

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

O.A. No.1523/2014

**M.A. Nos.2050/2014, 2589/2014,2640/2014,
1768/2014, 2522/2014, 3087/2014, 3244/2014,
3243/2014, 2071/2015, 2072/2015 and 1769/2015**

**Reserved On:13.10.2015
Pronounced On:16.10.2015**

Hon'ble Mr. Justice L.N. Mittal, Member (J)

S.K. Srivastava, IRS,
Commissioner of Income Tax,
Aged about 50 years
S/o Late B.S. Bhaskar,
CRD C-II/9, Pandara Park,
New Delhi-110 003.

...Applicant

By Advocate: Shri S.K. Gupta with applicant in person.

Versus

1. Union of India
Through Secretary,
Department of Revenue,
North Block,
New Delhi-110001.
2. The Central Board of Direct Taxes,
Through its Chairman,
North Block,
New Delhi-110001.
3. The Union Public Service Commission,
Dhaulpur House,
Shahjahan Road,
New Delhi-110001.
4. Ms. Deepa Krishan, IRS,
Now working as Member (P), CBDT,
C/o US, Ad-I, Department of Revenue,
North Block,
New Delhi-110001.

5. Sri S.M. Nigam, IRS,
Now working as DGIT [(Vig.) & CV],
CBDT,
C/o US, Ad-I, Department of Revenue,
North Block,
New Delhi-110001.
6. Sri B.K. Jha, IRS,
Now working as CIT, Delhi-III,
C/o US, AD-VI, Department of Revenue,
North Block,
New Delhi-110001.
7. Sri R.K. Tiwari, IRS,
703, Devika Apartment,
Sector-4, Vaishali, Ghaziabad.
8. Ms. Anjali Tiwari, IRS,
703, Devika Apartment,
Sector-4, Vaishali, Ghaziabad. ...Respondents
9. G.K. Maheshwari
Pr. Commissioner Income Tax,
C.R. Building,
I.P. Estate,
New Delhi-110002.
10. Buta Singh
Pr. Commissioner Income Tax,
Aayakar Bhavan,
Telankhedi Road,
Civil Lines,
Nagpur-440001.
11. Arun S. Bhatnagar
Pr. Commissioner Income Tax,
C.R. Building,
I.P. Estate,
New Delhi-110002.
12. Rakesh Kumar Kakkar
Pr. Commissioner Income Tax,
Aayakar Bhavan,
M.K. Road,
Churchgate Mumbai-400020.

13. Balakrishanan B.R.
Pr. Director of Income Tax (Inv-I)
Room No.303, Scindia House,
Ballard Estate Mumbai-400038.
14. Narendra Prasad Sinha
Pr. Commissioner Income Tax,
C.R. Building,
I.P. Estate,
New Delhi-110002.
15. Akhoury Abhay Shankar
Pr. Commissioner Income Tax,
Aayakar Bhavan,
M.K. Road,
Churchgate Mumbai-400020.
16. Vinodand Jha
Pr. Commissioner Income Tax,
Aayakar Bhavan,
M.K. Road,
Churchgate Mumbai-400020.
17. R.M. Garg
Pr. Commissioner Income Tax,
C.R. Building,
I.P. Estate,
New Delhi-110002.
18. Rakesh Kumar Gupta
Pr. Commissioner Income Tax,
E-2, ARA Centre,
Jhandewalan Extension,
New Delhi-110055.
19. Neena Nigam
Pr. Commissioner Income Tax,
C.R. Building,
I.P. Estate,
New Delhi-110002.
20. Sunita Puri
Pr. Commissioner Income Tax (OSD),
Pratyaksha Kar Bhavan,
SPM Civic Centre,

- Minto Road,
New Delhi-110002.
21. S.K. Dash
Pr. Commissioner Income Tax,
C.R. Building,
I.P. Estate,
New Delhi-110002.
22. Sushil Kumar
Pr. Commissioner Income Tax,
Tower No.5, 3rd Floor,
Vashi Station Complex,
Vashi.
23. Ashu Jain
Pr. Commissioner Income Tax (OSD),
E-2, ARA Centre,
Jhandewalan Extension,
New Delhi-110055.
24. Gauri Shankar Singh
Pr. Commissioner of Income Tax,
Matru Mandir,
Tardeo Road,
Mumbai-400007. ..Private Respondents

By Advocate: Shri Rajesh Katyal for Respondents No.1 & 2.

