

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 167 of 2015

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

Bandana Mohapatra, aged about 51 years, W/o Dr. P.R.Pradhan, Plot No. GA-61, Saileshree Vihar, Chandrashekharapur, Bhubaneswar, Dist. – Khurda, presently working as Primary Teacher, Kendriya Vidyalaya IV, Niladri Vihar, Bhubaneswar, Dist. – Khurda – 751001.

.....Applicant

VERSUS

1. Commissioner, Kendriya Vidyalaya Sangathan, 18, Institutional Area, Saheed Jeet Singh Marg, New Delhi – 110016.
2. Deputy Commissioner, Kendriya Vidyalaya Sangathan, Regional Office at Pragati Vihar, Mancheswar, Bhubaneswar, Dist. – Khurda.
3. Snehasuta Shadangi, Principal, Kendriya Vidyalaya IV, Niladri Vihar, Bhubaneswar, Dist. – Khurda, 751021.

.....Respondents.

For the applicant : Mr.S.K.Ojha, counsel

For the respondents: Mr.H.K.Tripathy, counsel

Heard & reserved on : 29.4.2019

Order on : 16.5.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

The applicant is aggrieved by the order of respondent No.3 dated 13.3.2015 (Annexure A/3) by which it was decided not to relieve the applicant to join the promotional post for which the applicant was duly selected by the competent authority. The OA is filed seeking the following reliefs :

- “(a) That the order dt. 13.3.2015 Annexure A/3 be quashed.
- (b) That the respondents may be directed to allow the applicant to join in her promotional post as HM w.e.f. 13.3.2015 with all consequential service benefits.
- (c) That any other order/orders as it would deem fit and proper to give complete relief to the applicant.

2. The case of the applicant in brief is that she joined in Kendriya Vidyalaya Sangathan (in short KVS) as Primary Teacher on 25.3.1997. She was duly selected for promotion to the post of Head Mistress through Departmental Examination vide order of the respondent No. 1 dated 23.2.2015 (Annexure A/1). As per the order she was to join the promotional post by 16.3.2015. She tendered her acceptance on 9.3.2015 with a request to respondent No.3 to relieve her w.e.f. 13.3.2015 so as to enable her to join the promotional post.

The copy of the order dated 23.2.2015 was endorsed to concerned Principal, Kendriya Vidyalaya (Respondent No.3) with further direction to relieve the applicant positively on or before 16.3.2015, and before relieving, it may also be ensured that they are not under currency of any penalty and no vigilance/disciplinary case is pending/contemplated against them. The respondent No.3 vide its letter dated 13.3.2015 (Annexure A/3) refused to relieve the applicant to join the promotional post under the pretext that a Disciplinary Proceeding (in short DP) is contemplated against the applicant.

3. The grounds in the OA are that the decision not to relieve her violated Article 14 and 16 of the Constitution of India. The applicant was issued a memo by respondent No.3 vide order dated 25.2.2015 (Annexure A/7) though the respondent No.3 was not competent to issue the charge memo. No DP or vigilance case was contemplated by the competent authority. It is stated that the action of respondent No.3 was mala fide.

4. The claim of the respondents in the counter are as under :

(i) The applicant was served with a show cause notice on 25.2.2015 on certain complaints received against her. She was asked to file reply by 4.3.2015. The respondent No.3 assumed the above pending allegation as an contemplation of disciplinary proceedings and declined to relieve her to take the promotional post.

(ii) On 13.3.2015, the applicant preferred an appeal to the respondent No.2 for intervention and for issue of direction to respondent No.3 to relieve her. The facts accepted by both the sides towards further development of the case is that respondent No.2 vide its order dated 17/18.3.2015 (Annexure A/5) constituted a committee for inquiry into the complaint against the applicant. A fact finding inquiry was conducted on 19.3.2015. As per the report of the Committee, the applicant remained adamant, refusing to answer any question of the Inquiry Committee. Since the disciplinary action against the applicant was contemplated vide the letter dated 4.3.2015 to the KVS Regional Office, Bhubaneswar, the decision of the respondent No.3 was stated to be correct.

