

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

% *Judgment Reserved on : January 27, 2015*
Judgment Delivered on : February 05, 2015

+ **W.P.(C) 838/2012**

J.C.THINDPetitioner

Represented by: Mr.Ankur Chhibber, Advocate

versus

UOI & ORS.Respondents

Represented by: Mr.Anurag Ahluwalia, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The writ petitioner prays to this Court that order dated January 24, 2011 upholding the penalty of reduction of lower time scale of pay for a period of three years inflicted upon the petitioner be quashed and a mandamus be issued to the respondents to open the sealed cover(s) in respect of recommendation made by the DPC qua the petitioner which met on November 12, 2005 and March 13, 2006 and to give effect to the same with all consequential benefits. The order in question dated January 24, 2011 directs that the penalty levied upon the petitioner shall be effective from July 29, 2010 i.e. from the date of the final order passed by the Disciplinary Authority and not from September 02, 2003 i.e. the date of the incident, and in respect of which direction an alternative submission is made, that if the first relief prayed for is not granted, it

should be declared that the penalty levied shall be applicable with effect from September 02, 2003.

2. The instant writ petition is preceded by various proceedings initiated by the petitioner in the Patna High Court and this Court and thus it would be useful to briefly pen profile the backdrop facts.

3. Joining service under CISF and lastly promoted to the rank of a Commandant on October 23, 2002, the petitioner was posted as the Commandant of the CISF Battalion stationed at Uri in the State of Jammu and Kashmir to give protection to the hydroelectric power project at Uri. On September 02, 2003, a truck bearing No.JK 05 7916 belonging to the force was intercepted by the police at Lakhanpur and was being found to be transporting 29 wooden sleepers without any valid documents. The truck was being driven by HC (Driver) Satish Kumar of the CISF Unit at Uri. An FIR No.55/03 dated September 02, 2003, for offences punishable under Sections 6/15/16 of the Forest Act, 1980 was registered. SI (Executive) Ram Bhagat of the CISF Unit at Uri was in-charge of the escort party and ostensibly the truck was to collect clothes, arms and ammunitions for the force personnel at Uri.

4. Senior Commandant Ajit Singh was directed to conduct a preliminary inquiry into the incident after the senior officers of CISF were given intimation by the local police at Lakhanpur, of a CISF truck being intercepted and later on impounded and the driver of the truck being arrested. He submitted a preliminary inquiry report opining that except for the role of HC(Driver) Satish Kumar and SI(Executive) Ram Bhagat, involvement of no other officer surfaced. But, simultaneously opined that there was a possibility of other officers being involved. Senior Commandant Ajit Singh was requested by the senior officers to

clarify on certain points and conduct a further preliminary inquiry, and therefore he submitted a second preliminary inquiry report once again fixing the sole responsibility on HC(Driver) Satish Kumar and SI (Executive) Ram Bhagat. He mentioned in the report that in the absence of direct evidence against any other person of the CISF stationed at Uri, prima-facie, no responsibility could be fixed on them. He also observed that it was his opinion that such a major incident of smuggling could not take place without the knowledge of the Commandant of the Battalion.

5. The senior officers therefore opined that a detailed, in depth, inquiry needs to be conducted; and accordingly Sh.Taj Hassan, IPS, then working as the DIG (Northern Zone) CISF was requested to conduct an in depth inquiry into the matter. He opined that petitioner's involvement in the smuggling of wood by using his junior staff could not be ruled out. Considering the preliminary inquiry report submitted by Sh.Taj Hassan, the Director General CISF referred the matter to the Cadre Controlling Ministry i.e. the Ministry of Home Affairs which in turn sought advice from the Central Vigilance Commission. Appraising the material gathered at the preliminary fact finding inquiries, the Ministry of Home Affairs recommended initiation of major disciplinary proceedings against the petitioner; resulting in a charge memo dated July 19, 2005 being issued to the petitioner initiating a major penalty proceedings under Rule 15 of the CCS (CCA) Rules, 1965. Vide letter dated July 29, 2005 the petitioner requested for certain documents to enable him to prepare his written statement of defence, and it appears he used the time extended as per his desire for filing a written statement of defence, to file a writ petition in the Patna High Court laying a challenge to the charge memorandum dated July 19, 2005, which writ petition was dismissed for

