**CENTRAL ADMINISTRATIVE TRIBUNAL**
**PRINCIPAL BENCH**

OA No. 3057/2012

New Delhi this the 30th day of November, 2015

**Hon'ble Mr. Justice Syed Rafat Alam, Chairman**
**Hon'ble Mr. A.K.Bhardwaj, Member (J)**
**Hon'ble Dr. Birendra Kumar Sinha, Member (A)**

Constable Shiv Kumar No. 5703/T,
S/o Late Shri Om Prakash,
Aged about 47 years
Posted as Reader to ACP/T, TRG,
R/o V & PO Rampur (Kundal),
District Sonepat, Haryana. .. Applicant

(By Advocate Shri Nilansh Gaur )

**VERSUS**

1. Government of National Capital Territory of Delhi,
   Through its Chief Secretary,
   Delhi Sachivalaya, I.P.Estate,
   New Delhi.
2. Commissioner of Police
   Delhi Police
   Police Headquarters, MSO Building,
   I.P.Estate, New Delhi.
3. Deputy Commissioner of Police
   Establishment PHQ
   Police Headquarters, MSO Building,
   I.P.Estate, New Delhi.
4. Deputy Commissioner of Police
   Police Control Room,
   New Delhi. .. Respondents

(By Advocate Ms. P.K.Gupta )

**O R D E R**

**Hon'ble Mr. A.K.Bhardwaj, Member (J):**

The brief facts of the case are that the applicant constable Shiv Kumar No. 5703/T (PIS No.28840140) was enlisted in Delhi Police as Constable in executive cadre on 1.05.1984 and was confirmed in the rank w.e.f. 9.5.1989. He was considered for promotion as Head Constable (Exe) on ad hoc basis by the DPC met on 27.04.2012 and

was given consequential promotion. After his such promotion, it could be brought to the light that an appeal No. 32/2007 against judgment dated 27.07.2006 passed in criminal case FIR No.446/1991 u/s 330/342/304/34/202 IPC PS Patel Nagar was pending. The applicant was accused in the said case and had been acquitted by the Trial Court. In view of the said fact a notice was issued to him vide PHQ No.XIII/12 (41)/14954/P.Br.(AC-III)/PHQ dated 18.07.2012 whereby he was called upon to show cause as to why in view of the pendency of aforementioned appeal the Headquarter Notification dated 14.05.2005 so far as it concerned with the admission of his name to promotion list 'C' (Exe) w.e.f. 11.05.2012 could not be cancelled. The applicant submitted his reply to the notice on 8.08.2012. After going through the reply and hearing the applicant, the competent authority vide PHQ order No. 18291/P.Br (AC-III)/PHQ dated 11.09.2012 cancelled the Notification dated 14.05.2012 and discontinued the adhoc promotion of the applicant. To keep the facts straight it is also recorded that after the order of Shri Narinder Kumar, Additional Session Judge, Delhi, the DE pending against the applicant was re-opened vide order dated 6.12.2006 from the stage it was kept in abeyance and directed to be entrusted to the enquiry officer to be nominated by DCP/DE Cell, Delhi itself for being conducting on day to day basis. Nevertheless the enquiry could not resume. When the matter came up for consideration before the Division Bench, it passed order dated 19.03.2013 directing the Registry to place the matter before the Hon'ble Chairman to constitute a Full Bench to consider the following questions:.

(i) Whether the order of the trial Court either convicting or acquitting the accused will tantamount to finality of the proceedings? Or

(ii) It will attain its finality only after the appeal against the orders in the criminal court is decided by the High Court? Or

(iii) Whether the decision of the Co-ordinate Bench of this Tribunal rendered in OA No. 23/2010 is per incurrium and has no binding value or not?

On 12.03.2014, we passed the following orders:-

> In terms of the order dated 19th March 2013, the Division Bench referred the following three questions for consideration by the Full Bench:
>
> (i) Whether the order of the trial court either convicting or acquitting the accused will tantamount to finality of the proceedings? Or
>
> (ii) It will attain its finality only after the appeal against the orders in the criminal court is decided by the High Court? Or
>
> (iii) Whether the decision of the Co-ordinate Bench of this Tribunal rendered in OA No. 23/2010 is per incurrium and has no binding value or not?
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> 2. The applicant moved M.A. No.70/2014 pleading therein that in the light of the facts involved in the present case the apt question of law, which arises for consideration by the Full Bench, is "whether on acquittal of the applicant on merits by the criminal court, merely on the basis of pendency of appeal against the order of acquittal sealed cover can be resorted to in terms of DoPT's O.M. No. 22011/4/91-Estt. (A) dated 14.9.2012".
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> 3. Mrs. Pratima Gupta, learned counsel for respondents also conceded the plea raised by the applicant (ibid). Learned counsels for the parties are also ad idem that in view of the facts involved in O.A.No.23/2010 decided on 15.7.2011, the third question referred by the Division Bench for consideration of the Full Bench does not arise.
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> 4. We heard the learned counsels for the parties and perused the records.
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> 5. The question Nos. (i) and (ii), as referred by the Division Bench, would broadly depend upon the provisions contained in the statute / rules / instructions with reference to which the ramification of the pendency of appeal can be deemed as pendency of prosecution for criminal charges. The finality of acquittal depends on the jurisdiction. In some countries under the rules of double jeopardy and autrefois acquit operate to bar the retrial of the accused for the same evidence and circumstances. In other countries, the prosecuting authority may appeal against acquittal, like the accused may appeal against conviction. In the present case, as can be seen from the

