

(2011) 02 DEL CK 0436

Delhi High Court

Case No: Writ Petition (C) 6536 of 2010

R.R. Sahay

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: Feb. 7, 2011

Hon'ble Judges: Suresh Kait, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: Ravi Shankar Prasad and Shishir Pinaki, in W.P. C 6536/2010, Jyoti Singh and Amandeep Joshi, in W.P. C 2124/2010, for the Appellant; Sarabjeet Sharma in W.P. (C) 6536/2010, A.K. Bhardwaj, Anuj Aggarwal and Gaurav Khanna, in W.P. (C) 2124/2010, for the Respondent

Judgement

Pradeep Nandrajog, J.

Though with completely different factual background, the two writ petitions are being decided by a common judgment for the reason the issue of law which arises for consideration in the two writ petitions is the same.

2. Facts pertaining to the case of Sh.R.R. Sahay are that having joined service under Central Industrial Security Force (CISF) he earned promotions and rose to the rank of Deputy Inspector General and as of the year 2010 not only became eligible to be considered for promotion to the next higher post i.e. the post of Inspector General but even came within the zone of consideration for the two vacancies which were anticipated to fall due in the year 2010.

3. Completing the procedural formalities and noting that no vigilance inquiry was pending against him, name of Sh.R.R. Sahay was considered at a Departmental Promotion Committee which met on 28.6.2010. The Committee opined that he was fit for promotion and thus placed his name at serial No. 2 in the select panel for the reason one Mr. R.R. Bhardwaj, Deputy Inspector General and senior to Sh.R.R. Sahay was also found fit for promotion.

4. The panel, consisting of two names, with that of Sh.R.R. Bhardwaj at serial No. 1 and that of Sh.R.R. Sahay at serial No. 2 was sent for approval of the Appointment Committee of Cabinet and learned Counsel for the parties were not at variance that as per the Rules of Appointment/Promotion recommendations of Departmental Promotion Committee had to be approved by the Appointment Committee of Cabinet before the same could be given effect to.

5. The Appointment Committee of Cabinet gave the necessary approval on 16.8.2010. By that date one out of the two anticipated vacancies to the post of Inspector General had already fallen due and thus on 16.8.2010 itself an order granting promotion to Sh.R.R. Bhardwaj was issued.

6. The second anticipated vacancy, due to the superannuation of Sh.D.S. Badwal, Inspector General, fell due on 31.8.2010 i.e. the date on which Sh.D.S. Badwal superannuated.

7. Sh.R.R. Sahay was expecting an order to be issued promoting him to the post of Inspector General which fell due on 31.8.2010, but found to his dismay that no such order was issued.

8. The reason why the order promoting him was not issued was a reference made to the Ministry of Home Affairs, whether or not Sh.R.R. Sahay should be promoted on account of the fact that the department took serious note of the fact that he proceeded on casual leave for 5 days with effect from 4.7.2010 but did not report for duty on 12.7.2010 and kept on informing that he was unwell. As per the department, Petitioner was holding the charge of Deputy Inspector General (Special Security Group) and (Government Building Security); an Important Security Assignment for the reason the Special Security Group looks after the security of protected persons placed in Category, X, Y and Z and the Government Building Security Unit manages the security of 49 government buildings in Delhi and on account of the Commonwealth Games to be held in Delhi in October 2010 the Petitioner was directly incharge of the operational preparedness of the men working under him. It was opined that the attitude of the Petitioner showed poor leadership qualities casting a doubt on his ability to shoulder the responsibilities of an Inspector General. It was also noted that once in the past also the Petitioner had likewise overstayed sanctioned leave for which he was warned.

9. The counter affidavit was filed on 20.10.2010 and when the writ petition was heard on 6.1.2011 the Court was informed that the Government has concurred in promotion not being granted to Sh.R.R. Sahay and that a decision has been taken to initiate disciplinary proceedings against him.

10. It is apparent that the legal issue which arose for consideration and was debated at the bar was: Whether a Government servant can be denied promotion for a stated misdemeanour allegedly committed after the Departmental Promotion Committee has met and given its recommendations finding the Government

Servant fit for promotion, which recommendations are accepted by the Competent Authority, but before a vacancy is available for promotion, the Government Servant comes under a cloud.

