

GAHC010203512021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/7338/2021

SATISH KUMAR,
S/O LATE SIVA CH. PRASAD SINGH,
R/A H/N-18(2ND FLOOR), SATGAON,
OPP. SATGAON POLICE STATION,
DIST-KAMRUP(M), ASSAM, PIN-781171.

.....Petitioner

-VERSUS-

1. THE UNION OF INDIA,
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF DEFENCE, SOUTH BLOCK, NEW DELHI-110011
- 2: THE CENTRAL ADMINISTRATIVE TRIBUNAL (CAT),
GUWAHATI BENCH AT GUWAHATI,
G.S ROAD, GUWAHATI-781005
- 3: THE CONTROLLER GENERAL OF DEFENCE ACCOUNTS (CGDA),
MINISTRY OF DEFENCE (FINANCE),
SOUTH BLOCK,
GOVERNMENT OF INDIA,
NEW DELHI, PIN-110011
- 4: THE PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (BR),
RING ROAD, NARAINA, DELHI,
PIN-110010
- 5: THE OFFICE OF THE CONTROLLER OF DEFENCE ACCOUNTS,
RAJENDRA PATH,
PATNA, BIHAR, PIN-841219
- 6: THE OFFICE OF THE CONTROLLER OF DEFENCE ACCOUNTS (BR),
UDAYAN VIHAR, NARANGI,
GUWAHATI, ASSAM, PIN-781171.

..... Respondents.

For the Petitioner : Mr. U.K. Nair, Sr. Adv.
: Ms. N. Newme, Adv.
: Mr. M.P. Sarma, Adv.
: Mr. A. Boro, Adv.
: Mr. A. Chakraborty, Adv.

Advocates

For the Respondents : Mr. B. Chakravarty, CGC.

Advocate

BEFORE
HON'BLE THE CHIEF JUSTICE (ACTING) MR. N. KOTISWAR SINGH
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Date of Hearing and Judgment : 25.01.2023

JUDGMENT AND ORDER

25.01.2023

[N. Kotiswar Singh, CJ(Acting)]

Heard Mr. U.K. Nair, learned Senior counsel assisted by Ms. N. Newme, learned counsel for the petitioner. Also heard Mr. B. Chakravarty, learned Central Government Counsel appearing for the respondents.

2. The present petition has been filed by the petitioner challenging the order dated 08.03.2021 passed by the learned Central Administrative Tribunal, Guwahati Bench in Original Application No.40/00230/2019 and the subsequent order dated 10.05.2021 passed by the Central Administrative Tribunal, Guwahati Bench in Review Application

No.040/00002/2021 and for setting aside and quashing the communications dated 27.08.2017 and 28.08.2018 issued by the respondent authorities denying promotion to the petitioner and also for issuing a direction to the respondent authorities to promote the petitioner to the cadre of Senior Auditor and Assistant Accounts Officer w.e.f. 02.04.2012 and 14.01.2016 respectively along with consequential benefits of pay, seniority etc.

3. Before we deal with the submissions advanced in challenging the aforesaid orders passed by the learned CAT, Guwahati Bench, a brief reference to the background facts may be appropriate.

4. The petitioner joined service as a Clerk on 30.06.2001 and posted at the Income Tax Appellate Tribunal, Mumbai and thereafter, on 24.05.2004, on inter-departmental transfer, he joined as a Clerk in the office of the respondent No.5. Subsequently, in the year 2007, he cleared the Subordinate Accounts Services (SAS) Part-I examination and was promoted to the cadre of Auditor on 15.02.2008. Thereafter, on 30.06.2008, he was transferred to the Area Accounts Office, Siliguri as an Auditor.

5. According to the learned Senior counsel for the petitioner, as on 02.04.2012, the petitioner became eligible for promotion to the cadre of Senior Auditor and his name was duly considered for promotion by the Departmental Promotion Committee along with others. However, his case was kept under the sealed cover due to a criminal case pending against him relating to suicide by his wife in connection with which an FIR was lodged on 17.08.2011 and registered as Bhaktinagar P.S. Case No.947/2011. The

petitioner was placed under suspension vide order dated 21.12.2011 but his suspension was subsequently revoked on 29.04.2013 and he resumed his service on 30.04.2013.

