

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 25th January, 2010

+ **W.P.(C) 4631/2008**

HC/DVR SHIV KUMAR SINGH Petitioner
Through: Mr. I.V. Raghav and Mr. S.B.
Raghav, Advocates
versus

MINISTRY OF HOME AFFAIRS & ORS. Respondents
Through: Mr. Ashwani Bhardwaj,
Advocate

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J. (Oral)

1. Rule. D.B. Counsel for respondent waives notice in the rule. The record which was directed to be produced on the last date of hearing is also made available. Counsels have been heard.
2. The writ petition lays a challenge to an order dated 16th of April, 2008 passed by the respondents cancelling the promotion of the petitioner to the post of Sub-Inspector/Machine Technician. The undisputed facts giving rise to this petition are noticed hereafter.

3. The petitioner was appointed to the post of Constable (General Duties) ('CT/GD' for short hereinafter) w.e.f. 27.07.1971 in the Central Reserve Police Force and was posted with the 82nd Battalion, CRPF since November 1989. The petitioner successfully undertook the promotional course for promotion from the post of Head Constable/Driver ('HC/DVR') to Sub-Inspector/Machine Technician ('SI/MT') at the CTC-I CRPF, Neemuch and qualified with 'C' grading. The petitioner was consequently promoted along with two other candidates to the post of SI/MT by order dated 27.09.2007 issued by the Director General of CRPF.

4. It appears that during this period, FIR No. 97/06 was registered on 25.02.1996 by the police station Kalyan Puri, Delhi against the petitioner under Section 279/304-A of IPC in connection with an accident by the Water Tanker No. DL IGC-0731. A civilian Om Prakash R/o Khichripur, Delhi was alleged to have been killed in that accident. The respondent has contended that prosecution of the petitioner in this behalf is pending at the district courts at Karkardooma, Delhi.

5. The petitioner however pleads innocence in this case and contends that the accident did not result on account of any fault attributable to him. According to the petitioner, a cyclist hit a civilian who was walking in an inebriated condition. Because of this collision with the cyclist and his drunken

condition, this civilian was unable to control himself and fell down between the left front and rear wheels of the passing water tanker which the petitioner unfortunately happened to be driving at that time. The petitioner claims to have rendered immediate assistance to the deceased who unfortunately could not survive.

6. Our attention is drawn to the court of inquiry which was ordered in the incident and conducted by the respondent into the alleged accident. The court of inquiry has recorded statements of relevant witnesses. After a detailed consideration of the material brought out in the inquiry, a report stands submitted completely absolving the petitioner of any culpability or blame in the incident. The findings of this court of inquiry deserve to be noticed and the relevant extract thereof reads as under :-

“ Having gone through the document/statement of witnesses and findings thereto the Court is of the opinion that No. 710040841 HC/Dvr Shiv Kumar on water truck duty was on way to Bn. Hqr. on 24.02.2006 after getting water from the water point. At Khichripur road a cyclist while crossing dashed a civilian namely Om Prakash from behind and Sh. Om Prakash being under influence of liquor could not control himself and fell between left front and rear wheel of the water truck. On a call from CT/GD Ashok Kumar who was sitting on the left side of the window keeping eye on left side because of rush, the driver managed to stop the vehicle before it could cross over the body of the civilian. He was taken to the LBS Hospital with the help of public and the attending doctor found him stable, conscious and there was no injury except injury on toe. He subsequently expired on way to Holy Family Hospital. The postmortem report confirmed his death due to Haemorrhagic shock consequent of blunt force impact.

