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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (S) No. 2543 of 2015**

State Of Chhattisgarh Through Its Principal Secretary, Department Of General Administration (IFS Cell) Mahanadi Bhawan, New Mantralaya, Raipur, (Chhattisgarh)

---- Petitioner**Versus**

1. Union Of India Through Its Secretary, Ministry Of Personnel, Public Grievances And Pension, Department Of Personnel And Training North Block, New Delhi
2. The Secretary Ministry Of Environment, Forests & Climate Change, Government Of India, Indira Prayavaran Bhawan, Jor Bagh Road, New Delhi- 110003
3. Shirish Chandra Agrawal S/o Late Shri Kishan Kishore, Aged About 56 Years Executive Director, Chhattisgarh State Minor Forest Produce (T&d) Co-Operative Federation Ltd. A-25, Vip Estate, Near Vip Club, Khamardih, Shankar Nagar, Raipur, (Chhattisgarh)

---- Respondents

For Petitioner/State:-	Shri JK. Gilda, Learned Advocate General along with Shri Shashank Thakur, Govt. Advocate for the Petitioner.
For Respondents/No.1 & 2:-	Shri N.K. Vyas, Asstt. Solicitor General for Union of India.
For Respondent No.3:-	Shri Akshat Agrawal and Shri Ankit Singhal, Advocates.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

C A V Order

Per Navin Sinha, Chief Justice

22/07/2015

1. The present application assails order dated 11.5.2015 by the Central Administrative Tribunal, Jabalpur Bench, Circuit Sitting at Bilaspur (hereinafter called 'the Tribunal') in O.A. No.203/00077/15. The Tribunal has directed to open the sealed cover and consider the candidature of Respondent No.3 for promotion to the post of Additional Principal Chief Conservator of Forest

notionally from the date that his juniors have been promoted.

2. Learned Advocate General submits that Respondent No.3 was an accused in a criminal prosecution under the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989. His candidature for promotion was kept in sealed cover when the Departmental Promotion Committee (DPC) met on 30.8.2013. Prosecution for sanction not having been granted, Respondent No.3 stood absolved of the charge on 21.10.2013. His candidature for promotion was to be taken up for consideration at the next DPC on 5.2.2014. On that date itself, another charge sheet had been issued to him containing four charges with regard to dereliction in discharge of duties having serious financial implications for the government. The Tribunal erred in directing the sealed cover to be opened because of exoneration of the previous charge. As fresh charge sheet had been issued on the date of subsequent consideration his candidature was again required to be kept in the sealed cover till conclusion of the subsequent departmental proceedings. On the relevant date Respondent No.3 was under a cloud and was not eligible for vigilance clearance in absence of which his candidature could not be considered.

3. Learned Advocate General in support of his submissions placed reliance on (1991) 4 SCC 109 (Union of India v. K.V. Jankiraman) in the following passages :-

“14.....A further guideline contained in this Memorandum is that the same sealed cover procedure is to be applied where a government servant is recommended for promotion by the DPC, but before he is actually promoted, he is either placed under suspension or disciplinary proceedings are taken against him or a decision has been taken to initiate the proceedings or criminal prosecution is launched or sanction for such prosecution has been issued or decision to accord such sanction is taken.....”

17.....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.....”

29....An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion.....”

4. Learned Advocate General further relied on (2000) 4 SCC 394 (Union of India v. R.S. Sharma) to submit that since fresh charge sheet stood issued on the date he was to be considered afresh, the sealed cover could not be directed to be opened. Reliance was placed on the following passages :-

“11. Without conceding to the above position, Shri Mukul Rohtagi, Additional Solicitor General adopted an alternative contention based on para 7 of the Sealed Cover Procedure which reads thus:

“Sealed cover applicable to an officer coming under cloud before promotion.—A government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this OM will be applicable in his case also.”

12. The conditions necessary to invoke the said clause are:

(1) Recommendations of DPC should have been made for promoting the government servant.

(2) After such recommendations and before he is actually promoted any one of the circumstances in clause (ii) (sic iii) of the second para (supra) should have arisen.

13. Two factual aspects are admitted. One is that the respondent was not actually promoted even now. The other is that formal sanction has been accorded to prosecute him in the meanwhile. If that be so, para 7 of the Sealed Cover Procedure would entirely apply and the recommendations made by DPC in respect of the respondent have to remain in the sealed cover “until he is completely exonerated of the charges against him”.

5. Learned Advocate General further submitted that office memorandum dated 2.11.2012 relied upon by Respondent No.3 cannot be interpreted to mean that if Respondent No.3 was exonerated of the original charge because of which his candidature was kept in sealed cover, it was mandatory for the sealed cover to be opened irrespective of the fact that on the subsequent date when the DPC was to consider him, he was already under a cloud by reasons of a fresh charge sheet. It was submitted that a conjoint reading of paragraphs-6,10 & 12 of the office memorandum dated 2.11.2012 says that promotion not being a matter of right, if a Government servant was of doubtful integrity, the charges were grave, the right to consideration for promotion could be denied if, on the relevant date, a fresh charge sheet had been issued.