Shri Ravinder Aggarwal for Respondent No.3-
UPSC.

None for Respondents No.4 and 5.

Shri B. Prabhu S. Patil with Shri Abid Ali
Beeran P. & Shri Amjad Maqbool for
Respondent No.6.

Shri Aljo K. Joseph for Respondents No.7 & 8.

ORDER

Justice L.N. Mittal, Member(J)

The instant OA relates to promotion of Commissioners
of Income Tax as Principal Commissioners of Income Tax.

The Applicant, S.K. Srivastava was admittedly facing three departmental charge sheets. Consequently, in view of paragraph 2 (ii) of Office Memorandum (OM) dated 14.09.1992, he was not entitled for vigilance clearance and sealed cover procedure had to be followed in his case.

2. The applicant had filed two separate applications under Section 156 (3) of the Code of Criminal Procedure, 1973 (in short Cr.P.C.) against respondent No.6 Shri B.K. Jha and others alleging commission of various offences and praying that concerned Station House Officer be directed to register FIR against the said persons. Learned Magistrate, New Delhi, vide separate identical orders dated 07.05.2013 concluded as under:-

“Therefore, the present case is not held to be a fit case for directing the SHO to register FIR as the complainant himself can also lead the evidence. Therefore, the prayer to direct the SHO to register the FIR is declined. However, the applicant U/Section 156(3) Cr.P.C. is treated as a complaint case. Cognizance of the offence is taken and the matter is adjourned for 27.07.2013 for pre-summoning evidence”.

The claim of the applicant is that in view of the aforesaid criminal complaints of which the cognizance has been taken by the Magistrate, respondent No.6 B. K. Jha was

also not entitled to vigilance clearance in view of paragraph 2 (iii) of OM dated 14.09.1992 as clarified vide OM dated 02.11.2012.

3. Inter alia, on the aforesaid submissions, the applicant sought the following relief:

“(i) To set aside and quash the deliberations of the DPC held on 01.05.2014 at Chennai for promoting the Commissioners of Income Tax (CsIT) of the CBDT to the rank of Principal Commissioners of Income Tax (Pr.Cs.IT) and to direct Official Respondents to consider the case of the Applicant at par with the case of Shri B.K. Jha (IRS 83004) and grant Vigilance Clearance to Applicant at par with Shri B.K. Jha (IRS 83004) and thereafter reconvene the DPC for promotion as Pr.Cs.IT”.

4. The case was heard by Bench comprising of Hon’ble Mr. G. George Paracken, Member (J) and Hon’ble Mr. Shekhar Agarwal, Member (A). Vide detailed judgment dated 07.05.2015, Member (J) concluded as under:-

“66.In conclusion, we partly allow this OA and hold as under:-

(i) The submission of the Applicant that there was no need of holding any DPC for the posts of Pr.Cs.IT is without any merit.

(ii) The submission of the Applicant that the presence of Shri R.K. Tewari, Chairman CBDT as Member of the DPC held on

30.04.2014/01.05.2014 has incurably vitiated it is not correct in the facts and circumstances of the case.

(iii) The decision of the DPC considering Shri B.K. Jha, CIT for promotion to the post of Pr.CIT and the consequential order of the Respondent No.1 promoting him to the post of Pr.CIT is in violation of the relevant instructions issued by the DoP&T and the principle of law laid down by the Apex Court in its various judgments on the issue and accordingly we quash and set aside the same.

