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(2013) 04 AHC CK 0308

Allahabad High Court (Lucknow Bench)

Case No: Writ Petition No. 2183 (S/S) of 2011

Asha Verma	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision: April 18, 2013

Acts Referred:

- Constitution of India, 1950 - Article 14, 226

Citation: (2013) 5 ALJ 329

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: A.M. Tripathi and Anurag Srivastava, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Anil Kumar, J.
Heard Shri. Anurag Srivastava, learned counsel for the petitioner, Shri. Pankaj Patel, learned Addl. Chief Standing Counsel and perused the record. Facts in brief of the present case are that on 12.8.1985, petitioner was appointed on the post of Supervisor in Bal Vikas Sewa Evam Pushtahar, Department, U.P., Lucknow (hereinafter referred to as the department).

2. While she was working and discharging her duties on the post of Mukhya Sewika, posted at Sirauli Gauspur, District-Barabanki, placed under suspension. So, for redressal of her grievances, approached this Court by filing Writ Petition No. 3734 (SS) of 2009 "Asha Verma v. State of U.P. & Ors." On 19.6.2009, an interim order has been passed, on reproduction reads as under:--

Heard Mr. A.M. Tripathi, learned counsel for the petitioner as well as learned Standing Counsel.

Through the present writ petition the petitioner has challenged the order dated 5.5.2009 passed by opposite party No. 2, whereby she has been placed under suspension.

Learned counsel for the petitioner submits that the charges levelled against the petitioner are absolutely vague. I find force in his submission.

Therefore, I hereby stay the operation of the order dated 5.5.2009 passed by opposite party No. 2 till further orders of this Court. However, the enquiry may go on.

3. On 3.9.2009, the official respondent has issued an order for conducting Departmental Promotion Committee (D.P.C.) for promotion on the post of Child Development Project Officer and in pursuance of the same, D.P.C. took place on 8/9.6.2009 for promoting from the post of Mukhya Sewika to the Child Development Project Officer in which the case of the petitioner along with other eligible were considered.

4. On 7.9.2009, the promotion order has been issued by the competent authority, on the basis of the recommendation of the D.P.C., but the name of the petitioner does not figure in the list/order by which the persons have been promoted from the post of Mukhya Sewika to the Child Development Project Officer in the department.

5. Aggrieved by the said facts, the petitioner made a representation to the opposite party No. 2/Director, Bal Vikas Sewa Evam Pushtahar, U.P., Lucknow, but no heed paid. Hence, she approached this Court by filing Writ Petition No. 5894 (SS) of 2009. On 16.9.2009, an order was passed thereby directing the competent authority to consider and decide the petitioner''s representation.

6. By order dated 5.1.2010 (Annexure No. 1), opposite party No. 2 has rejected the petitioner''s representation that she is not entitled for promotion, the relevant portion is quoted herein below:--

(Vernacular matter omitted.... Ed.)

7. Thereafter, order dated 18.8.2010 passed by opposite party No. 1/Principal Secretary, Manila Evam Bal Vikas, Government of U.P., Civil Secretariat, Lucknow by which censure entry has been awarded to the petitioner. Aggrieved by the order dated 5.1.2010 and 18.8.2010 passed by opposite party Nos. 2 and 1 respectively, the petitioner filed the present writ petition.

8. Shri. Anurag Srivastava, learned counsel for the petitioner, as per the instructions received to him, submits that the petitioner does not want to press the relief No. 2 by which she has claimed for quashing the order dated 18.8.2010 (Annexure No. 2) passed by opposite party No. 1 and petitioner may be permitted to raise her grievances in respect

to the said relief before the appropriate forum later on.

9. Shri. Pankaj Patel, learned Addl. Chief Standing Counsel has no objection to the above said request.

10. Accordingly, So far the matter relates to quashing of the order dated 18.8.2010 (Annexure No. 2) passed by opposite party No. 1 is concerned, the same is not adjudicated and decided at this stage in the instant petition, further as prayed, the petitioner is permitted to raise the said grievance before the appropriate forum, if so advised.

11. Shri. Anurag Srivastava, learned counsel for the petitioner has challenged the impugned order dated 5.1.2010 (Annexure No. 1) passed by opposite party No. 2 on the ground that the same is illegal and arbitrary in nature as when the D.P.C. took place on 8/9.6.2009, the charge-sheet has not been issued to the petitioner, so, the action on the part of the Committee (D.P.C.) to keep the case of the petitioner in sealed cover is an exercise which is arbitrary in nature as well as violative of Article 14 of the Constitution of India as in respect to the matter relating suspension, the petitioner has filed Writ Petition No. 3734 (SS) of 2009 "Asha Verma v. State of U.P. & Ors." in which by an order dated 19.6.2009 the suspension order has been stayed.