5. The applicant, vide para 11 in the rejoinder, submits that respondent No.2 has issued charge sheet under Rule 14 of the CCS (CCA) Rules, 1965 on 25.6.2015 and stated that it is issued on false and fabricated information and documents. It is the claim of the applicant that no disciplinary case was pending against her prior to selection to the promotional post of Head Mistress on 23.2.2015 and that the complaint which was acted upon by the respondent No.3 was on 25.2.2015.

6. Learned counsel for the applicant was heard. Besides reiterating the stand taken in the OA, it was submitted that the present charge sheet initiating the DP was issued on 25.6.2015. Hence, as on 23.2.2015 no DP was pending against the applicant and action of the respondent No.4 not to relieve the

applicant was illegal. Copy of the following judgments have been filed by the learned counsel in support of the applicant's case –

- (i) Union of India –vs- K.V.Jankiraman [AIR 1991 SC 2010]
- (ii) Union of India –vs- Sangram Keshari Nayak in Civil Appeal No. 3691 of 2005.

7. Learned counsel for the respondents argued that the promotion order issued for the applicant was a conditional promotional offer since the applicant was to be relieved if no DP was pending or contemplated. Since a DP was contemplated against the applicant, she was not relieved to join her promotional post. The complaints against the applicant was serious and the matter is pending at the level of the disciplinary authority. A written note of submission has also been filed by the learned counsel for the respondents, citing about 20 citations in support of the respondents' case.

8. In this case, the issue to be decided is whether the action of the respondent No.4 not to relieve the applicant to join her promotional post is legally sustainable. It is undisputed that the applicant has been duly selected for the next higher post of Head Mistress through departmental examination, with approval of the competent authority. The order dated 23.2.2015 (Annexure A/1). The instruction contained in the order dated 23.2.2015 to the respondent No.4 stated as under :

“The Principal, KV concerned for necessary action. Those not submitting such willingness/unconditional consent will be deemed to be not interested in offer of promotion and his/her offer of promotion shall stand automatically withdrawn without any further notice. If employee who have accepted the offer of promotion may be relieved positively on or before 16.3.2015 to enable them to join at the place of posting. Before relieving it may also be ensured that they are not under currency of any penalty and no vigilance/disciplinary case is pending/contemplated against them.”

9. The respondents have averred that since a DP was contemplated against the applicant, she could not be relieved by the Principal (respondent No.4). Respondent No.4 after receipt of the order dated 23.2.2015, issued a memo dated 25.2.2015 (Annexure A/7) to the applicant referring to a particular incident which took place on 21.2.2015 resulting in discovery of materials with objectionable language against the applicant, stating as under :

“So Mrs. Bandana Mohapatra, PRT is hereby directed to give sufficient reasons for this gross misconduct for such anti KVS activities provoking parents against Kendriya Vidyalaya No.4 Bhubaneswar and using objectionable and filthy words against Principal & KVS on or before 4th march, 2015 and explain why disciplinary action will not be initiated against such anti KVS activities.”

10. Admittedly, the respondent No.4 was not competent to initiate any DP against the applicant. Further, there was no link between the objectionable

materials in a packet recovered from the school premises and the applicant as on 25.2.2015. The words used in the memo dated 25.2.2015 are that "Mrs. Bandana Mohapatra PRT has left a packet containing different papers in the Vidyalaya Premises on Saturday that is 21.2.2015." It is not known on what basis, the respondent No.4 concluded between 21.2.2015 and 25.2.2015 that the applicant was responsible for the incident on 21.2.2015. Also, prior to 25.2.2015, no report was sent to the respondent No.2 who is the competent disciplinary authority for the applicant, if the respondent No.4 suspected that the applicant for the incident on 21.2.2015. Such report was sent on 4.3.2015, after which the fact finding committee was constituted by the respondent No.2 on 17/18.3.2015 to inquire into the incident. The committee inquired into the matter on 19.3.2015 (although the date of inquiry has been wrongly mentioned in para 15 of the counter to be 19.2.2015). Therefore, it is clear that the respondent No.2 had not constituted any committee to inquire into the matter by 13.3.2015 and there was no material on record on 13.3.2015 (except the report of the respondent No.4 dated 4.3.2015 to the respondent No.2) which would show that the applicant was responsible for the alleged incident on 21.2.2015. From the action of the respondent No.4 and wording of her memo dated 25.2.2015, it was obvious that she intended to initiate the DP against the applicant merely on suspicion and no report of the fact finding committee or any order of the respondent No.2 about initiation of DP was available as on 13.3.2015. Hence, it cannot be said that any DP was pending or was contemplated against the applicant as on 13.3.2015, except for the letter dated 4.3.2015 of respondent No.4, copy of which has not been produced by respondents with their pleadings.

