

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

+ **WRIT PETITION (CIVIL) No. 8758/2014**

% **Reserved on:** 30th November, 2016
Date of Decision: 30th January, 2017

UNION OF INDIA THROUGH THE SECRETARY,
DEPARTMENT OF PERSONNEL & TRAINING AND OTHERS
.....Petitioners

Through Mr. R.V. Sinha, Advocate.

Versus

V. APPALLA RAJURespondent
Through Ms. Jyoti Singh, Sr. Advocate with Mr. S.K.
Gupta & Mr. Sameer, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

This writ petition by the Union of India and its functionaries impugns the order dated 15th July, 2014 passed by the Principal Bench of the Central Administrative Tribunal (Tribunal, for short) whereby OA No. 107/2013 filed by V. Appalla Raju, the respondent before us, has been allowed with the direction that the respondent would be promoted as Commissioner of Income Tax with effect from 11th July, 2009, the date his immediate junior was promoted, and he would be entitled to consequential benefits of seniority and pay fixation.

2. The respondent is an officer belonging to the Indian Revenue Service. While working as Additional Commissioner of Income Tax, he was charge-sheeted under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 and accordingly the sealed cover procedure was followed by the Departmental Promotion Committee (DPC) held between December, 2008 and January, 2009 while considering him and others for promotion to the post of Commissioner of Income Tax. On 11th July, 2009, promotion orders for the posts of Commissioner of Income Tax were issued for those found fit by the DPC. The list included some officers, who were junior to the respondent.

3. The respondent had challenged the charge sheet in OA No. 2582/2009, which was allowed by the Tribunal on 24th February, 2010, *albeit* giving liberty to the petitioners to issue a fresh charge sheet, if so advised. Thereupon, the respondent filed OA No. 165/2011 with the prayer that the sealed cover should be opened. The Tribunal allowed OA No. 165/2011 vide order dated 12th September, 2011, directing the petitioners to open the sealed cover within six weeks. Alleging non-compliance, the respondent filed contempt petition CP No. 674/2012 in response to which an affidavit was filed by the petitioners stating that the respondent was found unfit for promotion by the DPC.

4. The respondent and some others in the meanwhile had been communicated “below the benchmark” Annual Confidential Reports (ACRs) for the years 2004-05 and 2005-06 in terms of the O.M. dated 13th April, 2010 issued by DoP&T, in compliance with the directions of the Supreme Court in *Dev Dutt versus Union of India*, (2008) 8 SCC 725. The

respondent made a representation for upgradation of the ACRs, which was accepted. On 27th and 28th December, 2010, a review DPC was convened to consider the case of the respondent and five others. On 1st April, 2011, these five officers were declared fit for promotion and were consequently promoted with effect from 11th July, 2009. The respondent was, however, left out and was not promoted. By letter dated 17th/20th December 2012, the respondent was informed as under:-

“I am directed to say that in compliance to the Hon’ble Tribunal’s direction dated 12.9.2011 the recommendation of DPC kept in sealed covers in respect of Sh. V.A. Raju was opened. The regular DPC had assessed the officer as ‘Unfit’. However, a review DPC for the panel year 2008-09 in respect of Sh. V.A. Raju, with the upgraded ACR as per DOPT’s OM dated 13.4.2010 was also held in which the officer was assessed as ‘Fit’.

The recommendation of the DPC after obtaining approval by Minister-in-Charge was sent to the DOP&T for consideration of the Competent Authority (ACC). The Competent Authority (ACC) decided as under:

“Shri V.A. Raju had approached the CAT regarding opening of sealed cover containing recommendations of the regular DPC. The direction of the CAT is also with respect to sealed cover of the regular DPC. The regular DPC for the panel year 2008-09 had adjudged Shri V.A. Raju as ‘Unfit’ While review DPC adjudged him as ‘Fit’. However, a case for review DPC has not been made out since the action of Department to communicate the below benchmark gradings in term of DOP&T OM dated 13.4.2010 and convening of review DPC for the year 2008-09 is not in order. The DOPT’s OM dated 13.04.2010 is concerned with only future DPCs and it does not affect the original DPCs held before that due.”

The above position is communicated to you in compliance to the order of Hon'ble Tribunal dated 4.12.2012”

5. These facts were also stated in the affidavit filed in CP No. 674/2012. The contempt petition was adjourned to 18th January, 2013.

