

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

+ **W.P.(C) No. 3025/2017**

% **10th April, 2017**

SIDHARTH RATH

..... Petitioner

Through: Mr. Shankar Raju and Mr. Nilansh
Gaur, Advocates.

versus

CENTRAL WAREHOUSING CORPORATION

..... Respondent

Through: Mr. K. K. Tyagi, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 13233/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) No. 3025/2017

1. By this writ petition under Article 226 of the Constitution of India the petitioner seeks the relief that his employer/respondent/Central Warehousing Corporation should not resort to the sealed cover procedure as on 11.8.2015, and the petitioner in fact should be given promotion to the post of DGM (Technical) with effect from 11.8.2015 with consequential benefits.

2. The limited issue in this case is with respect to interpretation of paragraph 2(iii) of the Department of Personnel & Training (DOPT) Office Memorandum (OM) dated 14.9.1992 and which allows a sealed covered procedure to be obtained when a prosecution for criminal charge is pending against a person. Paragraph 2 of the OM dated 14.9.1992 in its entirety reads as under:-

“2. At the time of consideration of the cases of Government servant for promotion details of Government servant in the consideration zone for promotion falling under the following category 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 criminal charge is pending.”

3. The factual matrix is that as against the petitioner a case under the Prevention of Corruption Act, 1988 and Section 120B and 420 of the Indian Penal Code, 1860 is pending as on date. The FIR in this case was sent to the concerned CBI court on 31.10.2014 and this is admitted by the petitioner himself in his letter dated 17.8.2016 and which letter reads as under:-

“Date: 17.08.2016

To
The Managing Director
CWC, CO,
New Delhi.

(Through Proper Channel)

Sub: Registration of FIR in CBI Court and withholding my promotion., reg
Ref: 1. My earlier representation on this matter during December 2015

2. My request for consideration of promotion dated 01.08.2016
3. DOPT Office Memorandum on vigilance clearance dt.02.11.2012

Sir,

With reference to above, it is to submit that the seal cover procedure has been adopted in case of my promotion which is since October 2015, when only a FIR was filed by the CBI, Patna with the Special Judge, CBI-III, Patna vide RC No. 0232014/21 dt. 31.10.2014. As per DOPT guidelines, FIR should not be considered as prosecution. It is the date on which the Magistrate/Court takes cognizance of the offence, that is taken as the initiation of prosecution. (ref.sl. 03 enclosed)

XXXXX

XXXXX

XXXXX

sd/-

(Dr. Sidharth Rath)

Encl: as above.

Asst. General Manager (PCS)”

4. Petitioner, however, claims that mere registration of FIR and consequent pendency of a case in a criminal Court should not be a ground to adopt the sealed cover procedure and that such sealed cover procedure can only be resorted to once a charge sheet is filed against the concerned person. Petitioner in support of his argument places reliance upon a Division Bench judgment of this Court in the case of *Union of India and Ors. Vs. Doly Loyi, 2013 (7) AD (Delhi) 559.*

5. It is clear that when we take the normal and literal meaning of the expression ‘prosecution for a criminal charge is pending’, then it is seen that since from 31.10.2014 a criminal case is pending against the petitioner, and therefore the case of the petitioner will necessarily fall under paragraph 2(iii) of the OM dated 14.9.1992. In fact, this is also so observed by the Division Bench of this court in the case of *Doly Loyi (supra)* with reference

to an earlier decision dated 2.12.2011 in W.P. (C) Nos. 3793/2011 and 1470/2011. The relevant paras of the judgment dated 2.12.2011 in W.P.(C) Nos. 3793/2011 and 1470/2011 are reproduced in para 10 of the judgment in the case of *Doly Loyi (supra)* and the said para along with para 11 of the judgment in the case of *Doly Loyi (supra)* are reproduced as under:-

