

GAHC010274562023



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

Case No. : WP(C)/7054/2023

PRASANTA KONWAR
R/O- RISCON ENCLAVE, HOCKEY STADIUM ROAD, SAUKUCHI,
GUWAHATI-781040.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF
ASSAM, DISPUR, GUWAHATI-781006.

2:THE SECRETARY TO THE GOVERNMENT OF ASSAM
FINANCE (ESTT.-B) DEPARTMENT
DISPUR GUWAHATI-6.

3:THE DEPUTY SECRETARY TO THE GOVERNMENT OF ASSAM
FINANCE (ESTT.-B) DISPUR GUWAHATI-6.

4:THE SECRETARY TO GOVERNMENT OF ASSAM
POLITICAL (VIGILANCE CELL) DEPARTMENT
DISPUR GUWAHATI-6.

5:THE DEPUTY SECRETARY TO GOVERNMENT OF ASSAM
POLITICAL (VIGILANCE CELL) DEPARTMENT
DISPUR GUWAHATI-6.

6:THE SUPERINTENDENT OF POLICE
DIRECTORATE OF VIGILANCE AND ANTI-CORRUPTION
ASSAM SRIMANTAPUR
RUPNAGAR GUWAHATI-32

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

Date of hearing : 26.06.2024

Date of Judgment : 26.06.2024

Judgment & order(Oral)

Heard Mr. J. Patowary, learned counsel for the petitioner. Also heard Mr. C. K. S. Baruah, learned Government Advocate; and Mr. P. Nayak, learned standing counsel, Finance Department, appearing on behalf of their respective respondents.

2. The petitioner, in the present proceeding, has assailed the regular inquiry being Regular Enquiry No. 42(9)2016, as instituted against him by the Directorate of Vigilance and Anti-Corruption, Assam. The petitioner has further raised a grievance with regard to the action on the part of the respondent authorities in not promoting him to the cadre of Junior Grade-I of the Assam Finance Service in terms of his selection for such promotion by the constituted Selection Board in its meeting held on 03.03.2023, on the ground of pendency of the said vigilance enquiry i.e. Regular Enquiry No. 42(9)2016, against him.

3. The petitioner, herein, was initially recruited as a Finance and Accounts Officer(FAO) in the Assam Finance Service on 04.06.2007. The post, the petitioner was recruited to, fell within the Junior Grade-III of the said service. The petitioner was thereafter promoted to the cadre of Junior Grade-II of the service.

4. In the gradation list as published on 18.05.2020 in respect of the officers in the Junior Grade-II of Assam Finance Service; the name of the petitioner figured at Serial No. 15. It is revealed from the records that a Selection Board meeting was convened on 03.03.2023, for consideration of the cases of the officers in the Junior Grade-II of the Assam Finance Service for promotion to the post figuring in the Junior Grade-I of the Assam Finance Service.

5. In the said selection meeting; the Selection Board had made the consideration in respect of 78 vacant posts in the cadre of Junior Grade-I of the Assam Finance Service.

6. On consideration of the cases of the persons in the zone of consideration; the Selection Board proceeded to recommend the names of 61 incumbents for promotion. The name of the petitioner figured at Serial No. 10 in the recommendations so made by the Selection Board.

7. It is to be noted here that on account of the pendency of the Disciplinary Proceeding/Criminal Proceedings, the cases of 4 officers came to be kept in "sealed cover" and the cases of 3 officers were not so recommended on account of the fact that they had not submitted their annual property returns and ACRs.

8. The Selection Board in its recommendations had also further stipulated that promotion of the officers, so recommended, to the

cadre of Junior Grade-I was further subject to obtaining vigilance clearance in respect of each of them. In pursuance of the recommendations as made by the constituted Selection Board, the respondent authorities vide Notification, dated 25.04.2023, proceeded to issue orders promoting the officers so recommended to the cadre of Junior Grade-I and accordingly, 60 officers came to be so promoted to the cadre Junior Grade-I of the Assam Finance Service. However, the name of the petitioner, herein, did not figure in the list of 60 persons.

9. It is contended that on an enquiry being made by the petitioner for understanding the reasons for which his name was omitted in the said Notification, dated 25.04.2023; he was given to understand that a regular inquiry being Regular Enquiry No. 42(9)2016 was initiated against him by the Directorate of Vigilance and Anti-Corruption, Assam, for complaints received against the petitioner during his tenure as Finance and Accounts Officer(FAO) in the Animal Husbandry & Veterinary and Dairy Development Department, Assam and enquiry therein was in progress.

10. Armed with the said information and with the contention that the said vigilance inquiry, not having been concluded; the petitioner could not have been denied his due promotion to the cadre of Junior Grade-I in terms of his selection by the constituted Selection Board; the present proceeding has been so instituted by the petitioner.