6. This prompted the respondent to file OA No. 107/2013 challenging the order dated 17th/20th December, 2012 which as noticed above, has been allowed vide impugned order dated 15th July, 2014.

7. In the meanwhile, another significant and relevant development had taken place. On 9th April, 2008, sanction for prosecution of the respondent was granted by the competent authority and on 30th May, 2008 the challan/report under Section 173 of the Code of Criminal Procedure, 1973 (Code for short) was filed before the Special Judge, Vishakhapatnam by the Central Bureau of Investigation against the respondent, under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 and Sections 109, 468 and 471 of the Indian Penal Code, 1860. Thus, on the date when the review DPC was held i.e. 27th/28th December, 2010 the respondent was already charge-sheeted and facing prosecution in the criminal case. The contention of the respondent, on the other hand, was/is that the report under Section 173 of the Code filed before the Special Judge on 30th May, 2008 was not accepted, but returned. Attempts were again made to file the said report on 12th March, 2009, 7th July, 2009 and also on 25th March, 2010, but the report was returned due to defects. The report under Section 173 of the Code was finally filed on 22nd April, 2010 and on 24th April, 2010 cognizance was taken by the Special Judge, Vishakhapatnam. Thus, till 22nd April, 2010, the respondent was not

charge-sheeted in the criminal case. It is submitted that the others, including juniors to the respondent, were promoted in July, 2009 and at that time no charge sheet had been issued.

8. The Tribunal in the impugned order had framed two issues, or questions, which are as under:-

- “(i) Whether the ACC was right in holding that the review DPC conducted by the respondents-department was not in order being contrary to the instruction of DoP&T issued vide their O.M. dated 13.04.2010?
- (ii) Whether the applicant was clear from vigilance angle and deserved to be promoted on the basis of recommendations of review DPC?”

On the first question, it has been held that the stand of the Appointments Committee of the Cabinet, that the review DPC was not in order and the respondent had not been discriminated, was un-sustainable. On the second issue, it has been held that the Special Court had taken cognizance of the police report under Section 173 of the Code on 24th April, 2010 only. The petitioners had not specifically denied that the report filed on 30th May, 2008 was returned by the criminal Court on the said date and on several dates thereafter. Therefore, it could not be said that the respondent was facing a criminal charge on the date when his juniors were promoted on 11th July, 2009. The contention of the petitioners placing reliance upon the O.M. dated 14th September, 1992 was rejected.

9. The facts of the present case would show that a charge memo under Rule 14 of the CCS (CCA) Rules, 1965 was issued to the respondent on 28th June, 2008. This charge memo was quashed by the Tribunal with liberty to

issue a fresh charge memo vide order dated 24th February, 2010. In the meanwhile sanction for prosecution was given on 9th April, 2008 and the charge sheet/report under Section 173 of the Code under the provisions of Prevention of Corruption Act and Indian Penal Code was filed on 30th May, 2008, but as per the respondent, was returned. Cognizance against the respondent was taken on 24th April, 2010 on the charge sheet re-submitted on 22nd April, 2010 by the Central Bureau of Investigation against the respondent before the Special Judge, Vishakhapatnam.

10. The Tribunal in the order dated 24th February, 2010 in OA No.2582/2009 had quashed the charge-sheet, and accordingly sealed cover was opened. The respondent had been declared as unfit for promotion by the DPC held in December, 2008/January, 2009. This position was good even on 11th July, 2009 when his immediate junior was promoted. The respondent was communicated “below the benchmark” ACRs for the years 2004-05 and 2005-06. On representation made by the respondent, these were upgraded and review DPC was held in December, 2010. By then, the respondent was summoned and was certainly facing prosecution in the charge sheet filed under the Prevention of Corruption Act and the Indian Penal Code.

11. Thus the opening of the sealed cover of the DPC held in December, 2008 and January, 2009 was inconsequential as the respondent was declared unfit by the said DPC on account of “below the benchmark” grading. No doubt, the gradings were subsequently upgraded and the matter was placed before the review DPC, who had to decide whether or not the respondent shall be promoted, but by then the respondent had been summoned as an accused. Promotion to the post of Commissioner was not a formality or a

foregone conclusion. It was not automatic. The review DPC, which was held in December, 2010 should have also followed the sealed cover procedure because by then the respondent had been charge-sheeted and had been summoned in the criminal case on 24th April, 2010. In either case, we do not find any justification to issue direction that the respondent should be granted promotion with effect from 11th July, 2009 by opening the sealed cover of the review DPC.