12. In support of his contention, learned counsel for the petitioner has placed reliance on the judgment given in the case of Union of India Vs. K.V. Jankiraman, etc. etc., and also on the judgment given by a Division Bench of this Court in Writ Petition No. 293 (SB) of 2010 "Dr. Shailesh Kumar Srivastava v. State of U.P. & Ors. (Reported in 2010 (4) ALJ (NOC) 423". as well as on a Division Bench judgment passed in Writ Petition No. 538 (SS) of 2010 "Dr. Bhudeo Singh v. State of U.P.". Accordingly, learned counsel for the petitioner requests that the impugned order dated 5.1.2010 (Annexure No. 1) passed by opposite party No. 2 is contrary to law, liable to be set aside.

13. Shr. Pankaj Patel, learned Addl. Chief Standing Counsel, in rebuttal, submits that in the present case, the petitioner has been placed under suspension by order dated 5.5.2009 against which he has filed Writ Petition No. 3734 (SS) of 2009 in which an interim order has been passed by which the suspension order has been kept in abeyance.

14. Thereafter, D.P.C. for promoting the persons from the post of Mukhya Sewika to the Child Development Project Officer in the department has taken place on 8/9.6.2009 and the case of the petitioner has been considered and kept in sealed cover by D.P.C. as her matter relating to the suspension is subjudice before this Court, so the said action on the part of the D.P.C. is in accordance with law as laid down by Hon"ble the Apex Court in the case of Food Corporation of India and Another vs. Abhay Ram, (2002) 10 SCC 455 . Hence, the further action on the part of the opposite party No. 2 to pass the impugned order is perfectly valid and in accordance with law. In this regard, he has also placed

reliance on the judgment given by Hon"ble the Apex Court in the case of Union of India Vs. Kewal Kumar, , where it has been held as under:--

Para 2 - The question in the present case, is: Whether the decision in Jankiram was correctly applied in the present situation? In Jankiram itself, it has been pointed out that the sealed cover procedure is to be followed where a Government Servant is recommended for promotion by the D.P.C., but before he is actually promoted if "he is either placed under suspension or disciplinary proceedings are taken against him or a decision has been taken to initiate the proceedings or criminal prosecution is launched or sanction for such prosecution has been issued or decision to accord such sanction is taken". Thus, the sealed cover procedure is attracted even when a decision has been taken to initiate disciplinary proceedings, or "decision to accord sanction for prosecution is taken" or criminal prosecution is launched or...decision to accord sanction for prosecution is taken". The object of following the sealed cover procedure has been indicated recently in the decision in Civil Appeal No. 1240 of 1993 - Delhi Development Authority Vs. H.C. Khurana, , and need not be reiterated.

15. Lastly it is submitted by Shri. Pankaj Patel, learned Addl. Chief Standing Counsel that the action on the part of Committee to keep the case of the petitioner in sealed cover is in accordance to the paragraph No. 2 of the Government Order dated 28.5.1997, quoted herein below:--

(Vernacular matter omitted.... Ed.)

16. Accordingly, he submits that there is no illegality or infirmity on the part of the D.P.C. to consider the case of the petitioner and keep in sealed cover on the ground that the petitioner has been placed under suspension prior the date when D.P.C. has took place. So, the present writ petition lacks merit, liable to be dismissed.

17. I have heard learned counsel for the parties and gone through the records.

"Promotion" as it is understood in service jurisprudence is advancement in rank or grade or both. Promotion is always a step forward towards a higher position and power.

18. Promotion is a positive act of elevation in status conveyed by employer by a written order issued in favour of the person promoted and communicated to him. It entails duties of higher responsibilities. It must satisfy the test of a selection, in the manner prescribed either in the statue, administrative instructions or Service Commission.

19. It is also settled position that there is no right to promotion. But, an employee has a right to be considered for promotion if he satisfies the prescribed or required eligibility conditions. It creates a right to higher pay commensurate with the duties of the promotion post, as declared by the Government. It is immaterial how long the promotion post is held.

20. Further, Constitution of Departmental Promotion Committees are made in accordance of the provisions contained in the relevant recruitment Rules. The principle function of this Committee is assessment of inter se merits of the eligible candidates for promotion.

21. And, Idea of sealed cover is to avoid promoting a public servant who is being considered unfit for promotion on account of existence of a prima facie case of grave misconduct that is fit to be inquired into against him. So that a person who is to be immediately punished is not given an unwanted promotion, a device called "sealed cover procedure" has been invented. The fundamental right of consideration for promotion is satisfied when his case is forwarded to the D.P.C. for consideration and the D.P.C. considers his eligibility, merit and fitness without being influenced by the fact of a pending inquiry. At the same time, by keeping the recommendation of the D.P.C. under "sealed cover" the interest of the employer (not to promote a person under cloud) is also satisfied. "Sealed cover procedure" is an unique discovery of the executives.