6. According to the petitioner, he passed the Subordinate Accounts Services (SAS) Part-II Examination and became eligible for promotion to the cadre of Assistant Accounts Officer (AAO). However, on this occasion also, he was denied promotion and his case was kept under the sealed cover because of the pendency of the aforesaid case.

7. According to the petitioner, though a case was pending against him, yet, no charge-sheet was issued to him when the said consideration for promotion to the higher posts were made and as such, he could not have been denied promotion regarding which he has submitted several representations to the authorities. However, the authorities rejected his representations vide their communication dated 28.08.2017 and 27.08.2018.

8. Thus, being aggrieved, the petitioner approached the learned CAT, Guwahati Bench challenging the aforesaid communications dated 28.08.2017 and 27.08.2018 denying him promotion and seeking promotion to the higher posts as mentioned above, which, however was dismissed by the learned CAT, Guwahati Bench vide their order dated 08.03.2021 passed in Original Application No.040/00230/2019. His application for review was also dismissed by the learned CAT vide order dated 10.05.2021 passed in Review Application No.040/00002/2021 in O.A.040/00230/2019.

Accordingly, the petitioner is before us challenging the aforesaid decisions of the CAT.

9. Mr. Nair, learned Senior counsel for the petitioner has submitted that denial of promotion to the petitioner was not in accordance with the relevant Office Memorandum relied upon by the authorities.

10. In this regard, Mr. Nair has drawn our attention to two Office Memoranda, namely, Office Memorandum dated 14.09.1992 and Office Memorandum dated 02.11.2012.

11. In the O.M. dated 14.09.1992, it has been provided, *inter-alia*, as follows,

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

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

2.1 The Departmental Promotion Committee shall assess the suitability of the Government servants coming within the purview of the circumstances mentioned above alongwith other eligible candidates without taking into consideration the disciplinary case/criminal prosecution pending. The assessment of the DPC, including ‘Unfit for Promotion’, and the grading awarded by it will be kept in a sealed cover. The cover will be superscribed ‘Finding regarding suitability for promotion to the grade/post of in respect of Shri.....(name of the Government servant). Not to be opened till the termination of the disciplinary case/criminal prosecution against Shri.....’ The proceedings of the DPC need only contain the note ‘The findings are contained in the attached

sealed cover'. The authority competent to fill the vacancy should be separately advised to fill the vacancy in a higher grade only in an officiating capacity when the findings of the DPC in respect of the suitability of a Government servant for his promotion are kept in a sealed cover.

2.2 The same procedure outlined in para 2.1 above will be followed by the subsequent Departmental Promotion Committees convened till the disciplinary case/criminal prosecution against the Government servant concerned is concluded.

.....”

12. It is clear from the aforesaid Office Memorandum dated 14.09.1992 that the case of an employee/Government servant in respect of whom a prosecution for a criminal charge is pending, has to be kept under sealed cover. However, since there was some ambiguity as to when a criminal charge can be said to be pending against a Government servant as mentioned in the Office Memorandum dated 14.09.1992, the same was clarified by the authorities by issuing the subsequent Office Memorandum on 02.11.2012 in the following manner,

“7. The law on sealed cover based on the judgment of the Apex court in Union of India vs. K.V. Janakiraman etc. (AIR 1991 SC 2010), is by now well settled. The O.M. dated 14.9.92 confined the circumstances for adopting sealed cover to the three situations mentioned in para 2 of the said O.M. Even after recommendation of the DPC, but before appointment of the officer if any of the three situations arise, the case is deemed to have been kept in sealed cover by virtue of para 7 of the O.M. dated 14.9.92.

8. As regards the stage when prosecution for a criminal charge can be stated to be pending, the said O.M. 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 is adopted for the purpose. The Rule 9(6)(b)(i) of CCS (Pension) Rules, 1972 provided 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”.

13. Thus, the authorities by referring to Rule 9(6)(b)(i) of CCS(Pension) Rules, 1972, clarified the said O.M. dated 14.09.1992 by holding that the judicial proceedings shall be deemed to be instituted in the case of a criminal proceeding, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made.

14. From the above clarification in O.M. dated 02.11.2012, it can be said that it is when the Magistrate takes cognizance in a criminal proceeding, a prosecution for criminal charge can be said to be pending as mentioned under para 2(iii) of the O.M. dated 14.09.1992.