contents of paragraph 3 of the M.A. the applicant was considered for being included in promotion list 'A' and financial upgradation in terms of the Assured Career Progression (ACP) Scheme. Nevertheless, in view of the pendency of prosecution for criminal charges framed against him under Sections 304/34 IPC, recommendations of the Departmental Promotion Committee (DPC)/ Screening Committee could be kept in sealed cover. On 27.7.2006, the applicant was honorably acquitted from the criminal charges and the State preferred the criminal appeal against the order of acquittal. On 30.12.2008 the applicant was admitted to promotion list 'C'. He was also given the benefit of financial upgradation. Subsequently, the respondents passed the order No.2322-2334/CR-IV/PCR dated 12.3.2010 canceling the order dated 5.11.2007 whereby the applicant was granted financial upgradation in terms of the ACP Scheme, the order No. XIII/12 (31/11/14954/P. Br./PHQ (AC-III) dated 18.7.2012 discontinuing his ad hoc promotion and the order No. 17133-162/HAP (P-II) PCR dated 6.12.2006 for re-opening the disciplinary proceedings. Thus he has questioned the aforementioned orders and sought issuance of directions to the respondents to open the sealed cover of promotion list 'A' and antedate his promotion as Head Constable (Executive) with effect from 1999.

6. Ex facie the grievance of the applicant is against discontinuance of his ad hoc promotion, withdrawal of financial upgradation granted to him and non-opening of the sealed cover of the recommendation of the DPC met to consider him for promotion to the post of Head Constable (Executive) on account of the pendency of the Criminal Appeal No.665/2006 preferred against the order of acquittal. In view of the controversy, we agree with the learned counsels for the parties that one of the questions, which need to be addressed in the matter is "whether pendency of appeal against the order of acquittal of a person in a criminal trial can be considered as pendency of prosecution for criminal charges within the meaning of paragraph 2 (iii) of the DoPT's O.M. dated 14.9.1992". Since the applicant was admitted to promotion list 'C' (Executive) on 11.5.2012, when the criminal appeal was pending and subsequently his ad hoc promotion was discontinued in terms of the order dated 18.7.2012 due to pendency of appeal against the order of acquittal, another question, which may arise to be determined by us, would be "when at the time of consideration of the applicant for his promotion, the fact of pendency of appeal against the order of acquittal was not brought to the notice of the DPC and he is given ad hoc promotion, whether after revelation of the fact of pendency of such appeal the promotion can be discontinued".

7. As far as the question whether the order of the Division Bench of this Tribunal in O.A.No.23/2010 passed on 15.7.2011 is per incurriam and has no binding value, the same may not arise to be determined in the facts of the

present case for the simple reason that in the said Original Application the Division Bench did not pronounce upon the finality of acquittal. In paragraph 3 of the said order, it could be viewed that since disposal of appeal in a criminal case takes long time, the Department should not await the decision in the same for giving the benefits due to an employee, but for his prosecution for criminal charge. In the said Original Application, the applicant was acquitted from the criminal charge on 31.1.2005 and was exonerated in the departmental proceedings vide order dated 30.8.1995. When the departmental proceedings had attained finality, in view of the pendency of appeal against the order of acquittal, no decision could be taken in respect of the period of his probation in the rank of Inspector (Executive). He approached the Tribunal with a prayer for issuance of direction to the respondents to declare that he had successfully cleared the period of probation. Taking the view that the disposal of the criminal appeal might take long time, the Tribunal gave a direction to the respondents to take a decision as to how the period during which the applicant remained under suspension has to be treated and also to declare whether he had successfully completed the period of probation or not. In the said case, the issue "whether during pendency of the appeal against it, the order of acquittal should be treated as final or not", was not addressed to. In view of the controversy involved in the present Original Application, we agree with the submission put forth by learned counsels for the parties that the issue whether the order dated 15.7.2011 passed in O.A. No.23/2010 is per incuriam does not arise to be determined by us.

8. In view of the aforementioned, the questions arise to be answered in the present case are reframed as under:-

(i) Whether pendency of appeal against the order of acquittal of a person in a criminal trial can be considered as pendency of prosecution for criminal charges within the meaning of paragraph 2 (iii) of the DoPT's O.M. dated 14.9.1992?

(ii) When at the time of consideration of the applicant for his ad hoc promotion the fact of pendency of appeal against the order of acquittal was not brought to the notice of the DPC, which resulted in promotion of the applicant as Head Constable (Executive) ad hoc, whether after coming of the said fact to light, the respondents were justified in canceling the admission of his name in promotion list?