lack of territorial jurisdiction. The petitioner thereafter submitted his written statement of defence. Before the matter could proceed further, the Central Vigilance Commission sent a communication which was received by the Directorate in CISF on September 12, 2005 advising the rectification of the apparent shortcomings in the charge memorandum issued to the petitioner on July 19, 2005. By then, the writ petitioner had filed W.P.(C)No.23386/2005 in this Court laying a challenge to the charge memorandum dated July 19, 2005 and also prayed that he be promoted as a Senior Commandant from the date persons junior to him were promoted, and needless to state, he did so on the plea that recommendations pertaining to him were kept in a sealed cover by the two DPCs which met on November 12, 2005 and March 13, 2006. During the course of hearing of the said writ petition this Court was informed that an administrative decision has been taken to withdraw the charge memorandum dated July 19, 2005 without prejudice to the right of the department to serve a fresh charge memorandum by curing the technical defects in the charge memorandum dated July 19, 2005. The petitioner's counsel pressed for relief concerning prayer made to promote the petitioner as a Senior Commandant on the ground that once the department was withdrawing the charge memorandum there was no impediment to give effect to the recommendations of the DPC qua him. The writ petition was disposed of noting the rival stands but without granting relief to the petitioner as prayed for; and it is apparent that the matter was left open.

6. On February 09, 2007 a fresh charge memorandum was served upon the petitioner. The petitioner submitted his written statement of defence to the charge memorandum and considering the same the

disciplinary authority opined as per order dated April 09, 2007 that matter required evidence to be led and thus appointed an inquiry officer to submit a report after conducting an inquiry into the charges framed against the petitioner.

7. At this stage it may be apposite to note that under the memorandum dated July 19, 2005, which was ultimately withdrawn vide order dated February 09, 2007, four charges were listed against the petitioner as under:-

“ARTICLE-I

That Shri J.C.Thind, while posted and functioning as Commandant, CISF Unit, HEP Uri from 23.10.2002 to 13.06.2004, committed a gross misconduct in that he abused his authority and tried to transport 29 sleepers of Deodar from Uri to Delhi through Govt. vehicle i.e. truck No.JK-05-7916 which was otherwise meant for transportation of Arms & other stores, but the said truck was nabbed by J&K Police at Modhopur (Punjab), alongwith sleepers on 02.09.2003, and an FIR No.55/2003 dated 02.09.2003 U/S 6/15/16 of Forest Act was registered and HC/Dvr. Satish Kumar was arrested. Thus, Shri J.C.Thind, Commandant, misused the manpower and Govt. vehicle placed under his administrative control, failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of an officer of this status and service in an Armed Force of the Union.

ARTICLE-II

That Shri J.C.Thind, while posted and functioning in the aforesaid capacity during the aforesaid period, committed a gross misconduct in that he, after getting information about the arrest of HC/Dvr. Satish Kumar, over phone, on 02.09.2003 at about 0430 hrs to own responsibility for the sleepers. Thus, Shri J.C.Thind, Commandant, failed to maintain absolute integrity and acted in a manner unbecoming of an officer of his status and service in an Armed Force of the Union.

ARTICLE-III

That Shri J.C.Thind, while posted and functioning in the aforesaid capacity during the aforesaid period, committed a gross misconduct in that he detailed 7 CISF personnel including HC/Dvr. Satish Kumar with truck No.JK-05-7916 from CISF Unit, HEP Uri to Base Workshop Barwaha, via NZ Hqr. Delhi for transporting Arms & Stores, vide Movement Order No.E-38014/CISF/HEPO/Local/MO/Adm/03/4723 dated 31.08.2003. But, after getting information about the arrest of HC/Dvr. Satish Kumar and seizure of Deodar sleepers by Police, Shri Thind issued a fresh Movement Order No.E-38014/CISF/HEP/Local/MO/Adm/03..... dated 31.08.2003 containing directions for HC/Dvr. Satish Kumar only to proceed to CISF NZ Stores Saket, with Govt. vehicle No.JK-05-7916. The fresh Movement Order was issued on 02.09.2003 purporting to have been issued on 31.08.2003, with a malafide intention to change the circumstantial evidence and to give a new twist to the case. Thus, Shri J.C.Thind, Commandant, failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of an officer of his status and service in an Armed Force of the Union.