12. In *Union of India and Ors. v. K.V. Jankiraman and Ors.* (1991) 4 SCC 109, the Supreme Court has elucidated on the sealed cover procedure. The Court has held that the sealed cover procedure is to be adopted and followed when an officer is due for promotion or an increment but is facing criminal prosecution or departmental proceedings. The sealed cover is opened if and after the said proceedings culminate in a favourable order. Once the said sealed cover is opened and the officer it is observed is entitled to grant of promotion, the promotion is granted with effect from the date it was due and his junior was promoted. The sealed cover procedure, therefore, has the effect of keeping the result of the DPC in abeyance till culmination of the departmental proceedings or the criminal case. The sealed cover procedure is a stop gap or an interim arrangement to be followed when the aforesaid negative circumstances exist.

13. After the Judgment in the case of *K.V. Jankiraman* (supra), the DOP&T issued O.M. dated 14.09.1992 which stipulates:

“The procedure and guidelines to be followed in the matter of promotion of Government servants against whom disciplinary/court proceedings are pending or whose conduct is

under investigation have been reviewed carefully. Government have also noticed the judgement dated 27.08.1991 of the Supreme Court in Union of India etc. vs. K.V. Jankiraman etc. (AIR 1991 SC 2010). As a result of the review and in supersession of all the earlier instructions on the subject (OM No. 39/3/59-Estt.A dated 31.08.1960, 7/28/63-Estt.A dated 22.12.1964, 22011/3/77-Estt.A dated 14.07.1977, 22011/1/79-Estt.A dated 31.01.1982, 22011/2/1986-Estt.A dated 12.01.1988, 22011/1/91-Estt.A dated 31.07.1991), the procedure to be followed in this regard by the authorities concerned is laid down in the subsequent paras of this OM for their guidance.

2. At the time of consideration of the cases of Government servants for promotion, 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; and
- (iii) Government servants in respect of whom prosecution for a criminal charge is pending.

2.1 The Departmental Promotion Committee shall assess the suitability of the Government servants coming within the purview of the circumstances mentioned above alongwith other eligible candidates without taking into consideration the disciplinary case/criminal prosecution pending. The assessment of the DPC, including 'Unfit for Promotion', and the grading awarded by it will be kept in a sealed cover. The cover will be superscribed 'Findings regarding suitability for promotion to the grade/post of in respect of Shri (name of the Government servant). Not to be opened till the termination of the disciplinary case/criminal prosecution against Shri'. The proceedings of the DPC need only contain the note 'The findings are contained in the attached sealed

cover'. The authority competent to fill the vacancy should be separately advised to fill the vacancy in the higher grade only in an officiating capacity when the findings of the DPC in respect of the suitability of a Government servant for his promotion are kept in a sealed cover.

2.2 The same procedure outlined in para 2.1 above will be followed by the subsequent Departmental Promotion Committees convened till the disciplinary case/criminal prosecution against the Government servant concerned is concluded.

3. On the conclusion of the disciplinary case/criminal prosecution which result in dropping of allegations against the Govt. servant, the sealed cover or covers shall be opened. In case the Government servant is completely exonerated, the due date of his promotion will be determined with reference to the position assigned to him in the findings kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such position. The Government servant may be promoted, if necessary, by reverting the junior most officiating person. He may be promoted notionally with reference to the date of promotion of his junior. However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion and if so to what extent, will be decided by the appointing authority by taking into consideration all the facts and circumstances of the disciplinary proceedings/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so. It is not possible to anticipate and enumerate exhaustively all the circumstances under which such denials of arrears of salary or part of it may become necessary. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. These are only some of the circumstance where such denial can be justified.

3.1 If any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover/covers shall not be acted upon. His case for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him.

3.2 It is also clarified that in a case where disciplinary proceedings have been held under the relevant disciplinary rules 'warning' should not be issued as a result of such proceedings. If it is found, as a result of the proceedings, that some blame attaches to the Government servant, at least the penalty of 'censure' should be imposed.

