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

+ **W.P.(C) 5116/2014 & CM No.10198/2014**

Date of decision: 12th January, 2016

GOVT. OF NCT OF DELHI & ORS. Petitioners

Through: Ms. Jyoti Taneja, Advocate

versus

V K BHARDWAJ Respondent

Through: Mr. Ravi P. Shukla, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J. (ORAL)

The Government of National Capital Territory of Delhi ('GNCTD'), impugns the order dated 22.11.2012 passed in OA No. 1744/2012, filed by Shri V.K. Bhardwaj, the respondent herein.

2. Allowing the said application, the Central Administrative Tribunal, Principal Bench, ('CAT for short') held that Order No.330 dated 24th September, 2008 is illegal and contrary to law. The respondent was entitled to promotion as Grade-II (DASS) with effect from 7th July, 2008, along with pay and allowances for the said grade etc.

3. On 7th September, 1978 the respondent was appointed as a lower division clerk in Grade-IV (DASS) and was promoted as a

upper division clerk in Grade-III (DASS) on 9th May, 1988. On 16th November, 2006, sanction was granted by the Director General of Home Guards and Director Civil Defence for prosecution of the respondent under Section 19(1)(c) of the Prevention of Corruption Act, 1998 ('PC Act for short'), in a case relating to approval of 140 bogus members whose names had been forwarded to the Delhi Development Authority ('DDA') for allotment of land, when the cooperative society was already under liquidation. Thereafter the two more separate sanctions, dated 19th December, 2006 dated 13th July, 2007 were accorded for offences involving fraudulent revival of a cooperative society, recommendation for allotment of land to this society; and false/bogus election report, for facilitating revival of a cooperative society and approving list of 165 members, forwarded to the DDA for allotment of land.

4. Pursuant to the said sanctions, the Central Bureau of Investigation ('CBI' for short) had filed three separate charge-sheets, dated 8th December, 2006, 28th December, 2006 and 30th June, 2007 in which, prosecutions we are told, are still pending.

5. On 21st April, 2008, the Department of Home Guards enclosed documents of the respondent, along with others, for consideration for promotion to Grade-II (DASS). The Departmental Promotion Committee ('DPC'), in its meeting held on 7th July, 2008, recommended promotion of the respondent to Grade-II (DASS) and consequent transfer to the Directorate of Education, to implement the promotion. On 24th September, 2008, relieving and

posting order was issued. However, the respondent was not relieved for promotion and posting, being involved and facing prosecution in three cases.

6. It is clear from the aforesaid narration that, on the date when the DPC had recommended promotion to Grade-II (DASS), the respondent was already facing prosecution in three criminal cases in which charge- sheets had been served. In these circumstances, we fail to understand how the sealed cover procedure was not followed and the relieving and posting order dated 7th July, 2008 was passed, for promotion to Grade-II (DASS). This was contrary to law and completely against the ratio in *Union of India v. K.V. Jankiraman, (1991) 4 SCC 109*. Paragraph 16 of the said decision holds:-

*“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.**”(emphasis supplied)*

In para 17 it has elucidated:-

“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.”

Pursuant to the said enunciation, the Government of India issued Office Memorandum No.22011/4/91-Estt.(A), Government of India, Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training, North Block, New Delhi, dated 14th September, 1992. Paragraphs 2 and 7 thereof, for the sake of convenience and clarity, are reproduced below:

“2. Cases of government servants to whom sealed cover procedure will be will be applicable.-- At the time of consideration of the cases of government servants for empanelment 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;*
- (iii) Government servants in respect of whom prosecution for a criminal charge is pending.”*

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7. Sealed cover procedure applicable to officers coming under cloud holding of DPC but before promotion.—A Govt. 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 the conclusion of disciplinary case/criminal proceedings and the provisions contained in this letter will be applicable in his case also.”

7. In the facts of the present case, paragraph 2 of the aforesaid Memorandum would be authoritatively applicable, as the respondent was facing criminal prosecution in three cases in which charge sheets had been filed, when the promotion order was issued. Pertinently, paragraph 7 of the aforesaid Memorandum states that the consequences mentioned in paragraph 2 above would be equally applicable to a government servant who has been recommended for promotion by the DPC, but before he is actually promoted is suspended, served with a charge sheet in departmental proceedings or in respect of whom prosecution for a criminal charge is pending. In these cases also, the sealed cover procedure is to be followed. Paragraph 7 above was examined by the Supreme Court in *Union of India & Ors. v. Anil Kumar Sarkar, (2013) 4 SCC 161*, and after referring to *Union of India Etc. v. K.V. Jankiraman, (supra)* case, it was held that sealed cover procedure would be applicable even if a government servant has been cleared/approved by the DPC but the criminal/departmental proceedings have been initiated against him after recommendation of the DPC and before the date he could be actually promoted. The

judgment of the High Court was reversed, for it had overlooked paragraph 7 above, relating to the sealed cover procedure.

8. In **Union of India v. Inspector Jawahar Lal [WP(C) No. 3973/2011]** and **Union of India v. Binod Shahi [WP(C) No.1470/2011]**, decided on 2nd February, 2011, a division bench of this Court went into the question, what is meant by the expression “prosecution for criminal charge” is pending and has held:-

“10. We have to interpret the expression "prosecution for a criminal charge is pending". The emphasis is on the word "prosecution" meaning thereby that the prosecution should be pending and it should be in respect of a criminal charge. To attract this Clause, a criminal charge is necessary framed by the concerned Court. The question is when the prosecution would be said to be pending. No doubt, by mere sanctioning of the prosecution, it would not be pending, at the same time once, the FIR is lodged and the matter is under investigation, the prosecution would be treated as pending. This is so held by the Supreme Court in [State, CBI vs. Sashi Balasubramanian and another](#), (2006) 13 SCC 2520 in the following words:-

29. It is in the aforementioned context, interpretation of the word prosecution assumes significance. The term prosecution would include institution or commencement of a criminal proceeding. It may include also an inquiry or investigation. The terms prosecution and cognizance are not interchangeable. They carry different meanings. Different statutes provide for grant of sanction at different stages.