ARTICLE-IV

That Shri J.C.Thind, while posted and functioning in the aforesaid capacity during the aforesaid period, committed a gross misconduct in that he after getting information about the arrest of HC/Dvr. Satish Kumar and seizure of Deodar sleepers by Police, directed and sent Shri M.A.Dar, AC, CISF Unit, PGCB Wagoora to Jammu by air for having the case hushed up and arranging release of HC/Dvr. Satish Kumar and the truck. Shri Thind was not competent to send any non-entitled officer by air on official duty without prior approval of the competent authority. Thus, Shri J.C.Thind, Commandant, failed to discharge his duties as per standing instructions laid down vide SR-48(b) and acted in a manner unbecoming of an officer of his status and service in an Armed Force of the Union.”

8. Under the charge memorandum dated February 09, 2007 which was issued simultaneously when vide a separate order of even date the

charge memorandum dated July 19, 2005 was withdrawn, three articles of charge were framed against the petitioner as under:-

**STATEMENT OF ARTICLES OF CHARGE FRAMED
AGAINST SHRI J.C.THIND, COMMANDANT, CISF**

ARTICLE-I

That Shri J.C.Thind, while posted and functioning as Commandant, CISF Unit, HEP Uri from 23.10.2002 to 13.06.2004, committed a gross misconduct in that he transported 29 sleepers to Deodar from Uri to Delhi through Govt. vehicle i.e. truck No.JK-05-7916 which was otherwise meant for transportation of Arms & other stores. The said truck was nabbed by J&K Police at Modhpur (Punjab), along with unauthorized sleepers on 02.09.2003, and an FIR No.55/2003 dated 02.09.2003 U/S 6/15/16 of Forest Act was registered and HC/Dvr. Satish Kumar was arrested. He was sending the said sleepers out of J&K illegally on the instructions of Shri J.C.Thind.

Thus, Shri J.C.Thind, Commandant, failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of an officer of his status and service in an Armed Force of the Union.

ARTICLE-II

That the said Shri J.C.Thind while posted and functioning in the aforesaid capacity during the aforesaid period, committed a gross misconduct in that he detailed a party of 07 CISF personnel, including No.933470042 HC/Driver Satish Kumar with truck No.JK-05-7916 from CISF Unit, HEP Uri to Base Workshop Barwaha, vide CISF North Zone Hqrs., New Delhi for transporting Arms & Stores, vide Movement Order No.E-38014/CISF/HEP/Local/MO/Adm/03/4723 dated 31.08.2003. But when Shri Thind came to know about the arrest of Head Constable (Driver) Satish Kumar and seizure of Deodar sleepers by the Police, he got a fresh Movement order NO.E-38014/CISF/HEP/Local/MO/Adm/03/dated 31.08.2003 issued in the name of HC (Dvr) Satish Kumar alone, with a view to

keep all others out of purview of enquiry to save himself. Thus, he manipulated official documents in order to save himself, which shows his mala fide intention and lack of integrity.

Thus, Shri J.C.Thind, Commandant failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of an officer of his status and service in an Armed Force of the Union.

ARTICLE-III

That the said Shri J.C.Thind, while posted and functioning in the aforesaid capacity during the aforesaid period, committed a gross misconduct in that he after getting information about the arrest of HC/Dvr. Satish Kumar and seizure of Deodar sleepers by Police on 02.09.2003, he sent Shri M.A.Dar, AC, CISF Unit, PGCIL Wagoora to Jammu by air to help CISF personnel in securing bail and having the truck released, albeit he was not entitled to perform journey by air. So much so, Shri Thind did not seek prior/ex-post-facto approval of the Competent Authority for sending Shri Dar by Air which was administratively required of him.

Thus, Shri J.C.Thind, Commandant, failed to discharge his duties as per standing instructions laid down vide SR-48(B) and acted in a manner unbecoming of an officer of his status and service in an Armed Force of the Union.”

9. The petitioner filed WP(C) No.3131/2007 in the Patna High Court seeking a direction that recommendations pertaining to him put in a sealed cover be opened and given effect to. The petitioner pleaded that since the charge memorandum dated July 19, 2005 was withdrawn, there was no impediment to give effect to the recommendations of the two DPCs which met on November 12, 2005 and March 13, 2006.