21A. In The State of Madhya Pradesh Vs. Bani Singh and another, , the Supreme Court made the position clear. The respective rights of the employer and the employee was succinctly demarcated there thus:

If the departmental enquiry had reached the stage of framing of charges after a prima facie case has been made out, the normal procedure followed as mentioned by the Tribunal was sealed cover procedure; if the disciplinary proceedings had not reached that stage of framing of the charge after prima facie case is established the consideration for the promotion to a higher or selection grade cannot be withheld merely on the ground of pendency of such disciplinary proceeding.

22. In the case of Union of India Vs. K.V. Jankiraman, etc. etc., , that it is only when 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 before that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure.

23. The Constitution Bench in B.C. Chaturvedi Vs. Union of India and others, has settled the law that depending on the gravity, authorities may either adopt the sealed cover procedure or grant (interim) promotion, subject to the result of the disciplinary proceedings. In that case a plea was taken that as the appellant was promoted only recently he could not be proceeded against in a departmental proceeding and imposition of any penalty was unlawful. The Court settled the issue, thus:

8. It is true that pending disciplinary proceeding, the appellant was promoted as Assistant Commissioner of Income Tax. Two courses in this behalf are open to the competent authority, viz., sealed cover procedure which is usually followed, or promotion, subject to

the result of pending disciplinary action. Obviously, the appropriate authority adopted the latter course and gave the benefit of promotion to the appellant. Such an action would not stand as an impediment to take pending disciplinary action to its logical conclusion. The advantage of promotion gained by the delinquent officer would be no impediment to take appropriate decision and to pass an order consistent to the finding of proved misconduct.

24. Recently in the case of The Union of India (UOI) and Others Vs. Anil Kumar Sarkar, after placing the reliance on the judgment given by Hon''ble the Apex Court in the case of Union of India Vs. K.V. Jankiraman, etc. etc., has held as under:--

Para 13 - It is not in dispute that an identical issue was considered by this Court in Union of India Vs. K.V. Jankiraman, etc. etc., . The common questions involved in all those matters were:--

(1) What is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee?

(2) What is the course to be adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? and

(3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date?. Among the three questions, we are concerned about question No. 1. As per the rules applicable, the "sealed cover procedure" is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over. Inasmuch as we are concerned about the first question, the dictum laid down by this Court relating to the said issue is 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 chargesheet 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.

In para 17, this Court further held:

17. ...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 chargememo/charge-sheet has already been issued to the employee....

After finding so, in the light of the fact that no chargesheet was served on the respondent-employee when the DPC met to consider his promotion, yet the sealed cover procedure was adopted. In such circumstances, this Court held that "the Tribunal has rightly directed the authorities to open the sealed cover and if the respondent was found fit for promotion by the D.P.C., to give him the promotion from the date of his immediate junior Shri M. Raja Rao was promoted pursuant to the order dated April 30, 1986. The Tribunal has also directed the authorities to grant to the respondent all the consequential benefits....We see no reason to interfere with this order. The appeal, therefore, stands dismissed." The principles laid down with reference to similar office memorandum are applicable to the case on hand and the contrary argument raised by the appellant-Union of India is liable to be rejected.

Para 15 - In Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others, , this Court held as under:

27. There can be no quarrel with the settled legal proposition that the disciplinary proceedings commence only when a charge-sheet is issued to the delinquent employee. (Vide Union of India Vs. K.V. Jankiraman, etc. etc., and UCO Bank and Another Vs. Rajinder Lal Capoor,).

We also reiterate that the disciplinary proceedings commence only when a chargesheet is issued. Departmental proceeding is normally said to be initiated only when a charge sheet is issued.

25. As per the admitted facts of the present case, the petitioner was placed under suspension by order dated 5.5.2009 passed by opposite party No. 2, challenged by filing Writ Petition No. 3734 (SS) of 2009 "Asha Verma v. State of U.P. & Ors." and by order dated 19.6.2009, suspension order has been stayed till further orders with a direction to conduct the enquiry.

26. Subsequently, by order dated 3.9.2009, a Departmental Promotion Committee has constituted, took place on 8/9.6.2009 for promoting the persons from the post of Mukhya Sewika to the Child Development Project Officer, the D.P.C. considered the case of the petitioner but put in sealed cover.

27. Thus, in order to decide the controversy involved in the present case, I feel appropriate to consider the meaning of the word "stay order" first.