67. There shall be no order as to costs.

68. Before we part with this order, may say that if the intention of the DoP&T that the expression "criminal charge is pending" contained in their OM dated 14.09.1992 shall mean that judicial proceedings shall be deemed to be instituted in case of criminal proceedings on the date the Magistrate issues summons of the accused, it shall specify so by a separate Office Memorandum or amend Rule 9(6)(b)(i) of CCS (Pension) Rules, 1972 suitably".

However, Member (A) while agreeing with other conclusions of Member (J) expressed difference of opinion regarding the promotion of B.K. Jha, i.e., regarding conclusion (iii) of Member (J) and concluded as under:-

"12. Considering the facts and circumstances of this case, my considered opinion is that it cannot be inferred from the order of the

Magistrate dated 07.05.2013 that prosecution for a criminal case was pending against Sh. B.K. Jha on the date when the DPC was held as the Magistrate had not made up his mind to proceed against Sh. B.K. Jha under the Criminal Procedure Code. Even if it is presumed that the Magistrate had decided to proceed against him, there is nothing on record to show that UPSC and Government were aware of these pending proceedings. Hence, there was no reason for DPC to keep the case of Sh. B.K. Jha under sealed cover. I, therefore, do not find any infirmity in the action of the respondents in promoting Sh. B.K. Jha as Principal CIT and there is no reason to quash the same.

5. In view of the aforesaid difference of opinion between the two Members on the aforesaid point, the same has been referred to me for decision in terms of Section 26 of the Administrative Tribunals Act, 1985.

6. I have heard the learned counsel for the parties and perused the case file with their assistance.

7. The applicant also responded in person to the arguments raised by the counsel for the respondents. Brief written submissions under the signature of Mr. Ram Jathmalani, Senior Advocate, were also given and have been taken into consideration.

8. Counsel for the applicant referred to orders dated 7.5.2013 passed on applications of the applicant filed under

Section 156(3) of Cr. P.C. (treated as complaints) and contended that the Magistrate had specifically taken cognizance of the offences in both the complaints and, therefore, in view of paragraph 2 (iii) of OM dated 14.9.1992, respondent no.6 - B.K. Jha was not entitled to vigilance clearance and, therefore, sealed cover procedure had to be followed and consequently conclusion (iii) of Member (J) is correct. Paragraph 2 of OM dated 14.9.1992 is reproduced herein for proper appreciation:-

"2. At the time of consideration of the case of Government servants in the consideration zone for promotion falling under the following categories should be specially brought to the notice of the Departmental Promotion Committee:-

- (i) Government servant under suspension.
- (ii) Government servant in respect of whom a charge sheet had been issued and the disciplinary proceedings are pending.
- (iii) Government servant in respect of whom prosecution for a criminal charge is pending.

Attention of the Bench was also drawn to paragraph 8 of OM dated 2.11.2012 which is reproduced hereunder:-

"8. As regards the stage when prosecution for a criminal charge can be

stated to be pending, the said O.M., dated 14-9-1992 does not specify the same and hence the definition of pendency of judicial proceedings in criminal cases given in Rule 9(6)(b)(i) of CCS (Pension) Rules, 1972 is adopted for the purpose. The Rule 9(6)(b)(i) of CCS (Pension) Rules, 1972 provides as under:-

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made."

9. It was accordingly contended that since cognizance of the offences had been taken by the Magistrate, paragraph 2 (iii) of OM dated 14.9.1992 as clarified vide OM dated 2.11.2012 was applicable to respondent no.6. It was submitted that respondent no.6 was promoted during the pendency of the OA subject to final outcome of the OA and, therefore, his promotion has been rightly quashed by Member (J).

10. Another limb of the argument on behalf the applicant was that the applicant and respondent no.6 were on parity under paragraph 2 of the OM dated 14.9.1992 because applicant was covered by paragraph 2 (ii) thereof whereas the respondent no.6 was covered by paragraph 2 (iii) and,

therefore, on the ground of parity promotion of respondent no.6 was rightly quashed by Member (J).

11. It was also submitted on behalf of the applicant that no prayer against promotion of respondent no.6 or for quashing the same could have been made and was, therefore, not made by the applicant, but still the Tribunal could quash the said promotion, if found to be illegal.

12. On the question of cognizance, reliance has been placed on two judgments of Hon'ble Supreme Court, i.e., 2008 (2) Supreme Court Cases 492 – ***S.K. Sinha, Chief Enforcement Officer vs. Videocon International Limited and others*** and 2012 (10) Supreme Court Cases 517 – ***Manharibhai Muljibhai Kakadia and another vs. Shaileshbhai Mohanbhai Patel and others***. On the basis of these two judgments, it was submitted that cognizance has not been defined in Cr.P.C. but when judicial mind is applied by the Court or the Magistrate or notice is taken of alleged commission of offences, it amounts to taking of cognizance. It was also submitted that this Tribunal cannot sit over the orders of the Magistrate taking cognizance of the complaints filed by the applicant, as Court of Appeal. In other words, it was argued that the orders of the Magistrate have to be taken as such, depicting that the cognizance of

the two complaints had been taken by the Magistrate and consequently sealed cover procedure had to be followed in the case of the respondent no.6 in view of express and unambiguous orders of the Magistrate taking cognizance of two complaints, no doubt is left regarding applicability of sealed cover procedure to respondent no.6. It was submitted that the Tribunal has no jurisdiction to hold to the contrary. Reference was also made to paragraphs 25, 26, 27, 30, 34 and 43 in the case of **Manharibhai Muljibhai Kakadia** (supra) and paragraphs 19 to 22 of **S.K. Sinha** (supra).

13. Learned senior counsel for respondent no.6 contended that promotion of respondent no.6 could not be quashed by the Tribunal since neither there was any prayer for the same nor any such prayer could be made by the applicant. In this context, it was pointed out that eligibility of respondent no.6 for such promotion was not even in issue in the OA in which the applicant claimed the benefit of vigilance clearance for himself on alleged parity with respondent no.6 but did not challenge the vigilance clearance given to respondent no.6.

14. Counsel for respondent no.6 also contended that expression used in paragraph 2 (iii) of OM dated 14.9.1992 is regarding pendency of prosecution for a criminal charge, but in the instance case, no

prosecution for a criminal charge was pending against respondent no.6 merely on the basis of orders dated 7.5.2013 passed by the learned Magistrate. It was pointed out that vide said order dated 7.5.2013, learned Magistrate adjourned the matter to 27.7.2013 for pre-summoning evidence and no process for summoning the respondent no.6 in the said complaints had been ordered to be issued. It was pointed out that learned Magistrate vide said orders had not even considered and decided as to whether any offences and if so which offences had been committed and if so by whom, much less by respondent no.6 and, therefore, on the basis of said orders it could not be said that any prosecution on criminal charge was pending against respondent no.6.

15. It was also argued on behalf of respondent no.6 that the applicant cannot claim parity with respondent no.6 inasmuch as admittedly charge-sheets for disciplinary action were pending against the applicant and he was admittedly covered by paragraph 2 (ii) of OM dated 14.9.1992 whereas no departmental charge-sheet was pending against respondent no.6 nor any prosecution for criminal charge was pending against him.

16. It was also pointed out that quashing of promotion of respondent No.6 by Member (J) was not only beyond the

prayer in the OA but, in fact, contrary and contradictory to the said prayer inasmuch as the applicant claimed benefit for himself on alleged parity with respondent no.6 and did not claim debarring of respondent no.6 from promotion on the basis of criminal complaints filed by the applicant against respondent no.6 and others.

17. Counsel for respondent no.6 also referred to judgment AIR 1943 Patna 245 – ***Gopal Marwari and Others Vs. Emperor*** to contend that cognizance of any offence had not been taken against respondent no.6 by the Magistrate by passing orders dated 7.5.2013 and, therefore, paragraph 2 (iii) of OM dated 14.09.1992 was not applicable to respondent no.6.