11. We can examine the case from another angle. If the contention of the respondents that by virtue of the letters of the respondent No.4 dated 25.2.2015 and 4.3.2015, it can be concluded that the DP is contemplated against the applicant who should be deprived from availing the promotion order issued by the competent higher authority, then it will result in a situation where a subordinate authority can deny promotion of an employee duly approved by the competent authority by sending a report against the employee without any preliminary inquiry or prima facie materials against the employee. Such a situation is undesirable from the point of view of the administrative propriety and fairness.

12. Learned counsel for the applicant has cited the judgment in the case of K.V.Jankiraman (supra). In this case Hon'ble Apex Court has considered the question as to when the recommendation of DPC will be kept in a sealed cover on account of pendency of disciplinary proceeding. It is held that the pendency of investigation prior to issue of charge memo is not sufficient to enable the authorities to adopt sealed covered procedure on the ground that the

disciplinary proceeding is pending or there is a prima facie case on the basis of which decision has been taken to proceed against the concerned official. Hon'ble Apex Court has held as under :

"6. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a chargesheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

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

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before . ' ' There' is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

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

As per the ratio decided in the above judgment the disciplinary/criminal proceeding will be considered to be pending if the charge sheet has already been issued to the employee.

13. Another case cited by the applicant's counsel is the judgment of Hon'ble Apex Court in Sangram Keshari Nayak (supra). This case has reference to the judgment in K.V.Hankiraman's case. In this case the sealed cover procedure was adopted by the DPC on the ground that a vigilance case was pending.

When the applicant challenged before the Tribunal direction was given to promote him from the date his junior was promoted. This order was upheld by the Hon'ble High Court relying on the judgment in the case of K.V.Jankiraman (supra). It is observed in the judgment as under :

"Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within its purview an effective, purposeful and meaningful consideration. Suitability or otherwise of the candidate concerned, however, must be left at the hands of the DPC, but the same has to be determined in terms of the rules applicable therefor. Indisputably, the DPC recommended the case of the respondent for promotion. On the day on which, it is accepted at the bar, the DPC held its meeting no vigilance enquiry was pending. No decision was also taken by the employer that a departmental proceeding should be initiated against him."

14. Learned counsel for the respondents has referred to a number of judgments in his written notes, which were perused by us. Based on the information given in the written notes, it is seen that none of the judgments permits the authorities to withhold the promotion when the concerned employee has not been held to be responsible during preliminary enquiry/fact finding enquiry by the competent authority. Hence, these judgments referred to in the written notes are of no help to the respondents.

15. From the above discussions of the circumstances of this case as well as the case laws, we have no hesitation to hold that there was no disciplinary proceeding pending or being contemplated against the applicant based on prima facie evidence against the applicant as on 13.3.2015 and the respondent No.4 has exceeded her authority by not relieving the applicant on or before 13.3.2015 as per the directions vide order dated 23.2.2015 (Annexure A/1),. Hence, the order dated 13.3.2015 (Annexure A/3) passed by the respondent No.4 not to relieve the applicant being not sustainable, is quashed. The applicant shall be allowed to join against the promotional post immediately by the respondents as per the order dated 23.2.2015, since the post has been kept vacant as per interim order dated 8.4.2015. The applicant shall also be allowed all consequential benefits as per law. However, the actual payment of salary in the promotional post will be payable from the date of joining of the applicant in the said post.

16. The OA is allowed as above with no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath