* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 11.03.2025
Pronounced on: 21.04.2025

\+ W.P.(C) 4553/2021
SANJAY YADAV .....Petitioner
Through: Dr.S.S. Hooda and Mr.Aayushman Aeron, Advs.

versus

UNION OF INDIA & ANR. .....Respondents
Through: Mr.Raj Kumar Yadav, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
HON'BLE MR. JUSTICE TEJAS KARIA

J U D G M E N T

NAVIN CHAWLA, J.

1. This petition has been filed by the petitioner, challenging the Order dated 01.11.2019 passed by the respondent no.2 to the extent that it did not grant the benefit of Non-Functional Financial Upgradation (NFFU) to the petitioner. The petitioner further challenges the Order dated 19.02.2021 by which his representation against the refusal to grant NFFU was rejected. The petitioner prays that he be granted NFFU with effect from 01.01.2019.

Case of the Petitioner:

2. To put it briefly, it is the case of the petitioner that the petitioner joined the Border Security Force (in short, 'BSF') in the rank of Assistant Commandant (DE) on 01.10.1987, and was promoted to the rank of Deputy Inspector General (DIG) with effect from 26.06.2012.

3. The respondent no.1 notified the Non-Functional Financial Upgradation Scheme *vide* DoPT O.M. No. AB.14017/64/2008-Estt.(RR) dated 24.04.2009. The Paragraph 5 of the Annexure I to the said O.M. states that all instructions concerning grant of Non-Functional Upgradation presently applicable in the case of grant of Non-Functional Selection Grade (NFSG) to officers of Group 'A' Services would apply in the event of penalty, disciplinary proceedings, suspension, etc. The petitioner claims that with respect to grant of NFSG benefits, the conditions with respect to penalty, disciplinary proceedings, suspension, etc., are *pari materia* to the conditions stipulated by the O.M. No.22011/4/91-Estt.(A) dated 14.09.1992, which in turn prescribes that a sealed cover procedure for purposes of promotion can be adopted by the DPC only in the following three circumstances:

a) where the officer is under suspension;
b) where a charge sheet has been issued and the departmental proceedings for disciplinary action are pending;
c) where prosecution for a criminal charge is pending in a Court of Law.

4. Returning to the facts of the present case, a Staff Court of Inquiry (in short, 'SCOI') was ordered against the petitioner herein *vide* Order dated 06.11.2018 issued by Inspector General (HR & LOG) Command HQ (Spl Ops), on the basis of a complaint made by Const. Bhupender Sharma. The SCOI proceedings were concluded and provisions of Rule 173 (8) of the Border Security Force Rules, 1969, were complied with, and disciplinary proceedings were

thereafter contemplated to be initiated against the petitioner. However, before the disciplinary proceedings could be initiated, the respondents issued the Impugned Order dated 01.11.2019, *vide* which the NFFU was granted to various other personnel but not to the petitioner. A charge sheet for the General Security Force Court (in short, 'GSFC') was finally issued to the petitioner on 10.02.2020. On the same day, the petitioner also preferred a representation to the Director General, BSF seeking grant of NFFU, which came to be rejected by the Order dated 19.02.2021 passed by the respondent no.2 stating that the Internal Screening Committee has placed the case of the petitioner for grant of NFFU in a sealed cover.

5. The learned counsel for the petitioner reiterates that the sealed cover procedure can be followed by the Internal Screening Committee only in the three limited circumstances as stipulated in the O.M. dated 14.09.1992 and the Judgment of the Supreme Court in ***Union of India & Ors. v. K.V Jankiraman & Ors.***, (1991) 4 SCC 109. He submits that as in the present case, as on the date of the consideration by the Internal Screening Committee, that is, 17.10.2019, none of the above three circumstances were in existence, therefore, the Internal Screening Committee could not have resorted to sealed cover procedure for the petitioner.

<u>Case of the Respondents:</u>

6. On the other hand, it is the case of the respondents, and as has also been submitted by the learned counsel appearing for the respondents, that on a written complaint from Const. (GD) Bhupender

Sharma of 125 Bn. BSF, alleging that the petitioner was employing him and other BSF personnel at Agra/Lucknow (U.P.) for looking after his under construction house and not giving the expenditure amount incurred for the same and was also harassing and threatening them, the same was inquired through 2IC (Vigilance) FTR HQ (Spl Ops) Chhattisgarh and the Field Vigilance Team, FHQ, BSF, New Delhi. The complaint was found to have substance, and therefore, an SCOI was ordered, *vide* Order dated 06.11.2018. The SCOI found the petitioner blame-worthy and the ADG (Spl Ops) ANO (Anti Naxal Operations) directed, *inter alia*, disciplinary action to be taken against the petitioner. In the meantime, the petitioner's case was considered for grant of NFFU by the Internal Screening Committee, and as the petitioner was found blame-worthy by the SCOI and a disciplinary action was contemplated against him, the Screening Committee decided to keep its findings in a sealed cover with the remark that further action in this regard will be taken once the disciplinary action pending against the petitioner is finalized. The claim of the petitioner for NFFU was, therefore, kept in abeyance. Subsequently, charge sheet dated 10.02.2020 was issued to him, and the petitioner has been found guilty of two out of three charges leveled against him, and has been sentenced with the following punishment by the GSFC:

> *"(i) to take rank and precedence as if his appointment as Deputy Inspector General bore the date 26th day of June 2017, and,*
> *(ii) To be severely Reprimanded"*

7. The said Order has been confirmed on 10.11.2021 by the Confirming Authority, and the sentence was promulgated on 12.11.2021.

8. The learned counsel for the respondents, placing reliance on the Judgment of the Supreme Court in ***UOI & Anr. v. S. K. Goel & Ors.***, (2007) 14 SCC 641, submits that a DPC enjoys full discretion to devise its own methods and procedures for objective assessment of suitability and merit of the candidate(s) being considered by it. Such assessment should not be interfered with by the Court as it does not have the necessary expertise to undertake the exercise that is necessary for such purpose.

9. Placing reliance on the Judgment of the Supreme Court in ***KV Janakiraman*** (supra), he submits that an employee has no right to promotion but only a right to be considered for the same. The minimum expected standard for the same is that he/she should not be found guilty of misconduct. The entire record has to be taken into consideration for such determination. He reiterates that in the present case, as the petitioner has been eventually found guilty of two charges and has been sentenced for the same by the GSFC, he is not entitled for the grant of NFFU.

Analysis and Findings:

10. We have considered the submissions made by the learned counsels for the parties.

11. By the DoPT O.M. No. AB.14017/64/2008-Estt.(RR) dated 24.04.2009, accepting the recommendations of the 6th Central Pay

Commission, scheme for grant of higher pay scale on non-functional basis to officers of Organized Group 'A' Services was stipulated. It was further stipulated in Paragraph 5 of Annexure-I to the above O.M. as under:

> *"5. All instructions concerning grant of non-functional up-gradation presently applicable in the case of grant of NFSG to officers of Group 'A' Services would apply in the event of penalty, disciplinary proceedings, suspension etc."*

12. As far as the grant of NFSG is concerned, it was governed by the O.M. No. 22038/1/2002 – Estt (D) dated 08.01.2003 which, *inter alia*, provided as under:

> *"2. It is clarified that the Internal Selection Committee, while considering the issue of grant of NFSG in accordance with the criteria laid down in this Department's O.M. no. 28038/1/88-Estt D dated the 9th October, 1989, shall also place the recommendations for grant of NFSG in a sealed cover, if the Officer (s) concerned are covered by any of the following three situations as on the 1st January of the relevant calendar year in which the case of the concerned officers matures for grant of NFSG, unless such meeting is held in advance of the relevant year in which case the date of the meeting of the Internal Selection Committee will be relevant:*
>
> *a) Where the officer is under suspension;*
> *b) Where a charge sheet has been issued and the departmental proceedings for disciplinary action are pending; and*
> *c) Where prosecution for a criminal charge is pending in a court of law."*

13. A reading of the above would show that it is only where the officer is under suspension or where a charge sheet has been issued

and the departmental proceedings for disciplinary action are pending or where prosecution for a criminal charge is pending in a Court of Law, that the Internal Screening Committee can place its recommendation for the officer in a sealed cover. This is in consonance with the Judgment of the Supreme Court in ***K.V Jankiraman*** (supra) wherein it was held as under:

> *"**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. 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. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p. 196, para 39)

> ***"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;***
> ***(2) ******
> ***(3) ******
> ***(4) the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed before the criminal court and not before;"***

17.** There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other.* ***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. Thus read, there is no inconsistency in the two conclusions."*

(Emphasis Supplied)

14. Applying the above to the facts of the present case, as on the date of the Meeting of the Internal Screening Committee, that is, 17.10.2019, none of the above three situations, which could lead to the sealed cover procedure to be adopted, existed. The Internal Screening Committee, therefore, erred in adopting the sealed cover procedure in violation of the above-referred Office Memorandums and the Judgment of the Supreme Court.

15. As far as the submission of the learned counsel for the respondents that subsequently the petitioner has been found guilty and has been sentenced by the GSFC, is concerned, the same can have no relevance as regards the incorrect adoption of the sealed cover procedure by the Internal Screening Committee. On the date of the meeting/recommendations of the Internal Screening Committee, there was no disciplinary proceedings pending against the petitioner, leave alone a finding of guilt or punishment being awarded to him.

16. Similarly, though there can be no dispute to the submission of the learned counsel for the respondents that the Internal Screening Committee, for making its assessment of an officer, may adopt its own procedure, at the same time, it cannot act against the instructions issued by the government through the Office Memorandums and the applicable law, which permit adoption of the sealed cover procedure only in the event of either of the three circumstances mentioned hereinabove existing. The Internal Screening Committee could have, if law permitted, rejected the case of the petitioner for grant of the NFFU, however, could not have adopted the sealed cover procedure.

17. In view of the above, the adoption of the sealed cover procedure by the Internal Screening Committee for the petitioner, cannot be sustained. The respondents are directed to open the sealed cover and act in accordance with the recommendations contained therein. In case, the petitioner is found entitled to the grant of the NFFU, consequential orders for the same shall be passed by the respondents within a period of eight weeks from today and the monetary benefit shall be released to the petitioner in accordance with law, within the same period and alongwith interest at the rate of 6% per annum from the date the petitioner was entitled to the said benefit.

18. The petition is disposed of in the above terms. The parties shall bear their own costs.

NAVIN CHAWLA, J

TEJAS KARIA, J

APRIL 21, 2025/SG/*VS*