11. Facts pertaining to the case of Mohd. Rafique Hossain are that he joined service under Central Reserved Police Force as a Deputy Superintendent of Police on 13.12.1987 and earned promotions; reaching the post of Commandant on 4.6.2004 and having completed 5 years? regular service became eligible to be promoted to the rank of Deputy Inspector General Police and fell within the zone of consideration for the vacancy year 2009-10. Obtaining vigilance and integrity clearance by 12.2.2009, his name was included in the list of eligible officers for being considered by the Departmental Promotion Committee which met on 3.9.2009 and as per the panel prepared placed his name at serial No. 16 of the 19 officers found fit i.e. empanelled for promotion. The Competent Authority approved the panel on 12.9.2009 and on the same day 13 officers up to serial No. 14 were promoted. 2 vacancies accrued on 1.10.2009 due to superannuation of one Sh.N. Bhardwaj, DIG on 30.9.2009 and one Sh. Rohit Kumar, DIG proceeding on deputation to National Disaster Response Force. On 8.10.2009 Sh. Amar Singh Negi, Commandant at Serial No. 15 of the approval panel was promoted and not the Petitioner. 4 more vacancies fell due on 14.12.2009 due to promotion of 4 Deputy Inspector Generals to the rank of Inspector General, but the Petitioner was not promoted. The reason why he was not promoted is that complaints were received that he had facilitated LIC agents to obtain business by influencing new recruits of his unit to purchase LIC policies and further violated the codal formalities and did not maintain proper record pertaining to purchases made to distribute uniform to the recruits, which were being investigated and by August 2009 a decision was taken to formally charge sheet him in view of the preliminary inquiry report indicting him. The Cadre Controlling Ministry i.e. the Ministry of Home Affairs had to be consulted which gave concurrence to the draft article of charges by 20.11.2009. On 23.3.2010 a charge sheet dated 18.3.2010 was served upon him for a major penalty proceedings under Rule 14 of the CCS (CCA) Rules.

12. The charges framed read as under:

ARTICLE-I

That Shri M.R.HUSSAIN, Commandant IRLA No. 2672 while functioning as Commandant in 199 Bn. CRPF during the period from Nov 2007 to Feb 2008, committed an act of serious misconduct, in that, he facilitated some particular LIC agents in their business by influencing the recruits of his unit to purchase LIC policies. Orders were issued in this regard to all O Cs of Coys of his Unit to collect amount of premium from the recruits. Thus, the said officer failed to maintain absolute devotion to duty and acted in a manner unbecoming of a Government servant and thereby violated the provisions contained in Rule 3(1) (ii) and (iii) of CCS (Conduct) Rules, 1964.

ARTICLE-II

That during the period from August, 2007 to Feb 2008, Shri M.R.HUSSAIN, Commandant IRLA No. 2672 while functioning as Commandant in 199 Bn., CRPF committed an act of serious misconduct, in that, he allowed distribution of uniform and allied training items to the recruits by arranging purchase directly from private firm and supplier, without observing any codal formalities or maintaining proper records of purchase through canteen. The payment and collections from the recruits was done through staff for onward payment to the private firms without any official records. Thus, the said officer failed to maintain an absolute devotion to duty and acted in a manner unbecoming of a Government servant and thereby violated the provisions contained in Rule 3(1)(ii) and (iii) of CCS (Conduct) Rules, 1964.

13. The issue was debated between the parties with reference to the latest memorandum on the subject, being the Office Memorandum dated 31.7.1991 issued by the Government of India in light of the decision of the Supreme Court reported as [Union of India Vs. K.V. Jankiraman, etc. etc.](#), which Office Memorandum reads as under:

OFFICE MEMORANDUM

Sub: Promotion of Government servant against whom disciplinary/court proceedings are pending or whose Conduct is under investigation-Procedure and guidelines to be followed.

The undersigned is directed to refer to Department of Personnel & Training OM No. 22011/2/86-Estt.(A) dated 12th January, 1988 and subsequent instructions issued from time to time on the above subject and to say that the procedure and guidelines to be followed in the matter of promotion of Government servants against whom disciplinary/court proceedings are pending or whose conducts is under investigation have been reviewed carefully. Government have also noticed the judgment dated 27.08.1991 of the Supreme Court in [Union of India Vs. K.V. Jankiraman, etc. etc.](#). As a result of the review and in supersession of all the earlier instructions on the subject (referred to in the margin), 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 along with other eligible candidates without taking into consideration the disciplinary cases/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 super scribed 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 results 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 proceeding/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 causes 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 circumstances 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 his 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 cases 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 regarding disciplinary proceedings/criminal prosecution and the further measures to be taken to expeditious completion.