30. "In initio" means in the beginning. The dictionary meaning of "initiation" is cause to begin. Whereas some statutes provide for grant of sanction before a prosecution is initiated, some others

postulate grant of sanction before a cognizance is taken by Court. However, meaning of the word may vary from case to case. In its wider sense, the prosecution means a proceeding by way of indictment or information, and is not necessarily confined to prosecution for an offence.

11. The Court had drawn distinction between the terms 'prosecution' and 'Cognizance'. Cognizance comes even at a stage later than prosecution when after the challan/charge sheet is filed and the court takes cognizance thereof and issues notice to the accused. [Section 173](#) of the Code of Criminal Procedure deals with the report of the Police Officer on completion of investigation which has to be forwarded to a Magistrate empowered to take cognizance of the offence on the above police report. The format of the said police report is known as charge sheet which is filed before the Magistrate and it is only after going through the above charge sheet, the Magistrate takes cognizance and summons the accused. In the present case, even cognizance has been taken by the Court and the matter is at the stage of framing of the charge. Therefore, prosecution is definitely pending in respect of a criminal charge. It is thus clear that clause (iii) gets attracted.

12. The matter can be looked into from other angle namely the purpose behind such a clause. Obviously, the purpose behind inserting the aforesaid clause is that when the criminal proceedings have been initiated the result of DPC should be kept in a sealed cover as the investigation is complete and investigating agency has filed the charge-sheet in the court, obviously, as per the prosecution case against the delinquent for criminal trial has been made out. It is a matter of common knowledge that framing of charge by the court at times substantially delayed for one reason or the other. Had the matter been at an FIR stage and investigation in the process, situation perhaps may have

been different but would not so when the investigation is complete and even the charge sheet is filed in the competent court. Obviously, the filing of the charge sheet, it can safely be said that the officer has come under a cloud before promotion.

13. If one goes into the historical facts leading to the issuance of the aforesaid O.M, the original can be traced to the historic judgment of Apex Court in [Union of India vs. K.V Jankiraman](#), AIR 1991 SC 2010. The Court in that case expressed its concern while take note of the O.M contained in 30.01.1982 as the situation was that Union of India could not denied the promotion or years together even on account preliminary investigation continuing endlessly and when no departmental action was initiated either or charge sheet before the competent court filed. In such a situation, the court find equities in favour of the government servant. This led to the amendment in the O.M dated 12.01.1988 was issued and this was also superseded by the O.M dated 14.09.1992. Once the equities are to be balanced and where situations are different denying promotion to the government servant without any reasons, at the same time, public interest is also to be kept in mind while balancing the equities. With the filing of the charge sheet, the task of the investigating agency had been completed. For framing of the charge, ball is in the court of law. If there is a delay happening there which could be for various reasons including the reason that can be attributed to the accused, public interest should not suffered as with the filing of charge sheet the government servant has come under cloud. If such a situation is allowed, any such government servant who is due for promotion can prolonged the framing of the charge by the court of law and in the mean time get his case considered by the DPC. It cannot be countenanced. A Single Bench of this Court had dealt with the similar issue in [R.S Srivastava vs. Managing Director and Acting Chairman](#),

GIC, 1999(5) SLR 714. In this case, this Court relying on Union of India vs. K.V Janakiraman 1991 (5) SLR 602 (SC), in para 5 of the judgment held that the designated court had not framed charge and in para 6, this Court held that there is a criminal case pending against the petitioner. It has further been held that when the petitioner is acquitted by the criminal court, he will get all the benefits and till such time, the petitioner cannot be heard to say that the decision of the DPC in a sealed cover should be given effect to. We agree with this view.

14. We are, therefore, of the opinion that when the charge-sheet is filed, in the court of law, it should be treated that prosecution for a criminal charge against such a person is pending. Clause 2(iii) of O.M dated 14.09.1992 would thus get attracted.”

This judgement and ratio was followed on ***Union of India & Ors. v. Doly Loyi, (2013) ILR (Del) 2566.***

9. In light of the aforesaid position, we do not think that the Tribunal was justified and correct in issuing the impugned directions. In the present case, the bar and prohibition would be applicable and the sealed cover procedure has to be followed. We, therefore, quash and set aside the aforesaid directions given by the Tribunal. The direction that the respondent should be permitted to join the promotional post of Grade-II (DASS) with effect from 7th July, 2008 and would be entitled to pay arrears of pay and allowances and other benefits, are set aside. Sealed cover procedure must be followed.

10. The second relief granted to the respondent relates to benefit of 3rd Modified Assured Career Progression Scheme (‘MACP for short’). We perceive that no specific direction has been issued by the Tribunal, in relation to the said scheme and all that is required to be undertaken by the petitioner, is to examine the said prayer and decide the same as per the applicable scheme and circular/notifications issued in that regard. We do not perceive and believe that a specific order and particular direction to accord and give benefit of the 3rd MACP has been made in the penultimate paragraph in the impugned order. We would clarify this position, to avoid any ambiguity and doubt.

11. The writ petition is allowed in terms of the order passed above. CM No.10198/2014 also stands disposed off.

SANJIV KHANNA, J.

NAJMI WAZIRI, J.

JANUARY 12, 2016
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