

\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **WP(C) No.9277/2016 & CM No.37441/2016**

Reserved on: 16th August, 2017.
Date of Decision: 11th October, 2017.

UNION OF INDIA & ANR. Petitioners
Through: Mr.Arun Bhardwaj, Adv.

Versus

C.K. JAINRespondent
Through: Mr.Anupam Lal Das, Mr.Anirudh
Singh, & Mr.Krishanu Barua, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The Petitioner-Union of India assails the order dated 5th April, 2016 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No.3625/2015 wherein the Tribunal has allowed the said Original Application filed by the Respondent. Vide its impugned order, the Tribunal has directed the Petitioner to open the 'Sealed cover' containing the recommendations of the DPC held on 17th June, 2015 in respect of the Respondent and in case he is found fit, he has been directed to be promoted with all consequential benefits.

2. The Respondent, while working as a Deputy Commissioner of Customs, Central Excise & Service Department, was posted to the Inland Container Depot, Tughlakabad w.e.f. 29th September, 2011.

During this period, the Department of Revenue Intelligence (DRI) found some undeclared material, concealed behind cartons of papers in a consignment. Suspecting the Respondent's involvement in the clearance of the offending goods, the DRI summoned him and thereafter vide its order dated 4th October, 2013, placed him under suspension. Respondent's suspension was extended from time to time in accordance with Rule 10 of the CCS (CCA) Rules.

3. While the Respondent was under suspension, a Departmental Promotion Committee was convened on 17th June, 2015 for recommending eligible Deputy Commissioners, for promotion to the next higher grade of Joint Commissioner. As the Respondent was under suspension when the DPC met, recommendations qua him were placed in a sealed cover by the DPC. Soon thereafter on 30th June, 2015, Respondent's juniors were promoted to the post of Joint Commissioner.

4. However, in the interregnum, as no charge-sheet had been issued to the Respondent, his suspension was revoked on 24th June, 2015 in view of the decision of Supreme Court in the case of ***Ajay Kumar Chaudhary Vs. Union of India (2015) 7 SCC 291***. Immediately upon revocation of his suspension, the Respondent made representations seeking promotion to the post of Joint Commissioner. His plea was that as neither any charge-sheet had been issued to him, nor any criminal or departmental proceedings were pending against him, there was no justification in keeping his name in a sealed cover. The Respondent further relied upon DOPT's OM dated 14th September, 1992 to contend that his promotion was not barred by any of the stipulations in the OM.

5. Despite the revocation of the Respondent's suspension, the Petitioner did not open the 'sealed cover' adopted by the DPC qua him. In the aforesaid background, the Respondent preferred the Original Application before the Tribunal. In his OA, the Respondent sought a direction to the Petitioner to consider and promote him to the cadre of Joint Commissioner with effect from the date of promotion of his juniors. Placing reliance on the DOPT's OM dated 14th September, 1992, the Respondent had contended that upon revocation of his suspension, the embargo on his promotion no longer remained, as neither any chargesheet had been issued to him, nor any criminal proceedings were pending against him.

6. The Petitioner filed its counter-reply to the original application contending therein that as per DOPT's instructions contained in OM dated 14th September, 1992, the sealed cover could be opened only in case of culmination of disciplinary proceedings into exoneration/dropping of charges, which situation had not yet arisen in the present case. In its counter affidavit, the Petitioner also pointed out that though the Respondent's suspension had been revoked, he was still not clear from vigilance angle and there were serious charges against him. It was also pointed out that a reference had been made by the department to the CVC on 30th September, 2015 recommending RDA major, meaning thereby that charges against the Respondent, were of serious nature warranting major penalty proceedings against the Respondent herein.

7. The Tribunal vide its impugned order, has granted relief to the Respondent by directing the Petitioner herein to open the sealed cover and, if the Respondent is found fit, to promote him from the due date

along with all consequential benefits. While passing the impugned order, the Tribunal has placed reliance on the decision of the Supreme Court in the case ***Union of India & Anr. Vs. Anil Kumar Sarkar*** reported as ***AIR 2013 SC 1661***. The Tribunal agreed with the Respondent's contention that, on the date when his juniors were promoted, he was neither under suspension nor any chargesheet had been served upon him and he was also not facing any criminal prosecution. The Tribunal was of the view that since no chargesheet had been issued to the Respondent, there was no justification to continue to keep his case in a sealed cover.