5. In spite of the six monthly review referred to in para 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 his 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 near future
- d) Whether the delay in the finalization of proceedings, departmental or in court of law, is ot 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 investigation 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 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 grounds 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 procedures outlined in the preceding paras should also be followed in considering the claim for confirmation of an officer under suspension, etc. A permanent 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.

8. In so far as the personnel serving in the Indian Audit and Accounts Department are concerned these instructions have been issued after consultation with the Comptroller and Auditor General of India.

14. Relevant would it be to note that the Respondents heavily relied upon para 7 of the Office Memorandum.

15. In K.V. Janakiraman's case (supra), the Supreme Court considered Office Memorandum dated 30.1.1982 pertaining to what is commonly understood as Sealed Cover Procedure. The Supreme Court held that a Government Servant has a Constitutional Right to be considered for promotion as per Rules, but right to promotion is not absolute. It was held that if on date when a Departmental Promotion Committee meets, a Civil Servant is under suspension or a charge-sheet (departmental) is issued or a Criminal Investigating Agency has filed a charge-sheet in the Court of Competent Jurisdiction, recommendations pertaining to the said Government Servant have to be kept in a Sealed Cover and the Committee has to consider the candidature excluding the misdemeanor alleged.

16. However, relevant would it be to note that applying the aforesaid Statement of Law, to the facts before it, and noting that the DPC had met in July 1986 and a charge-sheet was issued in August 1987 to initiate departmental proceedings, the Government Servant concerned was held not entitled to be promoted and recommendations of the DPC were directed to be kept in abeyance. In para 17 of the decision, the Supreme Court held that law cannot be applied mechanically.

17. This is the ratio which can be culled out from a subsequent decision of the Supreme Court reported as State of M.P. v. Sayeed Nazeem Zahir AIR 1993 SC 116. The DPC had met on 20.10.1987. The charge-sheet was issued on 15.4.1988. The misdemeanor was under consideration i.e. preliminary inquiry was being held and matter was being considered whether the charge-sheet should be issued by which time the DPC had met and since a charge-sheet was finally issued, the Supreme Court held that recommendations pertaining to the Government Servant i.e. Sayeed Nazeem Zahir had to be kept in a Sealed Cover. The mechanical decision of the High Court which had held that since no charge-sheet was issued when DPC met required Sealed Cover Procedure not to be followed was overruled by the Supreme Court which specifically noted para 17 of the decision in K.V. Janakiraman's case (supra).

18. It is apparent that what was declared as the law by the Supreme Court pertaining to the Office Memorandum dated 30.1.1982 was crystallized in para 7 of the Office Memorandum dated 31.7.1991 and thus we may safely eschew a discussion of such decisions which were cited before us in which the Office Memorandum dated 30.1.1982 issued by the Government of India were considered or Office Memorandums issued by Public Sector Undertakings were considered and were akin to the language of the Office Memorandum dated 30.1.1982 and in this category would fall the recent decision of the Supreme Court reported as [Coal India Ltd. and Others Vs. Saroj Kumar Mishra](#), where the Office Memorandums considered were dated 27.6.1979 and 8.1.1981 issued by Coal India Ltd. Suffice would it be to state that said Office Memorandums did not have a clause akin to clause-7 which this Court is considering.

19. To be fair to the writ Petitioners we do note that they relied upon decisions wherein the Supreme Court had held that a Government Servant cannot be denied promotion if a charge-sheet is issued after the DPC has found him fit for promotion or in cases where the recommendations of the DPC were kept in a sealed cover on account of the Government Servant being charge-sheeted and on being exonerated, sealed cover was not opened on the ground that a subsequent charge-sheet had been issued against the Government Servant. The common ratio of the decisions was that it is only charge-sheets issued prior to the date when DPC met which would be relevant and not the subsequent. But, we may hasten to add that in no decisions, was para 7 of the Office Memorandum, which we are considering, the subject matter of consideration.

