IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14334 OF 2016

The Union of India and ors. ...Petitioners
Versus
Jhamman Singh ...Respondent

Ms Neeta V. Masurkar a/w. Mr. M.S. Bhardwaj and Ms Nieyaati V. Masurkar for the Petitioner.
Mr. L.S. Shetty a/w. M.M. Nair I/b L.S. Shetty and Associates of the Respondent.

CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.

DATE : 05.07.2018.

ORAL JUDGEMENT:

1] Heard learned counsel for the parties.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the judgment and order dated 27.08.2015 made by the Central Administrative Tribunal (CAT), Mumbai allowing O.A. No. 166 of 2013 instituted by the respondent. The operative portion of the impugned judgment and order reads as follows:

> *"68. Under such circumstances, the respondents are directed to consider the claim of applicant O.A. No.166/2003 for promotion/upgradation to the post of Deputy Commissioner (STS) in accordance with law and to grant notional benefits of pay fixation from the due date of promotion till the date of issuance of the charge sheet, being 28.08.2007. If the applicant is found otherwise fit for promotion, the respondents shall pass the order of promotion in the same terms and conditions of granting notional benefits from the date he became due for promotion till the date of issuance of charge sheet. His pay and pension also shall be refixed accordingly. The entire exercise shall be completed within twelve weeks from the date of receipt of this order. The O.A., accordingly, stand disposed of with the above directions."*

4] Ms Masurkar, learned counsel for the petitioners – UOI, submits that in 2010 when the DPC meet to consider the case of the respondent for promotion to the grade of Dy Commissioner (Senior Time Scale- STS), admittedly, charge-sheet dated 24.08.2007 had already been served upon the respondents. In such circumstances, following O.M. dated 14.9.1992, the recommendations concerning the respondent were rightly kept in a sealed cover. She points out that ultimately, penalty of withholding Rs.10,000/- per month from the pension of the respondent for a period of three years was imposed. Ms Masurkar submits that in such circumstances, there was nothing wrong in the DPC adopting the sealed cover procedure and considering that a penalty has ultimately been imposed upon the respondent, which penalty, has not even been challenged by the respondent, there can be no directions even to open such sealed cover. She submits that the CAT has misconstrued the O.M. dated 16.01.2007 containing BMB No. 190 of 2006 issued by the Central Board of Excise and Customs (CBEC) . She submits that this was not a case of mere upgradation, as held by the CAT, but rather, this was a case of promotion and therefore, the position as on the date of vacancy was relevant and not the position when the respondent, in terms of the rules, became eligible to be considered for promotion. Ms Masurkar submits that since this vital distinction has been missed by the CAT, the impugned judgment and order insofar as it concerns the respondent, warrant interference.

5] Mr. Shetty, learned counsel for the respondent, submits that the award of Senior Time Scale – STS does not strictly amount to a promotion but is a mere up-gradation upon completion of the qualifying service. He submits that there is no dispute whatsoever that the respondent completed the qualifying service in the year 2006 and therefore, had to be awarded STS in the year 2006 itself.

The issue of charge-sheet in the year 2007, was therefore, quite irrelevant to the issue of award of STS to the respondent in the year 2006 itself. Mr. Shetty submits that similarly, fortuitous circumstances that the DPC met so late in the year 2010, is also an irrelevant circumstance, because the DPC was required to consider the position as in the year 2006. Since, in the year 2006, there was no charge-sheet issued to the respondent, the DPC was not at all justified in seeking to adopt a sealed cover procedure. Mr. Shetty submits that position has been correctly appreciated by the CAT and there is no jurisdictional error or for that matter any error so as to warrant interference.

6] The rival contentions now fall for our determination.

7] There is no dispute that the decision of CBEC bind the departments which come under the purview of such board. Precisely in the context of award of Senior Time Scale - STS, the board, has issued a directives BMB No. 190 of 2006, which reads as follows:

"*BMB No. 190/06*

Issue in brief Date of effect for promotion to the grade of Deputy Commissioners (Senior Time Scale –

STS) – Four years of completion in the Junior Time Scale

Decision The issue regarding date of effect for promotion made to the grade of Deputy Commissioner (Senior Time Scale – STS) was discussed in the Board. It was noticed that the practice followed so far indicate that prior to 1997 Batch was granted STS benefit retrospectively w.e.f. the date of completion of four years in the Junior Time Scale (JTS). However, the 1997 Batch was granted STS benefit prospectively from 12.11.2002, even though the four year period expired earlier to this date.

The issue was discussed in the Board. It was felt that there are no differences in the work/ functions/powers between an Assistant Commissioner (JTS) and Deputy Commissioner (STS) and the promotions do not involve any transfers. <u>The earlier practice in the Department of granting STS from the date of completion of four years in JTS, as well as similar practice in other Services such as IRS (IT) would indicate that the grant of STS benefit has not been treated as promotion involving higher responsibilities. Grant of STS essentially involves upgradation of pay without any difference in terms of work/ functions / powers</u>. Accordingly, Board decided the following:

(i) <u>Senior Time Scale (STS) benefits in respect of 1997 and subsequent batch officers (whether direct recruits or promotees) may be made retrospective from the date when the officers completed four years in the JTS.</u>

(ii) <u>In case of promotee officers who have been promoted as Assistant Commissioners on ad hoc basis, the STS may be granted w.e.f. the date of completion of four years from their promotion to the JTS</u>.