“10. We are also faced with the same question in this case. It is not in dispute that the petitioners herein had kept the DPC proceedings with respect to the respondent in a sealed cover as the same falls within the scope of para 2(iii) of DOP&T dated 14.09.1992. This O.M dated 14.09.1992 was issued by the DOP& T pursuant to the judgment of the Supreme Court reported as AIR 1991 SC 1210 Union of India vs. K.V Jankiraman. It may be necessary to state here that the O.M dated 12.01.1998 stipulated that the sealed cover procedure could be adopted, with regard to a government servant in respect of whom prosecution for a criminal charge was pending, or sanction for prosecution has been issued, or a decision has been taken to accord sanction for prosecution. The O.M dated 14.09.1992 which superseded the O.M dated 12.01.1998 did not contain any stipulation where the sealed cover procedure could be adopted, when sanction for prosecution has been issued, or decision has been taken to accord sanction for prosecution. Clause 2 (iii) of O.M dated 14.09.1992 stipulated that sealed cover procedure can be adopted only if the prosecution for criminal charge is pending against government servant. The said Clause came up for interpretation before this court in W.P(C) no. 3793/2011 and W.P(C) 1470/2011 decided on 02.12.2011, wherein this court has held as under:

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, 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 chargesheet 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.

11. In view of what has been held by this court in the aforesaid two writ petitions, it is clear that mere issuance of sanction order, the DPC proceedings could not have been put in sealed cover. Even, if the sanction order issued with the approval of the Finance Minister, Government of India, on 22.09.2008 is considered, it is seen that no sanction order was in place when the DPC had met. A further question that could arise is whether registering a regular case by the CBI would entail invocation of Clause 2 (iii) of the O.M dated 14.09.1992 and thereby putting the DPC proceedings in the sealed cover. Going by what has been held by this court in writ petitions no. 3793/2011 and 1470/2011, when the charge sheet is filed in the court of law, it should be treated that prosecution for a criminal charge against a such person is pending, and Clause 2 (iii) of O.M dated 14.09.1992 would get attracted. In the present case, the chargesheet was filed by the CBI before the Special Judge only on 25.10.2008, as per the statement of relevant facts filed by the respondent at the time of arguments and the cognizance of which was taken in the month of November, 2008. Hence, Clause 2 (iii) of the O.M dated 14.09.1992 would not be attracted. In fact a perusal of the O.M dated 02.11.2012 relied upon by Mr.S.K Gupta would show that the ground on which the petitioners have invoked the sealed cover is unsustainable. Hence, we are of the view that apart from reasoning given by the Tribunal in allowing the O.A, what has been stated by us in para 10 as well as in this paragraph, would be an additional reason to grant relief to the respondent herein and the present petition filed by the petitioners have no merit and the same is dismissed.” (emphasis added)

6. It is clear that in the facts of the case in ***Doly Loyi (supra)*** the Court held that once there is only a sanction given for prosecution then a criminal case cannot be said to be pending but once a charge-sheet is issued in a criminal case then undoubtedly a criminal case can be said to be pending. However, simultaneously, the Division Bench in the case of ***Doly Loyi (supra)*** by referring to the judgment dated 2.12.2011 in W.P.(C) Nos. 3793/2011 and 1470/2011 has held that once even an FIR is lodged and the matter is under investigation or a case is pending in a Court, then the prosecution would be treated as pending. This is specifically observed in para 10 of the judgment dated 2.12.2011 in W.P.(C) Nos. 3793/2011 and 1470/2011. In para 13 of the judgment dated 2.12.2011 it is also reasoned that the issue with respect to pendency of a criminal case cannot be postponed till the filing of the charge-sheet otherwise people can delay framing of the charges and in the meanwhile seek promotion.

7. Therefore, in my opinion, observations of the Division Bench of this Court in the case of ***Doly Loyi (supra)*** along with the judgment dated 2.12.2011 in W.P. (C) Nos. 3793/2011 and 1470/2011 does not help the petitioner and in fact goes directly against the petitioner.

8. Reliance placed upon by the petitioner upon para 11 of the judgment in the case of ***Doly Loyi (supra)*** does not help the petitioner

because, and as already stated above, in ***Doly Loyi's*** case (*supra*) it was held that criminal case cannot be said to be pending against the petitioner in that case simply because sanction was issued for prosecution i.e the case was not a case where FIR was registered or a case was pending in a criminal court. As already stated above in this case the case before the criminal court against the petitioner is pending since 31.10.2014 and hence as in August, 2015 the sealed cover procedure was rightly adopted.

9. In view of the above, there is no merit in the writ petition and the same is hereby dismissed, leaving the parties to bear their own costs.

APRIL 10, 2017

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VALMIKI J. MEHTA, J