20. A Division Bench of this Court, in an unreported decision dated 17.11.2006 in UOI v. R.C. Sehgal WP(C) No. 10541-43/2006, setting aside the decision of the Central Administrative Tribunal in view of an Office Memorandum having pari-materia language with clause-7 of the Office Memorandum dated 31.7.1992, held that R.C. Sehgal, who was empanelled for promotion by the DPC on 31.3.2005 could not be promoted in view of the fact that by the date a vacancy arose i.e. 31.12.2005 due to retirement of an incumbent holding the promotional post, had come under a cloud and a decision was taken in the file to initiate disciplinary action against him.

21. We note that there is a direct decision of the Supreme Court on the point, being the decision reported as [Union of India and Another Vs. R.S. Sharma](#), where the Supreme Court had considered the Office Memorandum dated 31.7.1979 and evidenced by paras 14 to 16 of the decision, had considered the effect of para 7 of the Office Memorandum. The contra view taken by the Central Administrative Tribunal (as propounded by the Petitioners herein) was set aside and the Appeal filed by the Union of India was allowed.

22. A decision dated 2.12.2010 in Government of NCT Delhi and Ors. v. Deb Singh Bhakuni and Ors. WP(C) No. 5987/2010 was also relied upon by the Petitioners to support their contention and since the said decision has been authored by one of

us; Pradeep Nandrajog, J., we may clarify on the said decision.

23. The decision had considered the Office Memorandum dated 31.7.1991 and had noted that when the DPC met on 15.5.2008 and cleared the name of Deb Singh Bhakuni he was empanelled for promotion and on said date neither a charge-sheet for departmental inquiry was under contemplation or was issued and nor was any charge-sheet by a Criminal Investigating Agency filed in a Court. It was noted that even till 2.12.2010 when decision was pronounced by an oral order in Court, was any decision taken to initiate Departmental Proceedings against Deb Singh Bhakuni nor had any Criminal Investigating Agency filed a charge-sheet against him in the Competent Court. It was further noted that an FIR had been registered on 2.1.2006 pertaining to a stated financial bungling when Deb Singh Bhakuni as a Senior Accounts Officer and even till 2.12.2010 no charge-sheet was filed. It was on said facts it was held that Deb Singh Bhakuni had a right to be promoted.

24. Needless to state as held in K.V. Janakiraman's case (supra) and as followed in Sayeed Nazeem Zahir's case (supra) law cannot be applied mechanically.

25. We may only add that Courts have to balance the public interest which demands the accountability of/from every Government Servant vis-à-vis the right of a Government Servant to a speedy investigation of his conduct and not that his conduct being investigated should turn out to be a test of his patience.

26. If the Courts find equities in favour of a Government Servant on account of preliminary investigations continuing for years together and neither departmental action initiated nor a charge-sheet before a Competent Criminal Court filed and the Government Servant is otherwise found fit to be promoted, in those special circumstances, which create equities in favour of the Government Servant, appropriate directions can always be issued.

27. Turning to the facts of R.R. Sahay, it may be noted that the CISF Authorities have taken a serious view of the Petitioner evading responsibilities and the period in question precedes the date when a vacancy became eligible to promote him and on a reference made to the Cadre Controlling Ministry a conscious decision has been taken to withhold his promotion and initiate disciplinary proceedings against him. Thus, we hold that he would not be entitled to be promoted as claimed by him. But considering that not much preliminary investigation is required, would direct that a decision pertaining to a charge-sheet being issued to him be taken within 4 weeks of date of receipt of this order. Further action be chartered as per Law.

28. Qua Mohd. Rafique Hossain, facts evidence that when the DPC met on 3.9.2003 a departmental decision had already been taken in August 2009 to initiate disciplinary proceedings against him and for which a draft charge-sheet was prepared and sent to the Cadre Controlling Ministry for concurrence. Vacancies accrued only on 1.10.2009 and by which date, as noted herein above, a decision had already been taken in the file to initiate disciplinary proceedings against him and even a draft

charge-sheet had been prepared. We note that as against him a charge-sheet stands issued on 18.3.2010 pertaining to major penalty proceedings, and thus we hold that Mohd. Rafique Hossain is not entitled to the relief prayed for, save and except a direction that the departmental inquiry be expedited.

29. Relief claimed by the Petitioners is denied and the 2 writ petitions stand disposed of in terms of paras 27 and 28 above.

30. No costs.