18. Counsel for official respondent Nos.1 and 2 also supported the contentions of counsel for respondent no.6 and submitted that mere cognizance of the offence as taken by Magistrate vide orders dated 07.05.2013 is not sufficient to debar respondent no.6 from promotion because pursuant to such cognizance, there may not be any judicial proceedings against respondent no.6 or any other person named in the complaint because they may not be summoned at all.

19. Counsel for respondent no.3 – Union Public Service Commission submitted that respondent no.3 has no concern with grant of vigilance clearance to either applicant or respondent no.6.

20. The applicant responded that parity has been enforced between him and respondent no.6 by Member (J) by quashing the promotion of respondent no.6. It was also highlighted and emphasized that according to OM dated 14.09.1992, as clarified vide OM dated 02.11.2012, issuance of process against respondent no.6 was not essential for following sealed cover procedure and mere taking of cognizance by the Magistrate was sufficient for the purpose. It was pointed out that clarificatory OM dated 02.11.2012 in this regard has not been challenged by respondent no.6.

21. I have carefully considered the matter. I agree with contention of counsel for respondent no.6 that promotion of respondent no.6 could not be quashed [as sought to be done by Member (J)] because neither there was any prayer for the same nor any such prayer could have been made by the applicant. The promotion of respondent no.6 was not even in issue in the OA. The applicant did not even challenge the vigilance clearance granted to respondent no.6. Consequently, in view of conclusions (i) and (ii) by Member

(J) as agreed to by Member (A), the OA should have been dismissed. Quashing of promotion of respondent no.6 by Member (J) was not only beyond the prayer made in the OA but, in fact, contrary and contradictory to the prayer made in the OA and, therefore, it could not be done. As fairly and candidly conceded by the applicant and his counsel, the applicant could not have even made prayer for quashing the promotion of respondent no.6 and, therefore, no such prayer was made by the applicant. Consequently, the Tribunal on its own could not have quashed the promotion of respondent no.6.

22. The applicant also cannot claim parity with respondent no.6. It is undisputed that applicant was facing three departmental charge-sheets and, therefore, paragraph 2 (ii) of OM dated 14.09.1992 was undisputedly and admittedly applicable to him. However, as against respondent no.6 there was not even proper intimation to the concerned authorities that he was facing prosecution on criminal charge. In any case, applicability of paragraph 2 (iii) of OM dated 14.09.1992 as clarified vide OM dated 02.11.2012 was highly debatable. Consequently, if sealed cover procedure was not followed in the case of respondent no.6, the applicant could not claim parity with him because admittedly

sealed cover procedure had to be followed in the case of the applicant.

23. As regards applicability of paragraph 2 (iii) of OM dated 14.09.1992 to respondent no.6, no doubt the Magistrate vide orders dated 07.05.2013 had taken cognizance of offences in criminal complaints filed by the applicant against respondent no.6 and others. However, the said cognizance was taken for the purpose of cognizance under Cr.P.C. However, for the purpose of OM dated 14.09.1992, as clarified vide OM dated 02.11.2012, it cannot be said that cognizance of any offence had been taken as against respondent no.6 nor it can be said on the basis of orders dated 07.05.2013 of the Magistrate that respondent no.6 was facing prosecution on criminal charge. The word 'cognizance' may have different meanings in different contexts. For the purpose of Cr.P.C., it may be said that cognizance is taken once judicial mind is applied by Judge or Magistrate to the allegation regarding commission of any offence. However, the same meaning will not apply for the purpose of paragraph 2 (iii) of OM dated 14.09.1992 as clarified vide OM dated 02.11.2012. Reason for the same is that according to paragraph 2 (iii) of OM 14.09.1992, the criminal prosecution of the employee on a criminal charge

should be pending. However, merely on the basis of orders dated 07.05.2013 of the Magistrate, it cannot be said that criminal prosecution of respondent no.6 for a criminal charge was pending. Even pre-summoning evidence or even statement of the complainant had not been recorded at all before passing of the orders dated 07.05.2013. Consequently, from the said orders, it cannot be said that the Magistrate had concluded that any offence had been committed and if so what offence and by whom. With the order of issuance of process in a criminal complaint under Section 204 Cr.P.C., it may be said that the person, against whom process is ordered to be issued, is facing prosecution or trial for an offence, but prior to order of issuance of such process, it cannot be said that the person named in the complaint is facing trial or prosecution for any offence or criminal charge.