4. It is necessary to ensure that the disciplinary case/criminal prosecution instituted against any Government servant is not unduly prolonged and all efforts to finalise expeditiously the proceedings should be taken so that the need for keeping the case of a Government servant in a sealed cover is limited to the barest minimum. It has, therefore, been decided that the appointing authorities concerned should review comprehensively the case of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of 6 months from the date of convening the first Departmental Promotion Committee which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also every six months. The review should, inter alia, cover the progress made in the disciplinary proceedings/criminal prosecution and the further measures to be taken to expedite their completion.

5. In spite of the six monthly review referred to in para 4 above, there may be some cases, where the disciplinary case/criminal prosecution against the Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC, which kept its findings in respect of the Government servant in a sealed cover. In such a situation the appointing authority may review the case of the Government servant, provided

he is not under suspension, to consider the desirability of giving him ad-hoc promotion keeping in view the following aspects :-

- (a) Whether the promotion of the officer will be against public interest;
- (b) Whether the charges are grave enough to warrant continued denial of promotion;
- (c) Whether there is any likelihood of the case coming to a conclusion in the near future;
- (d) Whether the delay in the finalisation of proceeding, departmental or in a court of law, is not directly or indirectly attributable to the Government servant concerned; and
- (e) Whether there is any likelihood of misuse of official position which the Government servant may occupy after ad-hoc promotion, which may adversely affect the conduct of the departmental case/criminal prosecution.

The appointing authority should also consult the Central Bureau of Investigation and take their views into account where the departmental proceedings or criminal prosecution arose out of the investigations conducted by the Bureau.

5.1 In case the appointing authority comes to a conclusion that it would not be against the public interest to allow ad-hoc promotion to the Government servant, his case should be placed before the next DPC held in the normal course after the expiry of the two year period to decide whether the officer is suitable for promotion on ad-hoc basis. Where the Government servant is considered for ad-hoc promotion, the Departmental Promotion Committee should make its assessment on the basis of the totality of the individual's record of service without taking into account the pending disciplinary case/criminal prosecution against him.

5.2 After a decision is taken to promote a Government servant on an ad-hoc basis, an order of promotion may be issued making it clear in the order itself that :-

- (i) the promotion is being made on purely ad-hoc basis and the ad-hoc promotion will not confer any right for regular promotion; and
- (ii) the promotion shall be “until further orders”. It should also be indicated in the orders that the Government reserve the right to cancel the ad-hoc promotion and revert at any time the Government servant to the post from which he was promoted.

5.3 If the Government servant concerned is acquitted in the criminal prosecution on the merits of the case or is fully exonerated in the departmental proceedings, the ad-hoc promotion already made may be confirmed and the promotion treated as a regular one from the date of the ad-hoc promotion with all attendant benefits. In case the Government servant could have normally got his regular promotion from a date prior to the date of his ad-hoc promotion with reference to his placement in the DPC proceedings kept in the sealed cover(s) and the actual date of promotion of the person ranked immediately junior to him by the same DPC, he would also be allowed his due seniority and benefit of notional promotion as envisaged in para 3 above.

5.4 If the Government servant is not acquitted on merits in the criminal prosecution but purely on technical ground and Government either proposes to take up the matter to a higher court or to proceed against him departmentally or if the Government servant is not exonerated in the departmental proceedings, the ad-hoc promotion granted to him should be brought to an end.

6. The procedure outlined in the preceding paras should also be followed in considering the claim for confirmation of an officer under suspension, etc. A permanent regular vacancy should be reserved for such an officer when his case is placed in sealed cover by the DPC.

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.

[Deptt. of Personnel & Training OM No. 22011/4/91-Estt.(A) dated 14.09.1992] ”

14. The question of the applicability of the sealed cover procedure was considered by the Supreme Court in *Union of India v. R.S. Sharma* (2000) 4 SCC 394 wherein it was opined:-

“16. Learned counsel for the respondent made an endeavour to contend that in the light of the decision of this *Court in Union of India v. K.V. Jankiraman* (1991) 4 SCC 109 the Sealed Cover Procedure can be resorted to only after charge-memo is received or a charge-sheet is filed and that unless such an event had happened at the relevant time the government employee cannot be denied of his promotion, if he is otherwise entitled to it. Learned counsel also submitted that *Jankiraman* (1991) 4 SCC 109 was since followed in *Union of India v. Dr Sudha Salhan* (1998) 3 SCC 394 and *Bank of India v. Degala Suryanarayana* (1999) 5 SCC 762. The clauses of the second para of the Sealed Cover Procedure considered in *Jankiraman* (1991) 4 SCC 109 were not those involved in the present case and hence that decision is of no avail to the respondent. In the other two decisions the facts warranted application of the ratio contained in *Jankiraman* (1991) 4 SCC 109. The added factor in these two cases was that the public servant concerned had been exonerated of the charges framed by the criminal courts. In the

present case the respondent is still facing trial for serious offences, and hence the situation is different.