15. In view of the above subsequent clarification issued in O.M. issued on 02.11.2012, a criminal charge which is stated to be pending against a Government servant is referable to the time when the Magistrate takes cognizance of the offence in a criminal proceeding.

16. Accordingly, we proceed to examine in the present case as to when the criminal court took cognizance of the offence of the charge in connection with the aforesaid Bhaktinagar P.S. Case No.947/2011.

17. Mr. U.K. Nair, learned Senior counsel for the petitioner submits that as on the dates when the authorities adopted the sealed cover procedure on two occasions on 02.04.2012 and 14.01.2016 when the case of the petitioner was kept in a sealed cover procedure and his juniors were promoted, it cannot be said that prosecution for a

criminal charge was pending against him inasmuch as no cognizance was taken by the Court of the offences charged against him as on the aforesaid dates.

18. Mr. Nair, learned Senior counsel has drawn our attention to order dated 24.07.2019 passed by the learned Additional Sessions Judge, 3rd Court (Special), Jalpaiguri in Sessions Case No.150/2017 relating to the aforesaid G.R. Case No.3381 of 11 wherein it has been recorded that the Sessions Judge after commitment took cognizance vide his order dated 30.05.2017. Mr. Nair submits that since the learned Sessions Judge took cognizance only on 30.05.2017, it cannot be said that prosecution for a criminal charge was pending against the petitioner before 30.05.2017. He accordingly submits that the authorities could not have kept the case of the petitioner under sealed cover procedure when the Departmental Promotion Committee considered the case of the petitioner for promotion to the higher post of Senior Auditor on 02.04.2012 and Assistant accounts Officer on 14.01.2016.

20. We have also gone through the order dated 24.07.2019 passed by the learned Additional Sessions Judge, 3rd Court (Special), Jaipaguri in Sessions Case No.150 of 2017 which reads as follows,

“Order No.11,

Dated 24.07.2019

Sole accused Satish Kumar on bail is present before the Court by filing hazira.

No step by the State of West Bengal.

The G.R. Case No.3381 of 11 was committed by Ld. Chief Judicial Magistrate, Jalpaiguri vide order dated 06.03.2017 and Ld. Sessions Judge after commitment took cognizance vide his order dated 30.05.2017. Thereafter, the record was received on transfer by this Court on 11.08.2017.

But though information was given and reminders were issued by this Court vide order dated 12.12.2017, 08.03.2017, 07.08.2018 and 22.11.2018 upon the Public Prosecutor, Jalpaiguri for prosecuting the case for the State. Till date no Public Prosecutor has been appointed for prosecuting the case. The trial of the accused is being delayed unnecessarily.

Let a copy of the order be served upon the Ld. Chief Public Prosecutor, Jalpaiguri, Mr. Somenath Paul instructing him to take necessary steps for prosecuting the case for the State.

Fixing 23.09.2019 for framing of charge.”

[emphasis added]

20. From the above, it is clear that as the learned Sessions Judge took cognizance of offence vide order dated 30.05.2017, as mentioned in the clarificatory Office Memorandum dated 02.11.2012 it can be said that the prosecution for a criminal charge was pending against the petitioner w.e.f. 30.05.2017 and not prior to that.

21. Under the circumstances, we are also satisfied that the authorities could not have adopted the sealed cover procedure in respect of the petitioner before 30.05.2017 on which date the learned Sessions Judge took the cognizance of the offence relating to G.R. Case No.3381/2011.

22. In this regard, we have also noted that the charge-sheet No.1364/2012 was filed on 30.06.2012 before the Court of learned CJM, Jalpaiguri, West Bengal under Section 498A/306 IPC. However, as mentioned above, filing of charge-sheet cannot be the basis for holding that prosecution for a criminal charge is pending inasmuch as the concerned Magistrate or concerned Court was yet to take cognizance of the said charge.