8. Aggrieved with the order of the Tribunal, the Union of India has approached this Court by way of the present petition. Arguing for the Petitioner, Mr.Arun Bhardwaj, Advocate, has contended that the Tribunal has, while issuing the impugned directions, failed to consider the basic facts of the present case. He submits that the Tribunal simply relied on the decision of the Supreme Court in the case of ***Union of India Vs. Anil Kumar Sarkar (Supra)*** without examining the peculiar facts of the case. Mr.Bhardwaj contends that the Tribunal has failed to consider the basic fact, that the order revoking the Respondent's suspension was not a result of his being given a clean chit. The suspension was revoked as per the decision of the Supreme Court in the case of ***Ajay Kumar Chaudhary (supra)***, as the chargesheet could not be issued to him within ninety days of the suspension. He contends that when the suspension was revoked on 24th June, 2015, the matter was still under consideration of the CVC and, in fact, after consideration of the entire matter, a chargesheet dated 24th October, 2016 has already been served to the Respondent

on 7th November, 2016. Mr.Bhardwaj further contends that the charges leveled against the Respondent are serious in nature. He has played a key role in the clearance of consignment of 1504 cylinders containing R-22 gas. He submits that the Respondent was fully aware of the act of smuggling and, in fact, he goes on to contend that the smuggling was being done with the respondent's active connivance. Mr.Bhardwaj, therefore, contends that in such situation, where in any event, a chargesheet now stands served to the respondent and a departmental enquiry is underway on account of very serious charges, the direction to open the sealed cover and grant him promotion in case he is found fit, would amount to rewarding him with a promotion, despite an ongoing departmental inquiry on very serious charges against him.

9. Mr.Bhardwaj has further contended that, even otherwise, in view of the admitted position that before the sealed cover could be opened and promotion granted to the Respondent, he has already been issued a chargesheet, his case would be covered by para 7 of the DOPT's OM dated 14th September, 1992. Placing reliance on para 7 of the aforesaid OM, he contends that the Respondent cannot be promoted until he is completely exonerated from the charges against him. Mr.Bhardwaj has also relied on the decision of the Supreme Court in the case of *Union of India Vs. R.S. Sharma (2000) 4 SCC 394* in support of his plea that the recommendations made by the DPC in respect of the respondent, have to remain in sealed cover until he is completely exonerated from the charges against him.

10. Per contra, Mr.Anupam Lal Das, learned counsel arguing for the Respondent while supporting the impugned order of the Tribunal,

submitted that once the Respondent's suspension was revoked on 24th June, 2015 and it being the admitted fact that on that date, neither any disciplinary proceedings, nor any criminal proceedings were pending against him, it was incumbent upon the petitioners to open the sealed cover and give effect to the recommendations of the DPC. Mr.Das also refers to the same Office Memorandum dated 14th September, 1992 and submitted that as per the instructions in the OM, stipulations relating to adoption of sealed cover procedure-in case where disciplinary proceedings are pending consideration, have been specifically prescribed in para 2 of the OM. He, therefore, contends that since none of the said conditions-warranting adoption of sealed cover procedure existed after 24th June, 2015, it was not open for the Petitioner to continue to keep the case of the Respondent in a sealed cover and deny him promotion on 30th June, 2015, when his Juniors were promoted. Mr.Das has also relied upon OM dated 2nd November, 2012 in support of his plea that, no promotion can be withheld merely on the basis of suspicion or doubt, or where the matter is under preliminary investigation and has not reached the stage of issue of chargesheet. In support of his plea that the sealed cover ought to be opened, he has also relied upon the decisions of the Supreme Court in the case ***Union of India Vs. K.V. Jankiraman AIR 1991 SC 2010***. He has also placed reliance on the decision in case ***Sohan Lal Vs. Union of India & Ors. MANU/PH/1616/2015*** & order dated 22nd July, 2015 passed by the Central Administrative Tribunal, Chandigarh Bench in the case of ***R.L. Channalia Vs. Union of India***.