17. We may also point out, in this context, that in *Delhi Development Authority v. H.C. Khurana* (1993) 3 SCC 196 and *Union of India v. Kewal Kumar* 1993) 3 SCC 204 this Court found that the ratio in *Jankiraman* 1991) 4 SCC 109 is applicable only to the situations similar to the cases discussed therein, and hence the Sealed Cover Procedure resorted to by DPC in those two cases was upheld by this Court.”

15. In the facts of the present case, till the charge sheet was quashed on 24th February, 2010, the sealed cover could not have been opened. Even after the charge sheet was quashed, the sealed cover pursuant to the Review DPC held in December 2010 could not have been opened because on 24th April, 2010 the respondent had been summoned in the criminal case upon filing of the charge sheet/report. The sealed cover procedure would have bound and barred the Review DPC from disclosing their opinion. By then the effect of quashing of the charge memo on 24th February, 2010 insofar as opening of the sealed cover procedure was concerned, was inconsequential, for when the review DPC was held the respondent was summoned in the criminal case.

16. What was the subject matter of OA No. 2582/2009 was the charge memo in the disciplinary proceedings and not the charge sheet/report in the criminal prosecution, and as held by *R.S. Sharma* (supra) clause (ii) of Paragraph 2 of the DOP&T O.M. No. 22011/1/1/91-Estt.(A) dated 31.7.1991 postulates the "case will continue to be in the sealed cover on

account of existence of any one of the remaining three conditions specified in clauses (i) to (iii) by clause (iii) of the first OM". Thus the three postulates mentioned in OM dated 14.09.1992, (i) government servants under suspension;(ii) government servants against whom charge sheet has been issued and disciplinary proceedings are pending and (iii) government servants against whom prosecution for a criminal charge is pending, are distinct and operate independently. The negative stipulations are separate and the effects thereof, as far as sealed cover procedure is concerned, would be separate and distinct.

17. Clause 2(iii) of the O.M. dated 14.09.1992 stipulates that sealed cover procedure can be adopted 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 titled ***UOI v. Jawahar Lal and Ors.*** and W.P(C) No. 1470/2011 titled ***UOI v. Binod Shahi*** 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 v. Sashi Balasubramanian***, (2006) 13 SCC 252 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 v. K.V. Jankiraman*, (1991) 4 SCC 109. 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 be 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 be 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 v. Managing Director and Acting Chairman. GIC.**, 1999(5) SLR 714. In this case, this Court relying on **Union of India v. 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.”

18. **Jawahar Lal** (supra) and **Binod Shahi** (supra) were considered and reconciled and held not to be conflicting with **K.V. Jankirama** (supra) by a Division Bench of this Court in **Union of India v. Suresh Chandra** W.P.(C) 335/2012, decided on 3rd September, 2013, wherein it was held:-

“26. The matter can also be viewed from another viewpoint. The object behind the ‘sealed cover procedure’ is that an employee whose integrity has come under a cloud should not be promoted till the time such cloud is removed. Prior to the decision of the Supreme

