
(2017) 04 CAL CK 0030
In the Calcutta High Court
Case No : 167 of 2015

Chander Bhusan Sood

APPELLANT

Vs

Coal India Limited & ors.

RESPONDENT

Date of Decision : 21-04-2017

Acts Referred:

Citation : (2017) 04 CAL CK 0030

Hon'ble Judges : Dipankar Datta

Bench : SINGLE BENCH

Advocate : Biswaroop Bhattacharya,?Santanu Das, R. N. Majumder,?S. M. Obaindullah,?N. Roy,?P. Basu, Kumar Jyoti Tiwari

Judgement

1. Aggrieved by dismissal of his writ petition [W.P. 10654(W) of 2013] by a learned judge of this Court vide judgment and order dated January 30, 2015, Mr. Chander Bhusan Sood, the writ petitioner (hereafter Mr. Sood), carried the same in appeal. The learned judge presiding over the appellate Bench did not agree with His Lordship's companion learned judge that the appeal ought to be dismissed and the judgment and order under challenge upheld. By an order dated July 29, 2015 the appellate Bench directed the appeal to be placed before the Hon'ble the Chief Justice for appropriate order. The learned judge to whom the appeal was assigned having been transferred to another high court, the Hon'ble the Acting Chief Justice by an order dated February 13, 2017 reassigned the appeal to me. In compliance therewith, the appeal was placed before me and by this judgment and order I propose to dispose of the appeal finally.

2. Mr. Sood invoked the writ jurisdiction of this Court feeling aggrieved by denial of vigilance clearance that cost him an appointment on the post of Director (Technical), South Eastern Coalfields Ltd. (hereafter SECL) despite being recommended by the Public Enterprises Selection Board (hereafter Board). Clearance was denied on the ground of initiation of minor penalty proceedings for alleged misconduct based on a statement made by him on December 20, 2010. He challenged the office memorandum dated January 3, 2013 issued by the

Director, Central Vigilance Commission (hereafter CVC) containing the advice for initiation of minor penalty proceedings, memorandum dated February 19, 2013 (the charge-sheet) as well as communications dated March 20, 2013 and March 28, 2013 issued by the CVC and the Under Secretary (VIG), Ministry of Coal, Government of India respectively, purportedly denying vigilance clearance in respect of his appointment on the post of Director (Technical), SECL.

3. A brief recital of the facts leading to issuance of the memoranda and the communications under challenge in the writ petition would be apposite to comprehend the controversy, resolution whereof was sought for by Mr. Sood.

4. Disciplinary proceedings had been initiated against Mr. Sood by a memorandum of charge-sheet dated January 27, 2004, while he was posted as Assistant General Manager, Kunustoria Area, Eastern Coalfields Limited (hereafter ECL). The charges were found established and the disciplinary authority by his order dated January 28, 2005 imposed the penalty of "censure" on Mr. Sood. Such order was not immediately challenged in any departmental appeal by Mr. Sood; however, it was challenged by him in an appeal presented before the Chairmancum- Managing Director of Coal India Limited (hereafter CIL) on January 4, 2007. To explain the belated presentation of the appeal, Mr. Sood pleaded ignorance of an order imposing penalty of censure on an officer being an impediment in the way of his future promotion. As soon as he became aware thereof, he wasted no time in carrying the order of censure in appeal. Despite this being the plea of Mr. Sood, on March 9, 2007 he was promoted to the post of Chief General Manager in M-3 Grade. Time passed by but the decision on Mr. Sood's appeal was nowhere in sight; the appeal was not being decided either way for a sufficiently long period of time. To expedite a decision on the appeal, Mr. Sood had requested a Mr. A. K. Hazra, the then Deputy C.E. (Excavation), Sonapur Bazari Area, ECL to follow up processing of disposal of the said appeal. It was found that Mr. Hazra had tried to offer money to Mr. B. N. Mishra, the then Deputy General Manager (Vigilance), CIL and had later on submitted a statement on April 7, 2008 of such attempt having been made to offer money to Mr. Mishra at the behest of Mr. Sood. Mr. Sood having been confronted with such statement of Mr. Hazra wrote a letter dated December 20, 2010 addressed to the Chief Vigilance Officer, CIL. He admitted having provided money to Mr. Hazra to meet his expenditure towards travelling and food as he voluntarily agreed to follow-up the matter of Mr. Sood at the vigilance division of CIL. Ultimately, the appeal was dismissed by the appellate authority by his order dated September 28, 2011. The order of dismissal of the appeal was not challenged by Mr. Sood, as a result whereof the order of penalty imposing censure attained finality. Soon after such dismissal of the appeal, Mr. Sood entered the portals of this Court for the first time with a writ petition, W.P. 1202(W) of 2012. Contention raised in such writ petition was that Mr. Sood is a contender for the post of Director and/or Chairman-cum-Managing Director of any subsidiary of CIL and that he is not being considered for selection to such post(s), in spite of being interviewed, on the ground that in his service record there is an endorsement of minor