11. Mr. Patowary, learned counsel for the petitioner, by referring to

the decision of the Hon'ble Supreme Court in the case of ***Union of India & ors. v. K. V. Jankiraman & ors.*** reported in ***(1991) 4 SCC 109*** as well as the Office Memorandum, dated 09.05.2006, has contended that the petitioner could not have been denied his due promotion in-as-much as during the period, his case for promotion to the cadre of Junior Grade-I was so considered and even thereafter, as on 25.04.2023, when the order of promotion was so issued; the petitioner was neither under suspension nor a charge-sheet was issued in his case in any Disciplinary Proceeding so instituted against him nor was a prosecution sanction issued in his case in respect of a criminal charge pending against him.

12. It is the contention of Mr. Patowary, learned counsel for the petitioner, that the case of the petitioner not being covered by the circumstances as highlighted by the Hon'ble Supreme Court in the case of ***K. V. Jankiraman & ors.***(supra) as well as Office Memorandum, dated 09.05.2006; he could not have been denied his due promotion in the matter.

13. Mr. Patowary, learned counsel, has further submitted that insofar as initiation of regular inquiry in the matter against the petitioner is concerned; the petitioner, till the date of filing of this writ petition, was never required to appear before the said authorities and no notice in this connection was ever served on him.

14. In the above premises; Mr. Patowary, has submitted that the

respondent authorities having denied to the petitioner, his due promotion; this Court would be pleased to interfere in the matter and direct the respondent authorities to promote the petitioner with effect from the date his juniors were so promoted vide the Notification, dated 25.04.2023.

15. Mr. Baruah, learned Government Advocate, appearing on behalf of the Government of Assam, Political(Vigilance Cell) Department, has submitted that the complaints as received by the Vigilance Department, is not called to be furnished to the petitioner, herein, in-as-much as the inquiry is still under progress. It was further contended that after collection of sufficient material, the petitioner would be given an opportunity to have his say in the matter against the allegations so involved. Accordingly, it is submitted that the vigilance enquiry, in question, being in progress; the vigilance clearance as sought for in respect of the petitioner, could not be granted by the concerned Department.

16. Mr. Nayak, learned standing counsel, Finance Department, Assam, has submitted that the Selection Board having recommended the names of the eligible officers including the petitioner, herein, for promotion to the cadre of Junior Grade-I of the Assam Finance Service and having further stipulated that the vigilance clearance in respect of such recommended officers be obtained before promoting them; the Finance Department had required the Political (Vigilance Cell) Department, to submit the vigilance reports in respect of the

recommended officers including the petitioner, herein. On such clearance being sought for; the concerned Department had informed vide a communication, dated 16.03.2023, that in respect of the petitioner, a regular inquiry being Regular Enquiry No. 42(9)2016 having been initiated and enquiry therein being in progress; the vigilance clearance could not be granted by the concerned Department to the petitioner for his such promotion.

17. Mr. Nayak, has further contended that in the absence of vigilance clearance being granted by the Department concerned in favour of the petitioner; his name was not included amongst the names of the officers so promoted to the cadre of Junior Grade-I of the Assam Finance Service vide the communication, dated 25.04.2023.

18. I have heard the learned counsels appearing for the parties and also perused the materials available on record.

19. The issue that arises for consideration in the present proceeding is as to whether the petitioner on account of a regular inquiry being initiated against him by the Directorate of Vigilance and Anti-Corruption, Assam, can be denied his due promotion to the cadre of Junior Grade-I of the Assam Finance Service.

20. The said issue also arose before the Hon'ble Supreme Court in the case of ***K. V. Jankiraman***(supra); wherein, the Hon'ble Supreme Court, on consideration of the issue arising in the said matter; had

concluded that for the purpose of denying to an employee his due promotion, a charge memo in a disciplinary proceeding or a charge-sheet in a criminal proceeding is mandated to have been issued to the employee and must be pending at the relevant time when the case of such employee is so considered for promotion. It was further held that the pendency of a preliminary investigation prior to that stage, would not be sufficient to enable the authorities to adopt the "sealed cover" procedure i.e. to deny to the employee, his due promotion.

21. The relevant conclusions of the Hon'ble Supreme Court in the above-noted case being relevant, is extracted hereinbelow:

"16. 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 charge-sheet 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/charge-sheet. 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: (ATC p. 196, para 39)

"(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;

(2) *****

(3) *****

(4) the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed before the criminal court and not before;"

17. 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."

22. Following the decision of the Hon'ble Supreme Court in ***K. V. Jankiraman***(supra); the Government of Assam in the Department of Personnel, proceeded to issue an Office Memorandum, dated 09.05.2006, pertaining to the manner in which the promotion of a government servant against whom departmental/disciplinary/court proceedings are pending and whose conduct is under investigation.