6. The last submission was that the Tribunal could not have issued

directions to promote Respondent No.3. It could at best have directed consideration in accordance with law by the DPC.

7. Learned Counsel for Respondent No.3 countering the submissions on behalf of the Petitioner submitted that K.V. Jankiraman (supra) concerned Office Memorandum No. 22011/1/79. Estt.(A) dated January 30, 1982 and Office Memorandum No. 22011/2/86. Estt.(A) dated January 12, 1988 in supersession of all the earlier instructions on the subject including the Office Memorandum dated January 30, 1982. Likewise RS. Sharma (supra) was considering the subsequent Office Memorandum No. 22011/1/91-Estt.(A) dated 31-7-1991. The Office Memorandum No. 22011/2/2002-Estt.(A) dated 24.2.2003 issued after the judgment in Delhi Jal Board (supra) did not fall for consideration. It has been reiterated in Office Memorandum No. F.No.22034/4/2012-Estt.(D) dated 2.11.2012. Paragraph-7 of the memorandum dated 21.7.1991 referred to in R. S. Sharma (supra) has been now clarified as not applicable in facts like the present. The facts in Delhi Jal Board (supra) were identical to the present case. He next submits that the recommendation kept in sealed cover was in fact opened on 22.11.2013 after sanction for prosecution was denied on 21.10.2013. The authorities were simply required to consider him for promotion from the date when his juniors had been promoted. There was no occasion for referring his case to any fresh DPC. The fresh DPC which met on 5.12.2014 was completely foreign to the candidature of the Respondent and the entire plea of the authorities that on that date there was another charge sheet issued against him is completely misconceived and irrelevant. The office memorandum dated 2.11.2012 is absolutely clear and demands no ambiguity in paragraph-10 with regard to the present situation more particularly with reference to office memorandum dated 24.2.2003.

8. We have considered the submissions on behalf of the parties. In Delhi Jal Board (supra) delivered last in point of time, relied upon by Respondent No.3, the facts were identical. It was held :-

“5. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any disciplinary inquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time when DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the Department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection.”

9. K.V.Jankiraman (supra) and R.S. Sharma (supra) were considering the Office Memorandum No. 22011/1/79. Estt.(A) dated January 30, 1982, Office Memorandum No. 22011/2/86. Estt.(A) dated January 12, 1988 and Office Memorandum No. 22011/1/91-Estt.(A) dated 31-7-1991. The Office Memorandum No. 22011/2/2002-Estt.(A) dated 24.2.2003 issued after the judgment in Delhi Jal Board (supra) did not fall for consideration.

10. The relevant extract of The Office Memorandum No. 22011/2/2002-Estt.(A) dated 24.2.2003 reads as follows :-

3. It is, therefore, clarified that para 7 of the O.M. dated 14~~September, 1992 will not be applicable if by the time the seal was opened to give effect to the exoneration in the first enquiry, another departmental inquiry was started by the department against the Government servant concerned. This means that where the second or

subsequent departmental proceedings were instituted after promotion of the junior to the Government servant concerned on the basis of the recommendation made by the DPC which kept the recommendation in respect of the Government servant in sealed cover, the benefit of the assessment by the first DPC will be admissible to the Government servant on exoneration in the first inquiry, with effect from the date his immediate junior was promoted.

10. Subsequently Office Memorandum No. F.No.22034/4/2012-Estt.(D) dated 2.11.2012 described as a “Comprehensive review of instructions pertaining to vigilance clearance for promotion-regarding” for circumstances like the present provides as follows :-

9. For the purpose of vigilance clearance for review DPC, instructions exist in O.M. No. 22011/2 /99-Estt.(A) dated 21.11.2002 that review DPC will take into consideration the circumstances obtaining at the time of original DPC and any subsequent situation arising thereafter will not stand in the way of vigilance clearance for review DPC. However, before the officer is actually promoted it needs to be ensured that he / she is clear from vigilance angle and the provision of para 7 of O.M. No. 22011 / 4 / 91-Estt. (A) dated 14.09.1992 are not attracted.

10. Opening of sealed cover on conclusion of proceedings, is covered in the instructions in para 3 of the O.M. dated 14.9.92. In cases where by the time the Departmental Proceedings are concluded and the officer is fully exonerated but another charge sheet has been issued, the second charge sheet will not come in the way of opening of sealed cover and granting promotion notionally from the date of promotion of the junior and para 7 of O.M. dated 14.9.92 will not apply as clarified in the O.M. No. 22011/2 / 2002-Estt.(A) dated 24.2.2003. After the disciplinary proceedings are concluded and penalty is imposed, vigilance clearance will not be denied. The details of the penalty imposed are to be conveyed to the DPC.”

11. We find no reason to interfere with the order of the Tribunal. The authorities shall proceed to open the sealed cover, if not already opened, and then proceed in accordance with law under Office Memorandum No. F.No.22034/4/2012-Estt.(D) dated 2.11.2012 within a maximum period of eight weeks from the date of receipt and/or production of a copy of this order.

12. The application is dismissed.

Sd/-
(Navin Shiha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE

Priya