28. In the law Lexicon (at page 180) "stay order" is defined as under:--

The stay of operation of an order only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, (Constitution of India, Art. 226)

29. In Words and Phrases (permanent Edition) Vol 40 page 374, the "stay order" is defined as"

A "stay order" or a "stay of proceedings," is a stopping, the act of arresting a judicial proceeding by the order of a court or the temporary suspension of the regular order of proceedings in a cause by direction or order of the court.

30. Hon"ble the Supreme Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , has interpreted the word stay order in the following terms:--

While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.

31. Hon"ble the Apex Court in the case of Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, explained the meaning of the word stay order as under--

It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim order of the court.

32. Hon"ble the Apex Court in the case of B.P.L. Ltd. and Others Vs. R. Sudhakar and Others, , after placing reliance on its earlier judgment in the case of Ravi S. Naik and Sanjay Bandekar Vs. Union of India and others, , in para No. 14 held as under:--

Dealing with the staying of the operation of the order of disqualification, passed by the Speaker of the Assembly in regard to two members of the House, this Court held that the order of disqualification made by the Speaker dated 13.12.1990 was not operative and consequently it could not be said that they were not members of Goa Assembly. The Court, looking to the terms of the interim order and its effect on the disqualification of the members on the relevant date, held, it is settled law that an order, even though interim in nature, is binding till it is set aside by a competent court". Similarly, in the present case also looking to the terms of the interim order granted by the High Court staying the very operation of order of reference it could not be said that dispute was pending before the Tribunal on the relevant date, viz., the date on which the workmen were dismissed from service." (see State of Gujarat and Others Vs. Dilipbhai Shaligram Patil, and Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others, .

33. Thus, the position which is emerged out is that by merely passing of a stay order the operation of the order which is under challenge is kept in abeyance/non-operative from the date when the stay order is passed but it does not mean that the effect of the said order is nullified or wiped out and stay order finally merged in the final decision given in the matter in question in which the same is passed.

34. Keeping in view the said facts as well as the law as laid down by Hon"ble the Supreme Court in the case of Food Corporation of India and Another vs. Abhay Ram, (2002) 10 SCC 455 as under:--

Para 4 - It is contended by the learned counsel appearing for the appellant that the office memorandum dated 14.9.1992 clearly provides for the procedure to be adopted by the Departmental Promotion Committee in case where the servant is under suspension or the servant in respect of whom a charge-sheet has been issued and the disciplinary proceedings are pending and the servant against whom prosecution is there or a criminal charge is pending. This being the position on 23.5.1997, the appropriate authorities having placed the respondent employee under suspension, there was no infirmity with the sealed cover procedure adopted by the Departmental Promotion Committee and the High Court, therefore, was fully in error in directing the employer to open the sealed cover and implement the decision taken by the Departmental Promotion Committee.

Para 5 - According to the learned counsel, the procedure adopted by the Departmental Promotion Committee in the present case by putting the decision in a sealed cover is quite in consonance with the principles enunciated by this Court in issuing the impugned direction.

Para 6 - The learned counsel for the appellant also placed reliance on the decision of this Court in Union of India Vs. Kewal Kumar, .

Para 7 - Having heard the learned counsel for the appellant and having examined the materials on record, we have no hesitation to come to the conclusion that the High Court was totally in error in issuing the impugned direction requiring the employer to open the sealed cover and to implement the decision taken in the sealed cover. Be it stated that in the meantime, the disciplinary proceeding has culminated in finding the guilt of the respondent and inflicting certain punishments therefor.

35. As, in the instant case, it is not in dispute that the petitioner has been placed under suspension by order dated 5.5.2009 against which he filed Writ Petition No. 3734 (SS) of 2009 in which by order dated 19.6.2009, the same has been stayed. Thereafter, D.P.C. took place on 8/9.6.2009 for promoting the persons from the post of Mukhya Sewika to Child Development Project Officer, D.P.C. in which the case of the petitioner has been considered and kept in sealed cover. Thereafter, the impugned order dated 5.1.2010 (Annexure No. 1) has been passed by the opposite party No. 2/Director Bal Vikas Sewa Evam Pushtahar, U.P., Lucknow on the ground that the petitioner has been placed under suspension pending enquiry, so neither the action on the part of the Departmental Promotion Committee to consider and keep the case of the petitioner in a sealed cover nor the order dated 5.1.2010 (Annexure No. 1) passed by opposite party No. 2 are illegal exercise, rather the same are in conformity to law as laid down by Hon''ble the Supreme Court in the case of Food Corporation of India and Another vs. Abhay Ram, (2002) 10 SCC 455 as well as Clause 2(a) of the Government Order dated 28.5.1997. In the result, the writ petition lacks merit and is dismissed with the observations as made herein above.