11. We have heard learned counsel for the parties and perused the record as well as Office Memoranda dated 14th September, 1992 and

2nd November, 2012. The undisputed position which emerges from the record is that the Respondent was initially placed under suspension on 4th October, 2013. His suspension was extended from time to time as per provisions of Rule 10 of the CCS (CCA) Rules. A DPC was convened on 17th June, 2015 on which date the case of the Respondent was kept in a sealed cover. It is also an undisputed fact that the Respondent's suspension was revoked on 24th June, 2015 i.e. prior to the date when his juniors were promoted, vide order dated 30th June, 2015. The petitioner was neither under suspension, nor any kind of chargesheet had been issued to the Respondent on the date of promotion of his juniors.

12. It is also the common case of the parties that on 17th June, 2015, when the meeting of the DPC was convened, since the Respondent was under suspension, the DPC was fully justified in keeping his consideration in a sealed cover on the said date. It is equally true that as on 30th June, 2015, disciplinary proceedings were yet to begin against him. The question, however, which arises in the present case is as to whether, there was any obligation cast on the Petitioners to open the sealed cover immediately after 24th June, 2015, in view of the admitted position that no clean chit had been given to the Respondent on the said date, meaning thereby that he had not been exonerated. Before we proceed, we deem it appropriate to reproduce the relevant paras 2 & 7 of the OM dated 14th September, 1992 which read 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.

2.1 The Departmental Promotion Committee shall assess the suitability of Government servants coming within the purview of the circumstances mentioned above along with 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 'Finding regarding suitability for promotion to the grade/post ofin respect of Shri.....(name of the Government servant). Not to be opened till the terminator of the disciplinary case/criminal prosecution against Shri.....'. The proceeding 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 Committee convened till

the disciplinary case/criminal prosecution against the Government servant concerned is concluded.

XXX

XXX

XXX

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 O.M. will be applicable in his case also.”

(emphasis supplied)

13. Since reliance has been placed on OM dated 2nd November, 2012 by the learned counsel for the Respondent, we deem it appropriate to reproduce para 5 of the same which reads as under:-

“5. The O.M No. 22012/1/99-Estt. (D) dated 25th October, 2004 further provides that a DPC shall assess the suitability of the Government servant coming within the purview of the circumstances mentioned in para 2 of the Office Memorandum No. 22011/4/91- Estt. (A) dated 14.09.1992, alongwith other eligible candidates, without taking into consideration the disciplinary case/criminal prosecution pending. No promotion can be withheld merely on the basis of suspicion or doubt or where the matter is under preliminary investigation and has not reached the stage of issue of charge sheet etc. If in the matter of corruption/derelection of duty etc., there is a serious complaint and the matter is still under investigation, the Government is within its right to suspend the official. In that case, the officer's case

for promotion would automatically be required to be placed in the sealed cover.”

14. In view of the aforesaid provisions of the OM dated 14th September, 1992, there can be no dispute that the case of the respondent was rightly placed in a sealed cover as he was admittedly under suspension on 17th June, 2015-which is one of the three embargoes stipulated in the OM dated 14th September, 1992. The question, therefore, is whether, in view of the admitted position that the chargesheet dated 24th October, 2016 already stands served on the Respondent on 17th November, 2016, a direction can now be given to the Petitioners to open the sealed cover, or whether the case of the Respondent would be covered by para 7 of the aforesaid OM dated 14th September, 1992. It is also an undisputed fact that, till date, the respondent has actually not been promoted. Another undisputed fact is that one of the circumstances mentioned in para 2 of the OM dated 14th September, 1992, has arisen on 24th October, 2016 by way of issuance of a chargesheet to him. Consequently, disciplinary proceedings against the respondent are underway. We find that there is a specific bar in the OM, which envisages that in such circumstances, where any of the situations mentioned in para 2 arises before the actual promotion of the government servant, he will not be promoted until he is completely exonerated of the charges against him. We are, thus, of the considered view that the claim of the respondent for opening the sealed cover or giving effect to the recommendations of the DPC is not at all sustainable and, in fact, the Tribunal in our view, has acted in a mechanical manner by simply

relying on the decision of the Supreme Court in the case of *Union of India Vs. Anil Kumar Sarkar (Supra)*, without considering the peculiar facts of that case.