(iii) In case of direct recruit officers who joined with a subsequent batch (by taking one year extension), the officer may be granted STS, in terms of Next Below Rule (NBR), from the date his immediate junior direct recruit officer is granted the STS.”

(emphasis supplied)

8] From the aforesaid, it is clear that the board has itself accepted that the grant of STS benefit is not to be treated as promotion involving higher responsibilities. Grant of STS essentially involves upgradation of pay without any difference in terms of work/ functions / powers. Accordingly, the decisions were taken by the board to award STS to officers no sooner they complete four years in the Junior Time Scale (JTS).

9] Admittedly, the respondent completed four years in JTS in the year 2006 itself and therefore, in terms of the decision of the board, was eligible for consideration for grant of STS in the year 2006 itself. Even though, the DPC, for this purpose may have actually met in the year 2010, such DPC was required to consider the position as on 2006 itself.

10] In ***Union of India and ors. vs. Vipinchandra H. Shah – (1996) 6 SCC 721,*** the Hon'ble Supreme Court has held that unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State

Civil Service officers who fulfill the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed. The failure on the part of Selection Committee to meet during a particular year would not dispense with the requirement of preparing the select list for that year. If for any reason the Selection Committee is not able meet during a particular year, the Committee when it meets next, should, while making the selection, prepared a separate list each year keeping in view the number of vacancies in that years after considering the State Civil Service Officers who were eligible and fall within the zone of consideration for selection in that year. Therefore, the fact that the DPC met in the year 2010, does not mean that the DPC was absolved from considering the position as it existed in the year 2006, which was relevant year for consideration as to whether the respondent could be granted STS or not.

11] Admittedly, as in the year 2006, there was no charge-sheet issued to the respondent. Therefore, there was no question of DPC, adopting the sealed cover procedure as contemplated in the OM dated 14.09.1992.

12] Ms Masurkar did contend that even though the charge-sheet may have been issued only on 24.08.2007, even prior to the said date, vigilance enquiries had already commenced and therefore, there was nothing wrong in the DPC adopting sealed cover procedure even assuming that date relevant for consideration ought to have been in the year 2006 itself.

13] Apart from the fact that there is no clear material in support of the aforesaid contentions, in terms of the law laid down by the Hon'ble Supreme Court in ***Union of India and ors. vs. K. V.Jankiraman and ors. - (1991) 4 SCC 109***, the sealed cover procedure is to be resorted to only after the charge memo or that the charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be suffice to enable the authorities to adopt the sealed cover procedure. Therefore, we are unable to accept Ms Masurkar's contention.

14] In regard to Ms Masurkar's contention, the law laid down in paragraph 16 of *K.V. Jankiraman (supra)* affords a complete answer. The same reads as follows:

> *“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. <u>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.</u> The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. .....”.*
>
> *(emphasis supplied)*

15] Ms Masurkar also attempted to rely upon the ruling of the Hon'ble Supreme Court in ***Union of India and ors vs. Sangram Keshari Nayak – (2007) 6 SCC 704,*** which was in fact, a ruling relied upon by the respondent in his affidavit-in-reply. On the basis of a stray sentence in paragraph 11 of the said ruling, Ms Masurkar contends that if on the date the DPC meets, there is already a charge-sheet, then, sealed cover procedure has to be adopted. Paragraph 11 of *Sangram Nayak (supra)* reads thus:

> "*11. Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within it's purview an effective, purposeful and meaningful consideration. Suitability or otherwise of the candidate concerned, however, must be left at the hands of DPC, but the same has to be determined in terms of the rules applicable therefor. Indisputably, the DPC recommended the case of the Respondent for promotion. On the day on which, it is accepted at the bar, the DPC held it's meeting, no vigilance inquiry was pending. No decision ws also taken by the employer that a departmental proceedings should be initiated against him*".
>
> *(emphasis supplied)*

16] The fact in the case of *Sangram Nayak (supra)* are totally different. The issue involved in the present case was not the issue involved in the said case. In any case, on the basis of their observation completely torn out of the context, Ms Masurkar cannot in any manner advance the case of the petitioners.

17] Since, in 2006, there was no charge-sheet, issued to the respondent and since, 2006 was the relevant date for considering the case of the respondent for grant of Senior Time Scale- STS, we see no jurisdictional error in the view taken by the CAT in the impugned judgment and order insofar as the respondent is concerned.

18] No doubt, it is true that later on, a penalty of withholding of Rs.10,000/- per month from out of the respondent's pension, for a cumulative period of three years came to be imposed upon the respondent. There is no challenge to such a penalty. Such a penalty can and will continue to run its course, if, such course, has already not been completed. Therefore, this subsequent development is not at all a good ground to deprive the respondent the limited benefits granted by the CAT by the impugned judgment and order.

19] Upon cumulative consideration of the aforesaid circumstances, we see no good ground to interfere with the impugned judgment and order insofar as it concerns the respondent. Accordingly, the petition is dismissed. Rule is discharged. There shall be no order as to costs.

(M.S. SONAK, J.) **(ACTING CHIEF JUSTICE)**