23. Paragraph No. 2 of the said Office Memorandum, dated 09.05.2006, provides that at the time of consideration of cases of government servant in the zone of consideration for promotion; the fact as to whether a Show Cause Notice has been issued and a Disciplinary Proceeding has been pending and/or whether in respect of such government servant, a criminal charge is pending, has to be brought to the notice of the Selection Committee to enable it to place its recommendations for such government servant in "sealed cover". It was further provided in paragraph No. 3 of the said Office

Memorandum that no other details about any pending inquiry or the nature of charges are called upon to be furnished to the Selection Committee in the matter.

24. Paragraph No. 6 of the said Office Memorandum, dated 09.05.2006, further proceeds to stipulate that if the circumstances as noticed in paragraph No. 2 of the Office Memorandum, dated 09.05.2006, arises only after the Selection Committee had made its recommendations and the same could not be placed in "sealed cover"; the recommendations would be deemed to have been placed in "sealed cover" and such person shall not be promoted until he is exonerated of the charges.

25. The decision of the Hon'ble Supreme Court in the case of ***K. V. Jankiraman***(supra) and also the stipulations made in the Office Memorandum, dated 09.05.2006, clearly mandated that the promotion of an employee, can be denied only in the event, the circumstances as envisaged therein, having arisen in his case. In other words, the circumstances as set out by the Hon'ble Supreme Court in the case of ***K.V. Janikaraman***(supra) not arising, the Government servant concerned cannot be denied his due promotion.

26. Promotion in respect of a Government servant can be withheld or kept in abeyance only in terms of valid rules. The Office Memorandum, dated 09.05.2006, in the absence of a Rule made in the matter, would hold the field and the same having not provided that

even when a vigilance inquiry is pending against a government servant, his case for promotion cannot be considered and would be deemed to have been kept in "sealed cover"; the respondent authorities could not have only on the basis of pendency of a regular inquiry by the Vigilance Department against the petitioner, herein, denied to the petitioner, his valuable right to be promoted to the cadre of Junior Grade-I of the Assam Finance Service, in pursuance of his selection for the same.

27. The materials as brought on record, including the contentions made in the Affidavits filed by the Respondents reveals that an enquiry in connection with Regular Enquiry No. 42 (a) 2016 is pending against the petitioner and the collection of materials against him was underway. It is further brought to light that the stage for requiring the petitioner to have his say in the matter, had also not reached. Accordingly, it can be safely construed that the respondent authorities in connection with the said vigilance enquiry, had not drawn a satisfaction that a Disciplinary Proceeding and/or a criminal proceeding is required to be instituted against the petitioner, herein. It being the settled position of law that a Disciplinary Proceeding can be said to be instituted only on the issuance of a Show Cause Notice/memorandum in the matter and the criminal proceeding would be so construed to be instituted when a charge-sheet in the matter is filed against the government servant; the said aspect of the matter not having occasioned in the case of the petitioner, herein, the bar for his promotion to the cadre of Junior Grade-I of the Assam Finance

Service, in terms of his selection, cannot be said to have arisen in the matter and the conditions as mandated in paragraph No. 6 of the said Office Memorandum, dated 09.05.2006, do not stand attracted to the case of the petitioner, herein.

28. Accordingly, in view of the above position, the denial of promotion to the petitioner along with his juniors in terms of his selection by the constituted Selection Board, cannot be upheld by this Court.

29. Having concluded that the petitioner, herein, was illegally denied his due promotion to the cadre of Junior Grade-I of the Assam Finance Service and the justification as advanced by the respondents in this connection, not being acceptable, this Court would further proceed to hold that the respondent authorities, in the event, the petitioner is so promoted to the cadre of Junior Grade-I of the Assam Finance Service, would not be left in a helpless situation in-as-much as despite such promotion of the petitioner, subsequently, it is found that the petitioner is guilty of the allegations so pending against him; the respondent authorities can take appropriate steps in the matter in accordance with law.

30. In view of the said conclusions; the respondent authorities, more particularly, the authorities in the Finance Department, Government of Assam, are hereby directed to promote the petitioner, herein, to the cadre of Junior Grade-I of the Assam Finance Service with effect from

the date his juniors were so promoted in pursuance to the Notification, dated 25.04.2023.

31. The petitioner shall be so promoted to the cadre of Junior Grade-I of the Assam Finance Service with effect from the date when his juniors were so promoted; with all consequential benefits of pay, seniority, etc..

32. The arrears of pay now accruing to the petitioner, herein, on his promotion, in terms of the directions as passed by this Court hereinabove, to the cadre of Junior Grade-I of the Assam Finance Service, be computed and released to the petitioner by the respondent authorities within a period of 3(three) months from the date of receipt a certified copy of this order.

33. With the above directions and observations, this writ petition stands disposed of.

JUDGE

Comparing Assistant