punishment of censure. The said writ petition came up for admission before a learned judge of this Court on March 5, 2012. Finding that the Union of India and the Chairman of the Board were unrepresented, His Lordship adjourned hearing till March 13, 2012 and directed service of fresh notice on them. While so directing, His Lordship upon hearing learned advocates for Mr. Sood and CIL passed an ad-interim order to the following effect: "On being prima facie satisfied that imposition of minor punishment in the nature of censure ought not to be a disqualification for selection or promotion to a higher post in the absence of any rule to that effect, I restrain the respondents from taking cognizance of the adverse entry in the form of punishment of censure in the service record of the petitioner in the event the respondents proceed for selection to any of such post until 16th March, 2012".

5. The ad-interim order was extended on March 13, 2012 and by the next order dated March 20, 2012, the ad-interim order dated March 5, 2012 was further extended until further orders and the parties were invited to exchange their affidavits.

6. During the pendency of the said writ petition, Mr. Sood had applied on July 25, 2012 for appointment on the post of Director (Technical), SECL. There were several other contenders. As such, vigilance status of all the contenders was prepared and placed before the Board vide Annexure "A" of a letter dated October 26, 2012 of the Chief Vigilance Officer, CIL, addressed to the Joint Secretary, Ministry of Coal. Insofar as Mr. Sood is concerned, the relevant details read as follows:

Penalty imposed, if any during the last 10 years. Details of Disciplinary Action initiated/ being initiated, if any.

CMD, CCL/DA imposed a punishment of "Censure" on Shri C.B. Sood vide No. CCL/Vig/RDA- 13/2002/2442 dated 28/01/2005. Appeal of Shri Sood was disposed of vide order no. CIL/VIG/ECL/Appeal/CBS/985 dated 28.09.2011 by Chairman, CIL/AA who upheld the penalty. Shri C.B. Sood, ED(S& R), CIL had submitted the orders of Hon"ble High Court at Kolkata in W.P. No. 102(W) of 2012 was sent to MOC vide this office letter No. CIL/VIG/05525/DIR(33)/487 dated 28.08.2012. In a case of influencing vigilance official of CIL, Vig. Divn. by attempting bribe to him by Shri C. B. Sood, a proposal was placed to Chairman, CIL by CVO, CIL for initiation of major penalty proceedings against Shri Sood. The matter was discussed by the then CVO, CIL with the then Chairman, CIL on 03.11.2011 when the entire file was handed over to Chairman, CIL. No further views of Chairman, CIL has been received.

7. The Board interviewed all the contenders and ultimately made a recommendation dated October 30, 2012. Mr. Sood was recommended for appointment on the post of Director (Technical), SECL. According to Mr. Sood, his detractors started orchestrating moves to deny him appointment on such post, immediately after the aforesaid recommendation of the Board. By a letter dated

November 27, 2012, the Chief Vigilance Officer, CIL forwarded to the Director, CVC an investigation report on alleged attempt of bribery by Mr. Sood through the said Mr. A.K. Hazra. Receipt of such investigation report led the Director, CVC to issue office memorandum January 3, 2013 which, in turn, gave rise to the charge-sheet memorandum dated February 19, 2013. It is based thereon that CVC withheld vigilance clearance, which were all the subject matter of challenge in the writ petition together with the charge-sheet that had been drawn up against Mr. Sood in respect of the incident of 2008.

8. It would be apt, at this stage, to note the reasons for which the learned single judge refused to entertain the grievance expressed by Mr. Sood. Relevant portions from the judgment and order dated January 30, 2015 read as follows: "There does not appear to be any basis to the petitioner's grievance. To begin with, the sheet-anchor of the petitioner's case is the fact that the petitioner's name has been recommended by the PESB for appointment as Director (Technical) of SECL. The recommendation cannot be accepted as final since such recommendation was made under the constraint of an ad interim order passed in the previous petition which has not yet been disposed of. The petitioner has not been able to demonstrate any rule or service condition under which a minor penalty awarded to an employee has to be disregarded while considering the suitability of such employee to another post. The petitioner refers to the fact that one of the possible minor penalties is withholding promotion and says that since such measure was not taken against the petitioner, the punishment of censure cannot be used against the petitioner to stop the petitioner from taking up the post of Director. It is not the petitioner's case that the petitioner is being considered for promotion to the post of Director. Once it is evident that the petitioner applied for being considered for appointment to a higher post and it was not a promotional post, the fact that the punishment of withholding of promotion has not been granted against the petitioner and only a censure has been awarded, is of no relevance. The suitability of a candidate has to be considered on the basis of all material pertaining to the candidate, the good certificates of merit that he may have earned and the punishments or bad appraisals that he may have received. It is inconceivable that a fair selection process could have been conducted by the PESB without considering the punishment that the petitioner had earned. More importantly, at the time that the interim order of March 5, 2012 was passed in WP 1202 (W) of 2012, the appeal against the order of censure had not been disposed of. The appeal has since been disposed of against the petitioner. It does not appear that any proceedings have yet been instituted by the petitioner questioning the propriety of the appellate order. In such circumstances, the consideration of the petitioner's candidature by PESB without taking into account the punishment of censure earned by the petitioner, by virtue of the subsisting order in WP 1202 (W) of 2012, robbed the selection process of all sanctity. As a consequence, the sheet-anchor of the petitioner's case goes that he is entitled to be appointed as Director (Technical) of SECL and, by machinations resorted to by the superior

officials of Coal India Limited, he has been thwarted from taking up the post. Even if it be accepted that the propriety of the recommendation made by PESB in favour of the petitioner cannot be questioned, it does not appear that the disciplinary proceedings initiated or then proposed to be initiated against the petitioner were out of vengeance or otherwise malafide. The letter addressed by the petitioner on October 10, 2010 as referred to in the statement of imputation appended to the memorandum of February 19, 2013 would reveal the admission of the petitioner of having given "some money to Sri Hazra for his travelling and fooding purpose". In the light of such stand taken by the petitioner, it cannot be accepted that the charge brought against the petitioner was without any basis and had to be regarded as malafide and a ploy to ensure that the petitioner was denied the appointment.

Since it does not appear that the petitioner's recommendation as the most suitable candidate was on the basis of all material pertaining to the petitioner ? the good and the bad ? the plinth on which the petition stands is demolished. It also does not seem that the disciplinary proceedings were wrongfully initiated against the petitioner for the purpose of ensuring that the petitioner did not get the appointment that he claims to be entitled to."

9. It would now be appropriate to note the reasons assigned by the learned judge of the appellate Bench proposing and ordering dismissal of the appeal. The relevant paragraphs are quoted below:

"11. Ventilating his such grievances, he has filed a writ petition with a prayer to not to give any effect of memorandum dated 3rd January, 2013, 19th February, 2013, 20th March, 2013 and 28th March, 2013 and also a direction upon the authority concerned to appoint the appellant to the post of Director (Technical) SECL on the basis of the selection and recommendation made by the Public Enterprise Selection Board (PESB).