9. The M.A. is disposed of accordingly.
List the case on 16.4.2014.
Order dasti."

Accordingly, full Bench is constituted to decide the aforementioned questions of law. The question no.1 and 2 above can be dealt with

simultaneously. The doubt raised in the said question was whether the order of the trial court, either convicting or acquitting the accused attained finality only after the appeal provided against it is decided or before that i.e. at the time of its pronouncement. The issue of finality of an order cannot be generalized, as it would broadly depend upon statute as also upon the provisions contained in the statute providing for such order and the appeal against it. Nevertheless, general rule is that a judgment must be final before it can be appealed. There are statutory exceptions permitting interlocutory appeals of certain types of orders. These exceptions allow immediate appeals of orders that resolve discrete issues in probate and receivership cases. There can be only one final judgment in most cases (excepting situations such as the probate orders mentioned above). One final judgment should not be construed as one piece of paper. A series of cases when taken together, disposing of the claim of all parties can constitute a single final judgment. Finality can also be achieved by severance, dismissal, or nonsuit of unresolved claims. A judgment is final if it disposes of all parties and issues (North E.Indep.School Dist.v. Aldridge, 400 S.W.2d 893). There is no particular form required for a final judgment. Under Aldridge, if a judgment "not intrinsically interlocutory in character" is signed following "conventional trial on the merits" and if there is no order for separate trials, then the judgment is presumed to be final and dispose of all parties and all issues before the court. If we deal with the question of finality of judgment, as a general term then we may have to author detailed thesis on it. However, in the facts of the present case, we need to avoid that. For the present, it would be suffice to say that for the purpose of appeal a judgment is final if delivered after full trial or in terms of Mother Hubbard when the court

denies to grant a relief specifically claimed. In other words, in order to be final, a judgment rendered after a proceeding that is other than a "conventional trial" must actually and explicitly dispose of all claims of parties or State with unmistakable clarity that it is a final judgment. An unmistakable clarity standard is certified by the statement that if judgment finally disposes of all parties and all claims and is appealable. In **Narayan Prabhu Krishna Venkesewara Prabhu** Vs. **Narayan Prabhu Krishna Prabhu** (AIR 1977 SC 1268), Hon'ble Supreme Court viewed that grant of certificate of fitness to appeal against the decree may not take away the finality of the decision. Relevant excerpt of said judgment reads as under:-

> "16. So far as the question of appeal to this Court is concerned, it is true that no appeal lay as a matter of right against the judgment in the appeal in the money suit, but, we think the learned Counsel for the respondents is correct in submitting that the question whether there is a bar of res judicata does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue, under the circumstances given in S. 11, has been heard and finally decided. That was certainly purported to be done by the High Court in both the appeals before it subject, of course, to the rights of parties to appeal. The mere fact that the defendant-appellant could come up to this Court in appeal as of right by means of a certificate of fitness of the case under the unamended Article 133 (1) (c) in the partition suit, could not take away the finality of the decision so far as the High Court had determined the money suit and no attempt of any sort was made to question to the correctness or finality of that decision even by means of an application for Special Leave to Appeal.

Nevertheless, such is the perception of finality of an order passed in civil proceedings.

2. As far as the question of finality of an order in criminal proceedings is concerned, instead of referring to the finality of an order, we may refer to finality of conviction or acquittal. In the common law tradition, an acquittal formally certifies that the accused

is free from the charge of an offence, as far as the criminal law is concerned. This is so even where the prosecution has abandoned nolle prosequi. The finality of an acquittal is dependent on the jurisdiction. In some countries, like the United States, under the rules of double jeopardy and autrefois acquit operate to bar the retrial of the accused for the same evidence and circumstances. The effect of an acquittal in criminal proceedings is the same whether it results from a jury verdict, or whether it results from the operation of some other rule that discharges the accused. In other countries, the prosecuting authority may appeal against acquittal similar, like an accused may appeal against conviction. In Scotland, law has two acquittal verdicts: not guilty and not proven. However, the verdict of not proven does not give rise to the double jeopardy rule. In England and Wales, which share a common legal system, the Criminal Justice Act 2003 creates an exception to the double jeopardy rule, by providing that retrials may be ordered if new and compelling evidence comes to light after an acquittal for a serious crime. Also the Criminal Procedure and Investigations Act 1996 permits a tainted acquittal to be set aside in the circumstances where it is proved that the same has been obtained by violence or threats of violence to a witness or juror with one exception in the United States where acquittal cannot be appealed by the prosecution because of constitutional prohibitions against double jeopardy. The U.S. Supreme Court has ruled:-

> "If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. (**U.S**. V.**Sanges** (144 U.S.310 (1892).

A verdict of acquittal is a bar to a subsequent prosecution for the same offence (**Ball v. U.S.** (163 US 662 671, 672 (1896)). Society awareness for heavy personal strain which a criminal trial represents

for the individual defendant is manifested in the willingness to limit the Government to vindicate its very vital interest in enforcement of criminal laws. (**United States V. John** (US 470 489 (1971). While the trial is to jury or to the Bench, it subjects the defendant to post acquittal fact finding proceedings (**Smalis** V **Pennsylvania** (476 U.S.140 (1986).