24. In the instant case, during the course of hearing, the applicant fairly conceded that the stage of issuance of process under Section 204 Cr.P.C. in the complaints filed by the applicant has not yet arrived because the said complaints are still pending for pre-summoning evidence for the last 2½ years since after passing of the orders dated 07.05.2013 by the Magistrate. If in such circumstances an

employee is debarred from promotion, it will result in great injustice and such interpretation cannot be given to OM dated 14.09.1992 as clarified vide OM dated 02.11.2012. If this interpretation is accepted, then promotion of any deserving employee can be put to jeopardy by some vested interest by instituting false and frivolous complaint and by keeping it pending for years together for leading pre-summoning evidence and the complaint may ultimately be dismissed or withdrawn after number of years without even issuance of process against the employee, but the employee would have suffered those years by keeping his promotion in abeyance, if aforesaid interpretation is accepted.

24. In the instant case also in criminal case complaints instituted by the applicant, no process has yet been issued against anybody much less against respondent no.6, although for the purpose of Cr.P.C., Magistrate had taken cognizance vide orders dated 07.05.2013, i.e., almost 2½ years ago. Such interpretation which leads to absurdity, arbitrariness and injustice cannot be accepted. In fact, on the basis of OM dated 14.09.1992, it has to be seen whether prosecution for a criminal charge was pending against respondent no.6 or not? The answer to the question is an emphatic 'No'. Clarificatory OM dated 02.11.2012 cannot be

read to mean that prosecution for criminal charge was pending against respondent no.6 merely on the basis of the aforesaid orders of the Magistrate. The applicant sought to contend that OM dated 14.09.1992, as clarified vide OM dated 02.11.2012, is in the nature of subordinate Legislation and has to be given effect to. The contention cannot be accepted because both the said OMs have been issued in exercise of executive power of the Union of India and not in exercise of rule making power. Be that as it may, even reading the two OMs together, it cannot be said in the instant case that prosecution for criminal charge was pending against respondent no.6 merely on the basis of orders dated 7.5.2013 of the Magistrate.

25. It may also be added that even if it may be assumed for the sake of argument only that wrong benefit of promotion has been given to respondent no.6, the same benefit cannot be claimed by the applicant on the basis of parity or equality before law. It is settled law that parity or equality can be claimed on the basis of correct order and not on the basis of wrong order. If according to the applicant, the promotion of respondent no.6 was illegal, the applicant cannot claim parity or equality on the basis thereof.

26. It may also be noticed that even learned Member (J) found the clarificatory OM dated 02.11.2012 to be not appropriately worded to depict correct intention, and, therefore, observed that the same should be clarified or amended by issuing a separate OM.

27. It is thus manifest that for the purpose of paragraph 2 (iii) of OM dated 14.09.1992, as clarified vide OM dated 02.11.2012, prosecution for criminal charge cannot be said to be pending against any person merely because on filing of criminal complaint, Magistrate had taken cognizance of the offence and fixed the case for pre-summoning evidence. Prosecution for criminal charge for this purpose may be said to be pending against him only from the stage when process is ordered to be issued against such person in the criminal complaint under Section 204 Cr.P.C. In the instant case, the said stage has not yet arrived in the criminal complaints instituted by the applicant.

28. Resultantly, I agree with the opinion of Member (A) on the point of difference of opinion. Besides it, conclusion (iii) arrived at by Member (J) could not have been ordered in the instant case for the reasons mentioned in detail hereinabove.

29. As a necessary upshot, the OA is dismissed with no order as to costs.

30. All pending MAs are also disposed of as infructuous.

(L.N. Mittal)
Member (J)

Rakesh