10. By the time the writ petition was disposed of on January 16, 2008, the fresh charge memorandum dated February 09, 2007 had been served upon the petitioner. Noting said fact the learned Single Judge of the

Patna High Court, while dismissing on January 16, 2008 the writ petition filed by the petitioner, observed that ‘*Adoption of sealed cover procedure is well established.*’ Noting that the charge memorandum dated July 19, 2005 was withdrawn and the writ petition filed by the petitioner in this court was disposed of, the learned Single Judge of the Patna High Court, while declining relief to the petitioner as prayed for, opined as under:-

“A reading of order dated 6.10.2006 of the Delhi High Court would show that the respondents were given the liberty of withdrawing the earlier charge sheet and issuing a fresh one nowhere the order records that earlier charge sheet stands withdrawn automatically by virtue of passing of the order in question. The respondents still had the liberty to withdraw and issue a fresh charge sheet in the matter against the petitioner. After passing of the order of the Delhi High Court no doubt sometime has passed in issuing the order of withdrawal of the earlier charge sheet on 9.2.2007 but it is also true that a fresh charge sheet in relation to the earlier charges have already been issued on the same day. To that extent submission made on behalf of the respondents that the issuance of the second charge sheet after withdrawing the first one is a continuation of departmental proceedings initiated against the petitioner. The second charge sheet was necessitated because of a technical flaw observed in the earlier charge sheet dated 19.7.2005. Petitioner could have had a case to demand a consideration of promotion to the next higher post if Delhi High Court had in its order dated 6.10.2006 categorically recorded that the earlier charge sheet stood withdrawn but since Delhi High Court did not do so and left the matter in the hands of the respondents and a new charge sheet with regard to the same set of charges was issued on 9.2.2007 which means that there was no break in the proceeding initiated against the petitioner. If the respondents have taken a view that the sealed cover procedure had been adopted with regard to the claim of the promotion of the petitioner as per the recommendation of the second DPC meeting then that decision cannot be faulted with. The Court cannot create a legal fiction to grant benefit to the

petitioner when the same does not exist. Petitioner will have to face the departmental enquiry, meet the charges and only one the outcome of the said departmental enquiry could the claim of the petitioner for promotion be decided by the respondents in the present case.”

11. The petitioner filed LPA bearing No.191/2008 challenging the decision dated January 16, 2008 passed by the learned Single Judge of the Patna High Court dismissing WP(C) No.3131/2007 which was admitted.

12. The Inquiry Officer appointed to conduct an inquiry and submit a report pertaining to the charge memorandum dated February 09, 2007, after recording evidence, submitted a report to the Disciplinary Authority which forwarded the same to the petitioner for his response and considering the same vide Order dated July 29, 2010 imposed the penalty of reduction to lower time scale of pay for a period of three years upon the petitioner.

13. The petitioner challenged the penalty levied by filing another Writ Petition numbered as 14737/2010 before the Patna High Court which was disposed of on September 08, 2010 requiring the petitioner to make a fresh representation and with a direction that the same would be decided. Accordingly, on September 22, 2010 the petitioner made a representation to the President of India which came to be rejected on January 24, 2011. The rejection order, as noted in paragraph 1 above holds that the penalty levied cannot be given effect to from September 02, 2003, i.e. the date of the incident.

14. LPA No.191/2008 filed by the petitioner against the decision dated January 16, 2008 passed by the learned Single Judge of the Patna High Court dismissing WP(C)No.3131/2007 filed by him was withdrawn, and hence treated to be dismissed, vide order dated July 17, 2011, which

order was subsequently modified on July 14, 2011 observing that the writ petition itself was permitted to be withdrawn.

15. Instant writ petition was thereafter filed praying that recommendations of the DPCs which met on November 12, 2005 and March 13, 2006 having been kept in a sealed cover qua the petitioner be opened and recommendations therein be given effect to.

16. We note that the petitioner has not challenged the finding of guilt returned against him by the Inquiry Officer nor has he challenged the penalty levied. As noted above in paragraph 1, the prayer made is to give effect to the recommendations to the two DPCs and alternatively to treat the penalty as being effective from September 02, 2003 i.e. the date of the incident.

17. The contention of the petitioner is premised upon the decision of the Supreme Court reported as AIR 1991 SC 2010 UOI Vs. K.V.Jankiraman, which considered an office memorandum dated January 12, 1988 and subsequent instructions issued on the subject from time to time concerning the procedure to be followed in the matter of promotion of government servants against whom disciplinary/court proceedings were pending or whose conduct was under investigation. Pithily stated, the Supreme Court held that if on the date when a DPC met a government servant was neither under suspension nor was a charge memorandum issued, recommendation of the DPC concerning the government servant could not be kept in a sealed cover. As per the petitioner since the charge memorandum dated July 19, 2005 was withdrawn on February 09, 2007, there was no justification not to give effect to the recommendations of the DPCs which met on November 12, 2005 and March 13, 2006, for the reason as of said dates there would obviously be no charge memorandum

issued against the petitioner. The petitioner heavily relies upon a decision of the Supreme Court reported as 2013 STPL (Web) 201 SC UOI & Ors. Vs. Anil Kumar Sarkar.