On going through the profile of HC/Dvr Shiv Kumar it indicates that he is a seasoned driver having earned many rewards for driving in the last 27 years of service. Having examined the circumstances of accident the civilian namely Om Prakash sustained internal injury due to impact of fall on road leading to his death and has the driver not intervened in time the vehicle would have over-run his body. The contention of the complainant in FIR that the water truck hit the civilian namely Om Prakash and the water truck was in high speed seems to be after thought. Had the civilian been hit by the water truck he would have fallen in front of the left wheel where as he fell in between left front and rear wheel. Secondly had the water truck been in high speed then it would have been impossible to save a person fallen in between left front and rear wheel. Thirdly, during evening hours that too between 1830 to 1930 hrs it is very rushy and it is highly impossible to drive a vehicle that too heavy at a high speed. Hence it is found that the driver is not at fault. There is no loss to vehicle No. DL-I-GA-0731 water truck. Further considering the road conditions and rush, Khichripur route should be avoided and alternate route preferably through main road may be adopted"

7. The grievance of the petitioner is that the said FIR was registered by the police on account of a complaint made by relatives of the deceased. A charge sheet was filed in this case which is still pending against the petitioner when he was sent up for attending the promotional course and he was promoted with several other candidates by order dated 27.09.2007.

8. The respondents contend that the promotion was subject to the condition that the persons who were promoted are free from vigilance and departmental inquiries and there is no pending prosecution for the criminal charges. In view of the above stipulation, a response was required from the petitioner with regard to the status of the aforesaid criminal case. A

stand was taken on behalf of the petitioner to the effect that offence with which he was charged did not fall within the purview of either moral turpitude and that the same was not an intentional, culpable, deliberate or wilful offence and therefore implication in such case would not disqualify him for recruitment/promotion etc.

9. This stand on behalf of the petitioner was examined by the respondents in the context of the legal position. After careful consideration, the respondents were of the opinion that for the reason the criminal case was still pending against the petitioner, he could not be promoted to the post of SI/MT as per provision contained in para 11.3 of Chapter 54 Swami's Manual of Establishment and Administration Rules till such time he was exonerated from the charges levelled against him. For this reason, by a signal dated 16th of April, 2008, the petitioner was removed from the approved list of promotion and his promotion to the said post was also cancelled.

10. The petitioner has assailed this action of the respondents before us. From the above narration we find that there is no dispute that the petitioner stood implicated and is still facing prosecution for a criminal charge.

11. Our attention has been drawn to the provisions relied upon by the respondent with regard to the procedures which are to be followed by the Departmental Promotional

Committee.

Apart from a criminal prosecution, a government servant slated for promotion may be facing a vigilance inquiry or disciplinary proceedings. The procedure which is to be followed by the departmental promotion committee in respect of Government servants under a cloud has been laid down in the GI, Dept. of Pers. & Trg., OM No. 22011/4/91 – Estt.(A) dated the 14th of September, 1992 and extracted in para 11.1 and 11.2 of Swamy's Complete Manual on Establishment and Administration. While assessing the suitability of a government servant coming within the purview of consideration for promotion, one of the relevant circumstances is whether the government servants facing of a prosecution in a criminal case. It is provided that the Departmental Promotional Committee shall assess the suitability of such Government servant alongwith other eligible candidates taking into consideration the pending prosecution. However, its assessment with regard to the fitness and the grading awarded by it is required to be kept in a sealed cover which would be superscribed with the noting to this effect. So far as proceedings of the DPC are concerned, it is prescribed that it would be noted therein that findings are contained in the attached sealed cover. The authority competent to fill the vacancy is required to fill the vacancy in the higher grade only

in an officiating capacity when the findings of the Departmental Promotional Committee in respect of suitability of a government servant for his promotion are kept in a sealed cover. Para 11.3 notes the Government Instruction that this procedure would be required to be followed by subsequent Departmental Promotional Committee convened till the criminal prosecution against the government servant concerned is concluded.

12. In this behalf reference can also be usefully made to the pronouncement of Supreme Court reported at AIR 1991 SC 2010 titled as UOI Vs. K.V. Jankiraman etc. wherein on this issue, the Supreme Court observed that the sealed cover procedure is to be resorted to only after charge sheet is issued. Any proceedings prior to this stage is insufficient ground for the authority to adopt sealed cover procedure. The Supreme Court upheld the findings of the Full Bench of the Tribunal in this regard and held promotion cannot be withheld merely because some proceedings are pending. However, it can be so done only at the stage when charge sheet has already been issued. On the question of arrears of pay for the period of notional promotion prior to actual promotion will depend on the authority, who shall also take into account the facts and circumstances of the criminal proceedings.