3. As has been defined in Section 353 of the code of criminal procedure, the judgment in every trial in any criminal Court of original jurisdiction should be pronounced in open court by the presiding officer immediately after termination of the trial or at some subsequent time of which notice should be given to the parties or their pleaders-

(a) by delivering the whole of the judgment; or

(b) by reading out the whole of the judgment; or

(c) by reading out the operative part of the judgment, the substance of the judgment in a language which is understood by the accused or his pleader.

As provided in Section 354, the judgment referred to in Section 353 (c) shall specify the offence (if any) of the IPC (45 of 1860) or other law under which the accused is convicted. The judgment in acquittal shall state the offence of which the accused is acquitted and direct that he be set at liberty. In terms of Section 362 of the code, save as otherwise provided in the code or by any other law for the time being, no Court when it has signed its judgment or final order disposing of a case, shall alter or review except to correct a clerical or arithmetical error. It has been specified in Section 372 (Chapter XXIX) of the code that no appeal would lie from any judgment or order of a criminal court except as provided in the code itself or by any other law for the time being in force. Article 132 (1) of the Constitution provides that an

appeal would lie against any judgment, decree or final order of a High court in Civil, criminal and other proceedings only if the High Court may certifies under Art.134A that the case involves a substantial question of law. Article 132 (2) provided that where the High Court has refused to give such a certificate, the Supreme Court may on being satisfied that the case involves a substantial question of law, as to the interpretation of the Constitution, grant special leave to appeal from such judgment, decree or final order. Article 134 (1) of the Constitution provides certain appeal to the Supreme Court from any judgment, final order of acquittal of an accused person on sentence of death or withdraw for trial before itself any case from any court subordinate to its disciplinary authority and has on such trial convicted the accused person and sentenced him to death and certifies that the case is a fit one for appeal to the Supreme Court. Sections 373, 374 and 380, Section 374 (1) provide for appeal by a convict. Section 376 provides for disability of the convict to appeal in certain cases. Sections 377 and 378 provide for appeal against the acquittal. In such cases, the acquittal cannot be treated as final. However, where the prosecution decides not to prefer any appeal against the acquittal, even if provided in the statute, the same may be treated as final. Section 379 provides for appeal against the conviction by High Court to Supreme Court.

4. As far as the question of finality of conviction is concerned, it becomes effective, operative and final; the moment the competent Court passes such order. In sum and substance, when a statutory right is reserved to the State/ prosecution to persecute a person in appeal even after his acquittal, the person concerned cannot plead that he is let off of the charges, unless the statutory period of filing the

appeal is over. When a person is convicted, obviously he is found guilty of the allegation and the provision of appeal in the statute is only a remedy available to him to prove that the order of his conviction as incorrect.

5. In the aforementioned backdrop, it may be safely concluded that if there is no statutory appeal provided or preferred on behalf of the State, the acquittal is final, but if such appeal is provided and preferred, the acquittal cannot be considered as final. In **Shyam Sunder Lal** Vs. **Shagun Chand** (AIR 1967 Allahabad 214), in view of the judgment of Hon'ble Supreme Court in **G.Veeraya** Vs. **Subhiah Choudhary** (AIR 1957 SC 540), it could be viewed that even pendency of a criminal appeal is a pendency of judicial proceeding. For easy reference, relevant excerpt of the judgment in the case of **Shyam Sunder Lal** Vs. **Shagun Chand** (ibid) is extracted hereinbelow:-

> "19. In our view, the decision in G.Veeraya v.Subhiah Choudhry, AIR 1957 SC 540 relied upon by Beg and Tandon, JJ, in Sharafat Ullah Khan's case, 1950 All LJ 644: (AIR 1959 All 416) was no authority for the view which they, in effect, expressed in that decision. In Veeraya's case, AIR 1957 SC 540 their Lordships clearly pointed out that
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> "The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceedings".
>
> We are of the opinion that the aforequoted observation of their Lordships of the Supreme Court approves, without question, the view expressed, in regard to the position of an appeal qua a suit, by the Federal Court and this Court in the cases noticed above. We have, therefore, no hesitation in holding that the defendants in the instant case could take advantage of what was provided for section 15 of U.P.(Temporary) Control of Rent and Eviction Act 1947."