18. Since a charge memorandum was issued to the petitioner on July 19, 2005, the department had no option but to keep recommendations of the DPC which met on November 12, 2005 and thereafter on March 13, 2006 in a sealed cover. Whilst it may be true that the said charge memorandum was withdrawn on February 09, 2007, but it cannot be overlooked that on the same day a charge memorandum dated February 09, 2007 was issued. The reason was, as would be evident from the four charges listed against the petitioner under the charge memorandum dated July 19, 2005 and the three charges listed under the memorandum dated February 09, 2007, that there were technical defects in the language of the first charge memorandum and Articles I and II were defective. It is the substance and not the form which matters. Thus, read from a common sense point of view, it would be a case where one can safely say that the memorandum of charge dated February 09, 2007 effectively amended the memorandum of charge dated July 19, 2005.

19. That apart, in the decision reported as AIR 1993 SC 1165 State of M.P. & Anr. Vs. Syed Naseem Zahir & Ors., taking note of the law declared in K.V.Jankiraman's case (supra), the Supreme Court held that courts are not to act mechanically and cannot ignore glaring facts. In said case the government servant came under a cloud after a DPC met but before formal order of promotion could be issued and thus the Court held that in such a situation it would be permissible not to give effect to the recommendation of the DPC pending inquiry.

20. Another fact of relevance needs to be noted. After the decision of the Supreme Court was pronounced on August 27, 1991 in K.V.Jankiraman's case (supra), the office memorandum dated January 12, 1988 considered by the Supreme Court was replaced by an office memorandum dated September 14, 1992, in paragraph 7 whereof it has been laid down that :-

“7. 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 the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the 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.”

21. As regards the law declared by the Supreme Court in Anil Kumar Sarkar's case (supra) relied upon by the petitioner, the relevant facts would be that for promotion to Group 'A' (Junior Scale) from Group 'B' of the Indian Railways Accounts Service the DPC met on February 26 and 27 in the year 2002. Name of Anil Kumar Sarkar was considered and was placed in the extended Select Panel. On April 21, 2003 the Panel including the extended Select Panel was given effect to and batch mates of Anil Kumar Sarkar were promoted. On said date no charge sheet was served upon him and he was not placed under suspension. Anil Kumar Sarkar was placed under suspension on August 13, 2003 on which date a charge memorandum was served upon him. In said circumstances the Supreme Court observed that there was no reason not to promote Anil Kumar Sarkar along with his batch mates on April 21, 2003.

22. It is trite that a decision is an authority on a point of law with reference to the facts of the case and not what can be logically inferred from the decision.

23. The facts of every case have a story of their own to tell and no court can shut its ears to the story told by the facts of each case.

24. The story which has unfolded from the facts of the instant case as we have noted the same is that the petitioner came under a cloud when the charge memorandum dated July 19, 2005 was served upon him, which charge memorandum would be required to be treated as having been amended when the charge memorandum dated February 09, 2007 was issued. In between, DPCs met on November 12, 2005 and March 13, 2006, on which dates as a matter of fact and as a matter of law the charge memorandum dated July 19, 2005 was issued. Thus, recommendations qua the petitioner at the two DPCs were rightly put in a sealed cover. The moment the charge memorandum dated July 19, 2005 was withdrawn under order dated February 09, 2007, simultaneously the charge memorandum dated February 09, 2009 was issued. The petitioner was ultimately held guilty and punished. Thus, the question of opening the sealed envelopes pertaining to the recommendations of the two DPCs does not arise.

25. As regards the alternative prayer, no law or precedent was cited that a penalty takes effect from the date of the incident and not from the date it is levied. All decisions which we have seen in service jurisprudence concerning penalties have treated penalties to be effective from the date they were levied. The alternative prayer for treating the date of the penalty as commencing from September 02, 2003 is accordingly rejected.

26. The net result is that the petitioner on whom luck has not smiled in any court proceedings must continue to remain with no smile : the writ petition is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 05, 2015
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