Court in *Jankiraman's* case (supra), the sealed cover procedure was resorted even in cases where investigation/preliminary inquiry was being conducted into the allegations levelled against an employee or a decision has been taken to initiate the departmental action or sanction has been accorded to launch a (criminal) prosecution against the employee. In *Jankiraman's* case (supra), the Supreme Court frowned upon the aforesaid practice as it was causing injustice to the employees who were being denied promotion for years together because of pendency of investigation or in contemplation of initiation of departmental proceedings/criminal prosecution. However, at the same time, the Supreme Court emphasized that an employee has no right to promotion and public interest requires that promotion should be granted to the employees having 'unblemished record'. (See paragraph 29 of *Jankiraman's* case (supra) noted by us in the foregoing paras). Balancing interests of the employees on one hand and public interest on the other, the Supreme Court concluded that sealed cover procedure should be resorted to only when a charge memo is served on the concerned official (in case of a departmental proceeding) or the charge-sheet is filed before the criminal court (in case of a criminal prosecution) and not before. Now, the moment a charge-memo is issued to an employee in a departmental proceeding or charge-sheet is filed by the investigating agency in the criminal court dealing with a case registered against an employee, the integrity of concerned employee comes under a cloud for the issuance/filing of charge memo/charge-sheet implies that the department/investigating agency has found some truth in the allegations levelled against the employee after having conducted preliminary inquiry/investigation into such allegations. In view thereof, grant of promotion to the employee in respect of whom charge memo/charge-sheet is issued/filed would not only defeat the object of 'sealed cover procedure' but would also be contrary to the ratio of law laid down by the Supreme Court in *Jankiraman's* case (supra).

27. In this regards, it would also be most apposite to note the decision of the Supreme Court reported as (2006) 13 SCC 252 *State, CBI v. Sashi Balasubramanian & Anr.* In said case, amongst other aspects, the Court was dealing with clause (iii) of Section 95

of Finance Act, 1995 which prescribes that the provisions of Section 95 shall not apply to any person in respect of whom prosecution for certain specified offences or for purpose of enforcement of any civil liability has been instituted on or before the filing of the declaration. In said context, one of the questions which had arisen for consideration before the Court was that “when does a prosecution start”, which question was answered in following terms:-

“The First Information Report in regard to the offences committed, as indicated hereinbefore, was lodged on 02.03.1995. The investigation started immediately thereafter. The investigation was being carried out by the Central Bureau of Investigation (Economic Offences Wing). Only at a much later stage, namely, more than three years thereafter, i.e. on 31.12.1998, declarations were filed. Charge-sheet in the criminal case was filed on 12.04.1999. It is in the aforementioned context, interpretation of 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 term “prosecution” and “cognizance” are not interchangeable. They carry different meanings. Different statutes provide for grant of sanction at different stages.

“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.

The term “prosecution has been instituted” would not mean when charge-sheet has been filed and cognizance has been taken. It must be given its ordinary meaning.”

(Emphasis Supplied)

28. The above-noted observations made by the Supreme Court in *Sashi’s* case (supra) are to the effect that prosecution would begin when a person is accused of having committed an offence i.e. before

the filing of charge sheet by the investigating agency. Be that as it may. One thing is clear from the above observations that the prosecution would definitely be pending when the charge sheet is filed by an investigating agency in the criminal court.”

19. In the facts of the present case, we need not go into the question whether or not the challan/report filed by the CBI on 30th May, 2008, which was returned by the Special Judge, Vishakhapatnam would be sufficient to attract the sealed cover procedure. Ergo, the sealed cover procedure may, initially, have been followed on account of the fact that the respondent was served with the charge memo, but this again would not make any difference for the respondent had already been charge-sheeted and summoned in the criminal case before the review DPC could be held. The review DPC was bound to follow the sealed cover procedure.

20. There is another reason why the impugned order directing that the respondent should be promoted as the Commissioner of Income-Tax cannot be sustained. Para 7 of the OM dated 14th September, 1992 prohibits the promotion if the officer at the time when the promotion is granted is facing criminal prosecution, departmental enquiry or is suspended. Paragraph 7 would be applicable to the respondent, Therefore, even if it is assumed that the sealed cover procedure should not have been applied, the direction of the Tribunal to promote the respondent as Commissioner of Income-Tax cannot be sustained as the respondent with effect from 22nd April, 2010 is an accused in the criminal case.

21. This writ petition is allowed for the reasons elucidated and aforestated. The impugned order dated 15.07.2014 passed by the Tribunal

allowing OA No. 107/2013 is set aside and quashed. OA No. 107/2013 will be treated as dismissed and consequential benefits, if any, granted to the respondent, V. Appalla Raju, will be withdrawn. In the facts of the present case, there will be no order as to costs.

**Sd/-
(SANJIV KHANNA)
JUDGE**

**Sd/-
(CHANDER SHEKHAR)
JUDGE**

**JANUARY 30, 2017
VKR/ssn**