13. The Apex Court in AIR 1993 SC 1488 titled as Delhi

Development Authority vs. H.C. Khurana, had held that a 'Sealed Cover Procedure' is applicable in two situations. First, where disciplinary proceedings are pending in respect of a government servant. Second, a decision has been taken to initiate disciplinary proceedings. The legal principle was well-reasoned stating that promotion while proceedings are pending would be incongruous and against public policy and also against principles of good administration. On the other hand, not considering the employee at all would be unfair and arbitrary.

Therefore, to reconcile these conflicting interests, the result be kept in abeyance in a sealed cover and be implemented on conclusion of disciplinary proceedings.

14. In the present writ petition, the fact that criminal prosecution is pending and a charge sheet has been filed is undisputed. Therefore, in the light of the afore-noticed legal principle laid down by the Supreme Court, the 'sealed cover procedure' should have been adopted in the case of petitioner.

15. The above narration of facts would show that the sealed cover procedure has admittedly not been followed so far as the petitioner is concerned. The petitioner has placed reliance on the cases of one Sanjay Kumar and Krishan Kumar, also serving with the respondents, contending that they were implicated in cases and standing criminal prosecution at the

time of consideration for promotion. Hence they were similarly placed as the petitioner. The submission is that, therefore, the petitioner is entitled to promotion as well.

16. So far as Sanjay Kumar is concerned, the respondent has pointed out he was not involved in a criminal case involving death of a person. It has further been submitted that though the police has registered the case involving Sanjay Kumar on 24th June, 2004, the parties had settled the matter on 13th September, 2005 and the case was dismissed as withdrawn. Even the petition for compensation before the Motor Accident Claim Tribunal was settled in January, 2006. For these reasons no case was pending against the Sanjay Kumar in August, 2007 when he was considered for promotion. With regard to Kishan Kumar, it is contended that there is no record of pendency of prosecution available with the respondent. In this background, the reliance of the petitioner on these instances is misplaced. The respondents do not appear to have overlooked pendency of a criminal prosecution against a person being considered for promotion.

17. In any case, having regard to the procedure which the Departmental Promotion Committee considering the petitioner's cases was required to follow, we are not required to dwell any further on the question as to whether the respondents have deviated in the cited instances. There can

be no dispute that the Departmental Promotion Committee was required to consider the petitioner for promotion who was in the zone of consideration. The grading and recommendations of the Departmental Promotional Committee so far as his promotion are concerned, were required to be kept in sealed cover till such time the criminal proceedings against him came to an end. This has not been followed. On the contrary, the petitioner was actually promoted and thereafter his promotion has been cancelled by the impugned order dated 16th April, 2008 without any notice or hearing to the petitioner.

18. In view of the above discussion, the order dated 16th of April, 2008 cannot stand and is hereby set aside and quashed. As a consequence, the respondents would be required to maintain the grading awarded to the petitioner as well as the recommendation qua him by the departmental promotion committee in a sealed cover till adjudication and decision in the criminal prosecution. Thereafter, the prescribed procedure would require to be followed.

19. At this stage, learned counsel for the petitioner submits that the petitioner has since retired from service on 30.11.2009. In this background even if the petitioner is as to be ultimately exonerated from criminal charges it is obvious that, as a result, he would become entitled only to the financial

benefits which may flow from promotion, if any, in terms of the above.

20. Accordingly, it is further directed that the respondent shall maintain the recommendations of the Departmental Promotional Committee in a sealed cover till the result of the pending criminal case is received. In case the petitioner is acquitted there from, he shall be entitled to all financial and other benefits of service in the higher post in accordance with the applicable rules.

21. Needless to say pending finalization of the promotion aspect, the respondents are bound to release all other dues and pensionary benefits accruing to the petitioner upon his superannuation in accordance with rules in respect of the post held by him at the time of his superannuation. Action in this behalf shall be positively taken and completed within a period of three months.

22. This writ petition is allowed in the above terms.

Order be given dasti to parties.

GITA MITTAL, J

SURESH KAIT, J

JANUARY 25, 2010
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