Whether the order of Division Bench of this Tribunal dated 15.07.2011 passed in OA No.23/2010 is per incurrium and has no binding value or

not is again not an issue arises to be determined in the facts of the present case, for the simple reason, that in the said case the Division Bench did not pronounce upon the finality of acquittal. There at best the order remained sub-silentio on the issue, "whether acquittal attain finality with pronouncement of the order passed under Section 353 of the code of Civil procedure". In Para 3 of the order of the Division Bench, it could be viewed that since disposal of appeal in a criminal case takes long time, the department should not await the decision in the same for giving the benefits due to an employee, but for his prosecution for criminal charge. Nevertheless, to bring an end to the controversy, we could reframe the question arises to be determined in the present OA and adjudicate the same. The questions are:-

> "(i) Whether pendency of appeal against the order of acquittal of a person in a criminal trial can be considered as pendency of prosecution for criminal charges within the meaning of para 2 (iii) of the OM No.22011/4/91-Estt. (A) dated 14.09.1992.
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> (ii) When at the time of consideration of the applicant for his promotion, the fact of pendency of appeal against the order of acquittal was not brought to the notice of the DPC, which resulted in promotion of the applicant as Head Constable (Ex.Ad hoc), whether after coming of the said fact to light, the respondents were justified cancelling the admission of his name in promotion list 'C' (executive).

The parties could put forth their submissions on the aforementioned questions.

6. As far as the first proposition is concerned, though much is not required to be stated, still we may need to refer to the meaning of the term prosecution. As defined in the Black's Law Dictionary, it means a criminal action; a proceeding instituted and carried on by due course of law before a competent Tribunal for the purpose of determining the

guilt or innocence of a person charged with crime. For easy reference, such description of the term is extracted hereinbelow:-

> "**Prosecution.** A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime. U.S. V.Reisinger, 128 U.S. 398, 9 S.Ct.99, 32 L.Ed. 480. The continuous following up, through instrumentalities created by law, of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused.
>
> By an extension of its meaning, "prosecution" is also used to designate the government (state or federal) as the party proceeding in a criminal action, or the prosecutor, or counsel; as when we speak of "the evidence adduced by the prosecution."
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> The term is also used respecting civil litigation, and includes every step in action, from its commencement to its final determination. The Brazil, C.C.A. III, 134 F.2d 929, 930.
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> The Fifth Amendment, U.S. Const. requires that all prosecutions for infamous federal crimes (i.e. federal offences carrying a term of imprisonment in excess of one year) be commenced by grand jury indictment. This requirement, however, does not apply to state prosecutions for such rimes, which may be prosecuted on the basis of an information. Hurtado v. Califrornia, 110 U.S.516,4 S.Ct.111,28 L.Ed.2d 232."

Ex-facie, prosecution means the proceeding instituted and carried on by due course of law. Thus, if an appeal is provided against acquittal and preferred before the competent court, undoubtedly the prosecution can be said to be pending. There is difference between the term prosecution and trial. When criminal prosecution is a judicial proceeding brought by one party against another for a wrong done or for protection of a right or for prevention of a wrong, trial means the determination of a persons innocence or guilt by due process of law. The meaning of the terms is articulated hereinbelow:-

> "Criminal prosecution.- Action at law, legal action, action- a judicial proceeding brought by one party against another; one party prosecutes another for a wrong done or for protection of a wrong.

> Trial-(law) the determination of a person's innocence or guilt by due process of law, "he had a fair trial and the jury found him guilty" most of the complaints are settled before they go to trial"

In order to determine the proposition arises in the present case, we need to confine ourselves to the definition of prosecution and not the trial. At the time of consideration of the cases of Government servants in the zone of consideration for promotion, the particulars of the candidates falling under the following category should be specifically brought to the notice of the Departmental Promotion Committee.

> "i). Government servants under suspension
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> ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and
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> iii) Government servants in respect of whom prosecution for criminal charge is pending."

In case of a Government servant, in respect of whom prosecution for criminal charge was pending, the DPC would assess his suitability without taking into account consideration the criminal prosecution. Nevertheless, the assessment of DPC and the grading awarded by it will be kept in sealed cover. The aforementioned OM was issued after taking note of judgment dated 27.08.1991 of the Supreme Court in **Union of India etc**. Vs. **K.V. Jankiraman etc.** (AIR 1991 SC 2010). In para 3 of the OM, it is provided that on the conclusion of disciplinary case/criminal prosecution which results in dropping of allegations against the Government servant, the sealed cover or covers shall be opened. In case the Government servant is completely exonerated, the due date of his promotion would be determined with reference to the position assigned to him in the findings kept in sealed cover/covers and with reference to the date of promotion of his next

junior on the basis of such position. For the present, what is relevant for our consideration is para 2 (iii) of the aforementioned OM. To begin with whether prosecution for criminal charge includes the pendency of appeal against the acquittal or not, we may straightway refer to OM F.No.22034/4/2012-Estt(D) dated 2.11.2012 wherein it is provided that the definition of pendency of judicial proceeding in criminal cases given in Rule 9 (6)(b)(i) of CCS (Pension) Rules, 1972 is adopted to appreciate the prosecution for a criminal charge, referred to in para 2 of OM dated 14.09.1992. For easy reference, para 8 of OM dated 2.11.2012 is extracted hereinbelow:-

> "8. As regards the stage when prosecution for a criminal charge can be stated to be pending, the said OM dated 14.9.92 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 provides as under:-
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> "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."

