court that the Tribunal was not justified in passing the order that the sealed cover be opened and the recommendations of the DPC be given effect to. It was held that the sealed cover procedure was rightly adopted by the DPC and there was no reason to interfere with that procedure. The fact that an interim order was passed by this Tribunal to produce the sealed cover and to open the sealed cover will not in any way entitle the applicant to contend that he should be granted promotion, in spite of the fact that criminal prosecution is pending against him. Only if the applicant is completely exonerated of the criminal charges he would be entitled to the relief on the recommendations of the DPC as has been held in *Janakiraman's case - 1991 (4) SCC 101*. If a charge sheet was issued or the departmental proceedings are pending or the employee has been placed under suspension, the sealed cover procedure has to be resorted to. The sealed cover can be opened and further action can be taken on the recommendation of the DPC, only when the government servant is exonerated from the criminal charges laid against him. The opening of



the sealed cover pursuant to the order passed by this Tribunal does not confer on the government servant any right to get promotion when the criminal prosecution and disciplinary inquiry are pending against him. In the light of the authoritative pronouncements of the Hon'ble Supreme Court, as referred to above and in the light of the various DOP&T orders referred (supra), we have no hesitation to hold that the sealed cover procedure adopted by the respondents is perfectly legal and that the recommendations of the DPC can be given effect to only after the applicant is exonerated of the charges in the criminal prosecution and disciplinary inquiry pending against him.

25. In the light of what is stated above, the applicant is not entitled to the reliefs prayed for in this Original Application. Hence, the O.A is dismissed. No order as to costs.


(Mrs. P. Gopinath)
Administrative Member


(N. K. Balakrishnan)
Judicial Member