12. Respondent Nos. 1 to 3 filed affidavit in opposition in which they have categorically denied all the material allegations levelled against them. According to them, the appellant himself admitted his guilt in writing that he had given some money to one Asish Kumar Hazra for pursuing his (appellant) case pending before the appellate authority. Although the writ petitioner had taken a very weak plea that as the said Hazra was supposed to come to Calcutta so far his fooding and loading he had given the money. But his such plea is devoid of any merit on the ground that Hazra has his house in Calcutta. Therefore, there is no reason to believe that Hazra required some money for the purpose of his fooding and lodging in Calcutta. This apart, even if it was required, the appellant ought not to have given money to him.

13. At the time of hearing Learned Counsel appearing on behalf of the appellant submitted that the departmental proceeding was started and even after imposition of punishment under the style of "Censure" this writ petitioner was given promotion and held the post of Chief General Manager with effect from

9.3.2007. He has preferred appeal against the comment "Censure". In the meantime, he had appeared in ten interviews but due to existence of departmental proceeding he was not favoured. He further submitted that most illegally and for some ulterior motive, the respondent authority withheld the "appeal hearing". Thereafter another departmental proceeding was started and he was found guilty and for which punishment was awarded. He further submitted that Vigilance Commission had nothing to do except to clear his case. Not only that it is the Chief Vigilance Commissioner, who himself has advised the department concerned to initiate proceeding against him.

14. Learned Lawyer appearing on behalf of the Chief Vigilance Commissioner has submitted that the submissions of the writ petitioner should be discarded on the ground that there is a clear guideline of Chief Vigilance Commissioner, vide circular dated 12th July, bearing No. 3(v)/99/4 Satarkta Bhavan, Block ? A, GPO, Complex, INA wherein it has been mentioned that vigilance clearance is mandatory in respect of all candidates. He has also submitted that as per Section 8 Clause 1(g) of Chief Vigilance Commission Act, the said Commission has right to tender advice to the Department.

15. Learned Lawyer appearing on behalf of the respondent Nos. 1 to 3 has submitted that they could not take action against the erring officer so far as "Censure" is concerned because the present writ petitioner has obtained an order of stay which was valid up to 20.03.2012. Therefore, in between that period they had no occasion to start the Departmental Proceeding against him. Therefore, they are not at all responsible for causing delay in disposal of departmental proceeding.

16. According to the appellant, Learned Single Judge failed to appreciate that "Censure" cannot stand in the way of promotion and he has also preferred an appeal which is still pending. Secondly, in spite of punishment of "Censure", he was promoted to the post of Chief General Manager, with effect from 09.03.2007. Thirdly, delay in disposing of his appeal by the authority concerned is only to depriving him to get the top post. Fourthly, the Chief Vigilance Commissioner has no authority to withhold Vigilance Certificate in such cases.

17. Learned Counsel appearing on behalf of the respondent Nos. 1 to 3 and respondent No. 4 made a pincer attack to nullify the contentions of his adversary. Learned Counsel appearing on behalf of the respondent Nos. 1 to 3 submitted that appellant's affidavit is the admixture of half truths and untruths, which should be out rightly discarded.

18. Learned Counsel appearing on behalf of the respondent Nos. 1 to 3 categorically submitted that the writ petitioner was awarded punishment of "Censure" and during the pendency of the said appeal he offered money to Mr. Asish Kumar Hazra for pursuing his appeal and said Hazra admitted it in writing. This apart, the present appellant also admitted it in writing. Therefore, prima facie it appears that two offences have been committed by the appellant. For one

offence punishment has been given to him in the form of "Censure" and another offence is for giving money to one of his colleagues for pursuing of his appeal.

19. On perusal of affidavit, affidavit-in-opposition, affidavit-in-reply along with the documents filed herein and after giving an anxious thought over the rival submissions of both parties we are of the view that the appellant lost his every right to hold such a top post till Vigilance Commissioner Clearance is received. Chief Vigilance Commissioner has the right to tender advice to all the departments of Union of India under Section 8 Clause 1(g). A guideline of Chief Vigilance Commissioner is such that vigilance clearance is mandatory in respect of all candidates. Naturally, respondents had not committed any mistake. On the contrary, if the writ petitioner has done such thing then it is unbecoming of a public servant.

20. Charge in this case may not be serious enough in comparison to various scams but it is expected that such a top level post be adorned by a person, whose integrity is unquestionable and the person's antecedents must be unblemished one. There is no yardstick/parameter to measure the percentage of "Honesty". If anybody ventures to measure the degree of "Honesty", then it would be an auto-limitation. "Honesty" may not be a virtue (because everybody should have such quality) but dishonesty is a vice. If a person of that stature wants to get rid of punishment by paying money for inducing other person, certainly he will have no right to get top post.

21. In such circumstances, the appellant should not cry over spilt milk, because it may have been contaminated. It appears to us that the appellant left the room with silent dignity but caught his foot in the mat.

22. Therefore, the epilogue is: This appeal has no merit. Accordingly, it is dismissed."

(underlining in original)

10. The learned presiding judge of the appellate Bench delivered a short opinion, reading as follows: "With utmost respect to my learned Brother, I am unable to agree with this Judgment primarily for the following reasons :-

The vigilance department is an authority only to advise. The nature of offence that has been saddled upon the Petitioner is in the nature of casting an allegation of corruption. The finding of my learned Brother is that "if a person of that stature wants to get rid of punishment by paying money for inducing other person, certainly he will have no right to get the top post."

In my opinion, there is no finding to the effect that money was paid for inducing some other person. On the contrary, there are statements and evidences to show that money was paid for food and lodging. Therefore, the element of attempting to induce somebody, in my humble opinion, is perhaps missing and, therefore, I am unable to agree with this judgment."

11. It is the above conflict of opinion that has necessitated the reference.

12. Mr. Bhattacharya, learned advocate for Mr. Sood referred to the opinions of the learned judges adverse to the interest of Mr. Sood and contended that Their Lordships erred in refusing to accord relief to him. According to him, the vigilance status of Mr. Sood had been placed before the Board and it would be evident therefrom that Mr. Sood had suffered a minor penalty of censure as far back as on January 28, 2005, which could not have been regarded as a factor disentitling Mr. Sood to a recommendation for appointment. He said that the Board being abreast of the vigilance status of Mr. Sood, rightly selected him. He also urged that as on the date the Board recommended Mr. Sood, i.e. October 30, 2012, Mr. Sood had not been charged for commission of misconduct in relation to the incident of 2008 (of allegedly giving money to the said Mr. A. K. Hazra for food and travelling expenses). Relying on the decision of the Supreme Court reported in AIR 1991 SC 2010 (Union of India v. K. V. Jankiraman), it was contended that disciplinary proceedings are said to be pending if a charge-sheet were issued and the sealed cover procedure could be resorted to if such chargesheet had been issued prior to the date of consideration of the officer concerned for promotion by the Departmental Promotion Committee. Reminded by me of the position that K. V. Jankiraman (supra) related to a case of promotion and not appointment on a selection post, Mr. Bhattacharya argued that the principles laid down therein may not be different in respect of both such cases (promotion and appointment) submitting that promotion to a higher post would also result in an appointment and urged me to hold that the CVC, by denying clearance on the basis of pending disciplinary proceedings which were initiated more than three months after Mr. Sood was recommended by the Board on October 30, 2012, committed serious error and the learned judges by putting a stamp of approval thereon failed to exercise jurisdiction vested in them. He appealed before me to hold that Mr. Sood was entitled to vigilance clearance and also prayed, in view of Mr. Sood's impending retirement on June 30, 2017, for direction on the respondents to allow him discharge the duties attached to such post till retirement.

13. Mr. Bhattacharya, however, could not place for my consideration any circular of the CVC or the Union, or for that matter the relevant service rules governing the terms and conditions of Mr. Sood's service, which could effectively guide the respondents in taking an appropriate decision in the matter.

14. Bare perusal of the aforesaid opinions of the learned judges would also not reveal reference to any relevant rules/guidelines/circulars governing a situation as the one under consideration, since none of the parties had adverted thereto.

15. Inclined to the view that such rules/guidelines/circulars could have guided the respective Benches to give an appropriate decision on Mr. Sood's grievance, I had called upon Mr. Tiwary, learned advocate for the Union and the Board to place the relevant rules/guidelines/circulars for my perusal and consideration.