As mentioned above, the Rule 9 (6)(b)(i) of CCS (Pension) Rules, 1972 provides that in a criminal case, the judicial proceeding shall be deemed to be instituted on the date on which the complaint or report of a Police Officer of which the Magistrate takes cognizance, is made.

7. In **G.Veeraya** Vs. **N. Subhiah Choudhry** (AIR 1957 SC 540), it could be viewed that even pendency of a criminal appeal is a pendency of judicial proceedings. Relevant excerpt of said judgment read as under:-

> "43. We now pass on to consider another construction of Art.133 which appears to us to be quite cogent. We have seen that Ss.109 and 110 of the Code of Civil Procedure were adapted by the President's Order and the valuation had been raised from Rs.10,000 to Rs,20,000 in order to bring it into conformity with Art.133. Clause 20 of that

Adaptation Order itself provided that such adaptation would not affect the vested rights. Therefore those litigants who had a vested right of appeal from judgments, decrees or final orders of a High Court in a civil proceeding arising out of a suit or proceeding instituted prior to the Constitution and which involved a right or property valued at over Rs.10,000 but below Rs.20,000 are still to be governed by the old Sc.109 and 110. This means that the words "judgment, decree or final order "occurring in Sc.109 and 110 of the Code as adapted must be read as a judgment, decree or final order made after the date of the adaptation other than those in respect of which a vested right of appeal existed before the adaptation and which were preserved by cl.20. If Ss.109 and 110 must be read in this way why should not Art.133 be read as covering all judgments, decrees or final orders of a High Court passed after the commencement of the Constitution other than those in respect of which a vested right of appeal existed from before the Constitution? It is said that there is no saving provision to Art.133 like cl.20 of the Adaptation Order and therefore Art.133 cannot be read in a restricted way. This argument is unsound and here the observations of Rankin C.J. in the Special Bench case of Calcutta referred to above become apposite, namely, that the provision which takes away jurisdiction is itself subject to the implied saving of the litigant's right. Clause 20 will be meaningless if Art.133 is also not read in a restricted sense. This restricted construction of Art.133 will not be, open to the objection that it deprives the aggrieved litigant who had filed his suit or proceeding in a Princely State before the Constitution but against whom an adverse judgment, decree or final order has been made by the High Court of the corresponding Part B State for the Privy Council to which that litigant had the right to go had been abolished. Such a litigant had no vested right and therefore he can come under Art.133 if the conditions thereof are satisfied.

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47. What was claimed by the respondent was the attribute of finality attaching to the judgment, decree or final order of the Jaipur High Court. The argument was that the Jaipur **High Court having given its judgment in 1949 that judgment became final and the respondent had a vested right to that final order and that right had not been taken away by the Constitution either expressly or by necessary intendment. What this Court said was that the review application having been made the appeal became pending and at large, for the judgment was under consideration and therefore no finality had attached to it before the Constitution came into force.** The judgment on review was passed by the Rajasthan High Court in April 1950 that is after the Constitution by a High Court of a Part B State constituted under the Constitution and the respondent had no vested right of finality in relation to any judgment of

> the Rajasthan High Court. The appellant's vested right of appeal to the Privy Council of that State Came to an end as that authority was abolished & at the date of the suit he had no right of further appeal from the judgment of the Jaipur High Court to the Federal Court or to this Court. That being the position it was a judgment with respect to which nobody had any vested right of appeal and therefore, an appeal lay to this Court under Art.133 as construed above. It did not matter in that case whether the appeal was maintainable under Art.133 or Art.135 and the question that we are considering in the present appeal does not appear to have been urged by learned counsel or discussed by the court in that case and the cryptic observation quoted above cannot be taken as a considered and final expression of opinion that whenever a judgment, decree or final order is passed after the date of the Constitution it must come within Art.133 no matter whether the proceedings were instituted before or after that date."

Relying upon the said judgment of Hon'ble Supreme Court in **Shyam Sunder Lal** Vs. **Shagun Chand** (AIR 1967 Allahabad 214), Hon'ble High Court of Allahabad viewed as under:-

> "19. In our view, the decision in G.Veeraya v.Subhiah Choudhry, AIR 1957 SC 540 relied upon by Beg and Tandon, JJ, in Sharafat Ullah Khan's case, 1950 All LJ 644: (AIR 1959 All 416) was no authority for the view which they, in effect, expressed in that decision. In Veeraya's case, AIR 1957 SC 540 their Lordships clearly pointed out that
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> "The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceedings".
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> We are of the opinion that the afore quoted observation of their Lordships of the Supreme Court approves, without question, the view expressed, in regard to the position of an appeal qua a suit, by the Federal Court and this Court in the cases noticed above. We have, therefore, no hesitation in holding that the defendants in the instant case could take advantage of what was provided for section 15 of U.P (Temporary) Control of Rent and Eviction Act 1947."