23. It is to be noted that though the word "cognizance" has been used in several provisions of the Code of Criminal Procedure, the same has not been defined. However, the word "cognizance" has been explained by judicial pronouncements and it has acquired a definite connotation as explained by the Hon'ble Supreme Court in ***State of Karnataka and Anr. Vs. Pastor P. Raju, (2006) 6 SCC 728***, whereby it has been clarified that taking cognizance does not involve any formal action but only when the Magistrate applies his mind to the suspected commission of an offence. Thus, the various processes which are involved in a criminal proceeding including holding of investigation by the police on a complaint filed or filing of charge-sheet etc. before the Court does not amount to taking cognizance of the offence till the Court applies judicial mind on the reports or charge sheet submitted by the police on completion of the investigation.

24. In this regard, we may profitably refer to the following paragraphs of the decision of ***Pastor P. Raju*** (supra) which read as follows:

"10. Several provisions in Chapter XIV of the Code of Criminal Procedure use the word

"cognizance". The very first Section in the said Chapter, viz., [Section 190](#) lays down how cognizance of offences will be taken by a Magistrate. However, the word "cognizance" has not been defined in [the Code](#) of Criminal Procedure. The dictionary meaning of the word "cognizance" is - 'judicial hearing of a matter'. The meaning of the word has been explained by judicial pronouncements and it has acquired a definite connotation. The earliest decision of this Court on the point is [R.R. Chari v. State of U.P.](#), AIR 1951 SC 207, wherein it was held :-

“..... ‘taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence’.”

11. [In Darshan Singh Ram Kishan v. State of Maharashtra](#), AIR 1971 SC 2372, while considering [Section 190](#) of the Code of 1908, it was observed that: (SCC p.656, para 8)

"[T]aking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a magistrate first takes judicial notice of an offence. This is the position whether the magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer."

12. [In Narayandas Bhagwandas Madhavdas v. The State of West Bengal](#), AIR 1959 SC 1118, it was held that before it can be said that any Magistrate has taken cognizance of any offence under [Section 190\(1\)\(a\)](#) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter - proceeding under [Section 200](#) and thereafter sending it for inquiry and report under [Section 202](#). It was observed that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. It was also observed that what [Section 190](#) contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. The Court then referred to the three situations

enumerated in sub-section (1) of [Section 190](#) upon which a Magistrate could take cognizance. Similar view was expressed in [Kishun Singh & Ors. v. State of Bihar](#), (1993) 2 SCC 16 that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender, he is said to have taken cognizance of the offence. [In State of West Bengal v. Mohd. Khalid & Ors.](#), (1995) 1 SCC 684 the Court after taking note of the fact that the expression had not been defined in [the Code](#) held :-

"..... In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence and taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

25. In the present case, the charges against the petitioner are under Sections 498A/306 of IPC relating to which the Magistrate is not empowered to take cognizance but only the Court of Sessions. As per the subsequent O.M. dated 02.11.2012, judicial proceedings shall be deemed to be instituted 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 which in the present case will mean the Court of Sessions/competent Court, not the Magistrate.

26. It has been clearly mentioned in the order dated 24.07.2019 passed by the learned Additional Sessions Judge, 3rd Court (Special), Jalpaiguri that the learned Sessions Judge after commitment took cognizance vide his order dated 30.05.2017

and as such, it can be said that the judicial proceeding against the petitioner commenced when the Sessions Judge took cognizance of the offence on 30.05.2017 which is after the DPC(s) were held, in which event, the case of the petitioner could not have been kept under the sealed cover proceeding as had been done by the authorities. The case of the petitioner could be kept in sealed cover only after 30.05.2017 if any DPC is held.

27. Accordingly, we allow this petition by setting aside the impugned order dated 08.03.2021 passed by the learned Central Administrative Tribunal, Guwahati Bench in Original Application No.40/00230/2019 and the subsequent order dated 10.05.2021 passed in Review Application No.040/00002/2021 and direct the respondent authorities to open the sealed cover proceedings in respect of the DPCs held for promotion to the posts of Senior Auditor on 02.04.2012 and Assistant Accounts Officer on 14.01.2016 and accordingly, give the benefit of promotion to the petitioner to the Cadre of Senior Auditor and Assistant Accounts Officer w.e.f. 02.04.2012 and 14.01.2016 in terms of the recommendations of the DPCs within a period of one month from the date of receipt of a certified copy of this order.

28. With the above observations and directions, the present petition stands allowed.

JUDGE

CHIEF JUSTICE (ACTING)

Comparing Assistant