15. Upon a careful consideration of the decision of the Supreme Court in the case of *Union of India Vs. Anil Kumar Sarkar (Supra)*, we also find that the same is not at all applicable to the facts of the present case. The said case related to a Government servant, in whose case both-on the date of DPC, and on the date of promotion of his juniors, the matter was still at a preliminary stage and neither any suspension order had been issued, nor any of the other conditions referred to in para 2 of the OM had been fulfilled. In these circumstances, the Supreme Court held that on the relevant date, no disciplinary proceedings were initiated or pending against the Government servant and, therefore, rejected the reliance placed by the Union of India on para 7 of the memorandum by observing that on the date of promotion of juniors, none of the circumstances referred to in para 2 of the memorandum had arisen. The Supreme Court in para 11 of the aforesaid judgment, observed as under:-

“11. As per paragraph 2 of the said memorandum, at the time of consideration of the Government servants for promotion, the following details of Government servants in the consideration zone for promotion falling in the categories mentioned should be specifically brought to the notice of the DPC, viz., (i) Government servant is under suspension; (ii) Government servant has been served with a charge sheet and the disciplinary proceedings are pending; and (iii) Government servant is facing prosecution for a criminal charge and the said proceedings are pending. As rightly

observed by the High Court, if the above conditions are available, even one of them, then the DPC has to apply the 'sealed cover process'. In the case on hand, it is not in dispute that the relevant date is 21.04.2003, when the respondent's batch mates were promoted, admittedly on that date the respondent was not under suspension, no charge sheet was served upon him nor he was facing any criminal prosecution. In such circumstances, in terms of paragraph 2 referred to above, the recommendation of the DPC has to be honored and there is no question of applying 'sealed cover process'."

16. We find that in the present case, the question is not whether the respondent's case was rightly placed under sealed cover on the date of the DPC, but as to whether it ought to have been opened, immediately upon revocation of his suspension. In our considered view, the said issue had not at all arisen in the case of ***Union of India Vs. Anil Kumar Sarkar (Supra)*** relied upon heavily by the Tribunal while allowing the OM. We are, therefore, of the view that the Tribunal has erred in allowing the OM by relying on the decision of ***Union of India Vs. Anil Kumar Sarkar (Supra)*** without appreciating that the issue involved in both cases, was slightly different. In doing so, the Tribunal has ignored the well settled principle that a decision is only an authority for what it actually decides. The Supreme Court has repeatedly emphasized that a decision cannot be relied on without disclosing the factual situation. In ***Bhavnagar University Vs. Palltana Sugar Mill (P) Ltd. & Ors. (2003) 2 SCC 111***, the Supreme Court observed as under:-

“59. It is also well settled that a little difference in facts or additional facts may make a lot of difference, in the precedential value of a decision.”

17. We have also considered the decision of the Supreme Court in the case of *Union of India Vs. K.V. Jankiraman (supra)* on which reliance has been placed by the learned counsel for the Respondent. We find that even this decision does not deal with the peculiar facts of the present case. The present case relates to an employee whose consideration was rightly placed under sealed cover when the DPC met on 17th June, 2015. The issue is, as to when the sealed cover should have been opened. Is it to be opened immediately upon the revocation of suspension, or is the employer justified in reasonably awaiting the outcome of the disciplinary proceedings. In our view, the decision of the Supreme Court in the case of *Union of India Vs. K.V. Jankiraman (supra)* does not at all support, the claim raised by the Respondent. We have also considered the decision of the Supreme Court in the case of *Union of India Vs. R.S. Sharma (supra)* relied upon by learned counsel for the Petitioners. We agree with the learned counsel for the Respondent that the said case relates to an earlier OM of 1988 and not to the OM dated 14th September, 1992, which is applicable to the case of the Petitioner. We are, therefore, refraining from examining the ratio of the said decision relied upon by the learned counsel for the Petitioner.

18. If the view of the Tribunal were to be upheld, it would mean that the respondent, who was under the cloud even when his

suspension was revoked, as the matter was pending consideration with the CVC, would stand rewarded, notwithstanding the fact that a chargesheet has been issued to him some time thereafter, for which he is admittedly facing a departmental inquiry. Neither the OMs dated 14th September, 1992 and 2nd November, 2012 nor the decisions of the Supreme Court, relied upon by the Respondent, supports his claim for opening of sealed cover at this stage.

19. In these circumstances, the impugned order dated 5th April, 2016, passed by the Tribunal is wholly unsustainable and is set aside.

The writ petition is allowed, without order as to costs.

(REKHA PALLI)
JUDGE

(VIPIN SANGHI)
JUDGE

OCTOBER 11th, 2017/aa.