Such view was followed by Hon'ble Delhi High Court in WP (C) No. 13191/2009 decided on 16.09.2010 (**Lakhminder Singh Brar** Vs. **UOI & Ors**). Para 6 to 12 of the judgment read as under:-

"6. However, as far as the respondents are concerned, they have opposed the prayers made by the petitioner relying upon a full bench judgment of the Allahabad High Court delivered in the case of Shyam Sunder Lal Vs. Shagun Chand, AIR 1967 Allahabad 214 where relying upon a Supreme Court judgment delivered in the case of G.Veeraya Vs. Subhiah Choudhary, AIR 1957 SC 540 it was observed that even pendency of a criminal appeal is a pendency of a judicial proceedings during which the petitioner is only entitled to provisional pension in view of Rule 69 of the CCS (Pension) Rules ( for short 'Pension Rules') and the question of grant of regular pension would arise only after conclusion of criminal proceedings against the petitioner."

7. It would be appropriate to take note of Rule 69 of the Pension Rules which reads as under:

> **"69. Provisional pension where departmental or judicial proceedings may be pending:-**
>
> (1) (a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.
>
> (b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority.
>
> (c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon:
>
> Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

8. At this juncture it would also be relevant to take note of Rule 9(1) and 9(4) of the Pension Rules which read as under:

> **9. Right of President to withhold or withdraw pension:**

> (1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement.
>
> (2) & (3). xxxxx
>
> (4) In case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under Sub- rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

9. It is not in dispute that provisional pension has been granted to the petitioner inasmuch as a criminal appeal filed by the respondents against the order of acquittal is pending.

10. As regards the gratuity Rule 69(c) of the Pension Rules provides that:

> "(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon."

11. Moreover, Rule 69(2) of the Pension Rules reads as under:

> "(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."

12. Taking note of the aforesaid provisions, the Tribunal rightly observed that in a case where any departmental or judicial proceedings are pending against a Government servant, he would be entitled to provisional pension only to be adjusted under sub-Rule (2) of the Rule 69. The competent authority is required to pass order for regular pension only upon conclusion of these proceedings. It is, no doubt, true that the order of acquittal is final unless it is reversed in appeal. **Nevertheless, an appeal against the order of acquittal would be in continuation of the**

> **judicial proceedings pending against the Government servant within the contemplation of Rule 9 of Pension Rules. It cannot be said that the pendency of the criminal appeal against the order of acquittal of the petitioner would not amount to judicial proceeding under Rule 69 read with Rule 9 of Pension Rules, notwithstanding the fact that an order of acquittal is effective and final until it is reversed in appeal.** The consideration that matter in the case of suspension are different from those that may be relevant in the matter of grant of pension, be it provisional or a regular one. Grant of pension is regulated by relevant rules. As such, the cases relating to suspension as are relied upon by the petitioner"s counsel are distinguishable and are not of any help in so far grant of pension is concerned."

Also in **Deepak Rai** Vs. **State of Bihar** with **Jagat Rai and Another** Vs. **State of Bihar** ( 2013) 10 SCC 421), Hon'ble Supreme Court ruled that even an appeal by special leave under Article 136 of the Constitution is a continuation of the original proceedings. Para 35 of the judgment read thus:-

> "35. More so, it is settled law that an appeal by special leave under Article 136 is a continuation of the original proceedings. In Moran M. Baselios Marthoma Mathews (2) v. State of Kerala, this Court categorically observed as follows: (SCC p.523, para 13)
>
> > "13. We, therefore, are of the opinion that despite the fact that the appellants had insisted upon before the High Court for issuance of a writ or in the nature of mandamus upon the State or its officers for the purpose of grant of police protection as this Court has exercised its appellate jurisdiction under Article 136 of the Constitution of India, it can and should go into that question as well viz, as to whether the writ petition itself could have been entertained or not, particularly, when the appeal is a continuation of the original proceedings."
>
> ( emphasis supplied)

From the aforementioned, it is clear that the pendency of a criminal appeal is deemed as judicial proceedings for the purpose of rule 9 (6)(b)(i) of the CCS (Pension) Rules and the definition of pendency of judicial proceedings given in said rule is adopted as meaning of

prosecution for criminal charge mentioned in para 2 of OM dated 14.09.1992. Thus, there is no doubt that even when a Government servant is acquitted by the Trial Court ( court of first instance) and the appeal against such acquittal is pending, the recommendation of DPC regarding his assessment needs to be kept in sealed cover in view of the condition no 2 (iii) mentioned in OM dated 14.9.1992. In sum and substance, it is held that the pendency of appeal provided by law against the acquittal should be considered pendency of prosecution for a criminal charge.

8. As far as the question of discontinuation of adhoc promotion of applicant during the pendency of the appeal is concerned, though in para 5.1 of OM dated 14.09.1992 it is provided that in case the appointing authority comes to a conclusion that it would not be against the public interest to allow ad hoc promotion to the Government servant, his case should be placed before the next DPC in normal course after the expiry of the two years period to decide whether the officer is suitable for promotion on ad hoc basis or not, but such proposition does not arise when we determine the validity of the order dated 18.07.2012, as the said order does not deny consideration of the applicant for ad hoc promotion after two years from the sealed cover, but discontinue the adhoc promotion of the applicant on the ground that the same was ordered by mistake for the reason that the fact of pendency of appeal against the order of his acquittal could not be noticed at the time of reassessment for such promotion by the DPC. In this context, it would not be out of place to refer to para 5.4 of the OM dated 14.09.1992 wherein it is provided that if a Government servant is not acquitted on merits in the criminal prosecution but

purely on technical grounds and Government either proposes to take up the mater to higher Court or to proceed against him departmentally, the ad hoc promotion granted to him should be brought to an end. For easy reference, said para is extracted hereinbelow:-

> "5.4. If the Government servant is not acquired on merits in the criminal prosecution but purely on technical grounds and Government either proposes to take up the matter to a higher court or to proceed against him departmentally or if the Government servant is not exonerated in the departmental proceedings, the ad hoc promotion granted to him should be brought to an end."

In view of the said provision, even when adhoc promotion is granted to an employee after two years of the sealed cover consciously, on a decision being taken to file appeal against the order of acquittal, his such ad hoc promotion is brought to an end. In the present case, the situation was different. The applicant was given ad hoc promotion on the basis of recommendation of the DPC as if no prosecution for a criminal charge was pending against him. When the fact of pendency of criminal appeal at the relevant time was brought to light, his ad hoc promotion was discontinued after giving him a show cause notice. In general instructions issued vide G.I.M.F.O.M. No.F. 1(2)-Estt.III/59 dated 14.03.1963, the order of notification of promotion or appointment of a Government servant should be cancelled as soon as it is brought to the notice of the Appointing Authority that such a promotion or appointment has resulted from a factual error and the Government servant concerned should immediately on such cancellation, be brought to the position which he should have held but for the incorrect order of promotion or appointment. The said order of Govt.of India, reported below Fundamental Rule 31-A reads as under:-

> "The orders of notification of promotion or appointment of a Government servant should be cancelled as soon as it is brought to the notice of the Appointing Authority that such

a promotion or appointment has resulted from a factual error and the Government servant concerned should, immediately on such cancellation, be brought to the position which he would have held but for the incorrect order of promotion or appointment.

In the case, however, of a Government servant who has been erroneously promoted and appointed to a post in a substantive capacity, the procedure prescribed in the Ministry of Home Affairs, Office Memo No. 32/5/54-Ests.(A), dated the 24th November, 1954 (not printed), superseded by O.M. No. 12/2/67-Estt. (D), dated the 21st March, 1968 (extract given below) for de-confirming the Government servant in that post should be followed and only thereafter the Government servant concerned should be brought down to the position which he would have held but for the erroneous promotion/appointment by the issue of orders as mentioned above. Service rendered by the Government servant concerned in the post to which he was wrongly promoted/appointed as a result of the error should not be reckoned for the purpose of increments or for any other purpose in that grade/post to which he would not normally be entitled but for the erroneous promotion/appointment.

3. Any consequential promotions or appointments of other Government Servants made on the basis of the incorrect promotion or appointment of a particular Government servant will also be regarded as erroneous and such cases also will be regulated on the lines indicated in the preceding paragraph.

4. Except where the Appointing Authority is the President, the question whether promotion/appointment of a particular Government servant to a post was erroneous or not should be decide by an authority next higher than the Appointing Authority in accordance with the established principles governing promotions/appointments. Where the Appointing Authority is the President, the decision should rest with the President and should be final. The Ministry of Home Affairs should be consulted in respect of promotions /appointments in the Service administratively controlled by that Ministry. In other cases also, the Ministry of Home Affairs may be consulted, if any point is doubtful.

5. Cases of erroneous promotion/appointment in a substantive or officiating capacity should be viewed with serious concern and suitable disciplinary action should be taken against the officers and staff responsible for such erroneous promotion. The orders refixing the pay should be issued expressly under FR 31-A, and a copy thereof should be endorsed to the Ministry of Finance (Department of Expenditure)"

Thus, when at the time of promotion of the applicant, it could not be noticed that there was an appeal pending against his acquittal,

obviously his promotion was erroneous and was rightly cancelled by the concerned authority. At the cost of repetition, we may say that the view taken in order dated 15.07.2011 passed by this Tribunal in OA 23/2010 ((**Inspr. Devender Pal Singh** Vs **UOI & Another**) (ibid) is only on the premises that since disposal of criminal appeal takes quite long after acquittal of an employee in the trial, the decision regarding period of suspension and the period of probation should not be delayed. The interpretation of para 2 (iii) of OM dated 14.09.1992 was not a question there before the Division Bench in the said case, thus while taking a view on the controversy arises in the present case, we need not even say whether the said order is per incurrium or sub silentio. Before parting with, we may also say that the charges against the applicant in the criminal case in which the appeal is pending are quite serious and grave.

9. In view of the aforementioned we are convinced that the OA is devoid of merit. Same is accordingly dismissed. No costs.

**(Dr. Birendra Kumar Sinha) (A.K.Bhardwaj) (Syed Rafat Alam)**
**Member (A) Member (J) Chairman**

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