16. Mr. Tiwari ably assisted me by placing office memoranda dated July 29/ August 4, 1988 and December 14, 2007 issued by the Ministry of Personnel & Public Grievances & Pensions. Based thereon, he contended that despite the fact that no proceedings had been pending on the date the Board recommended Mr. Sood for appointment on the post of Director (Technical), SECL, the CVC had the competence and the authority to scrutinize the antecedents of the recommendee and denial of clearance could be justified having regard to the terms thereof.

17. He also placed reliance on the decision of a learned judge of the Delhi High Court reported in 95 (2002) DLT 186 (Y. N. P. Sinha v. Union of India & ors.) in support of his contention that the CVC has the authority to scrutinize the antecedents of an officer aspiring for appointment on a higher post on the recommendation of the Board for formation of an opinion about his integrity and uprightness and further as to whether he would be fit to hold the post.

18. It was in sync with what has been held in Y.N.P. Sinha (supra) that Mr. Tiwary urged me to concur with the view that even though no charge-sheet was drawn up against Mr. Sood on the date the CVC first considered the matter for grant of vigilance clearance, even then it could well have withheld clearance. His concluding remark was that Mr. Sood had rightly been held disentitled to relief by the learned judge who dismissed the writ petition and that His Lordship's judgment and order deserves to be upheld.

19. Mr. Majumder, learned advocate for CIL contended that advice of the CVC was sought for consistent with the procedure laid down in the extant guidelines and the CVC having advised initiation of disciplinary proceedings against Mr. Sood, CIL perhaps was left with no other option but to abide by such advice. It was further contended that the post of Director (Technical), SECL, for which Mr. Sood was a contender, has been filled up and the present incumbent holding such post not being a party respondent here, no order ought to be made affecting his interest. He also contended that the proceedings initiated by charge-sheet dated February 19, 2013 have since culminated in another minor penalty of "stoppage of one annual increment without cumulative effect" being imposed on Mr. Sood by order dated February 11, 2015 (although it could not be given effect because of the order dated February 16, 2015 passed on the application for stay filed in the appeal) and, therefore, there is no question of his claim being considered favourably.

20. Mr. Majumder before concluding his argument also placed for my consideration order dated February 3, 2015 passed on W.P. 1202(W) of 2012. It was considered by the same learned judge who spurned Mr. Sood's challenge earlier by the judgment and order under challenge herein. His Lordship was of the view that since the recommendation made by the Board in favour of Mr. Sood had been undone His Lordship's previous judgment and order, nothing meaningful survived for decision and accordingly disposed of W.P. 1202(W) of 2012 without any order.

21. In reply, Mr. Bhattacharya contended that the office memorandum dated July 29/August 4, 1988 has no existence in the eye of law having regard to the subsequent office memorandum dated December 14, 2007 and that the subsequent memorandum also does not advance the cause of the Union to deny vigilance clearance to Mr. Sood. Referring to the decision in Y.N.P. Sinha (supra), it was contended that the same was rendered prior to office memorandum dated December 14, 2007 being brought into existence and, therefore, was of no help to decide the issue emerging for decision in this appeal.

22. It is now time to consider the terms of the office memoranda referred to by Mr. Tiwari.

23. Office memorandum dated July 29/August 4, 1988 is on the subject of "Scrutiny of the antecedents of persons recommended for Board level posts in PUBLIC SECTOR ENTERPRISES", and reads as follows: "The undersigned is directed to say that a question for evolving a mechanism to ascertain and scrutinize the antecedents of persons recommended for Board level posts in public sector enterprises has been examined by the Government. It has been decided that it would be primary responsibility of the administrative Ministry/ Department concerned to ensure that the candidates, whose appointment as Functional Director/CMDs in public sector enterprises is recommended for being considered by the Appointments Committee of the Cabinet should be cleared from vigilance angle and that the Ministry/Department concerned should bring this fact specifically to the notice of Minister-in-charge. In respect of those persons who are already holding Board-level positions and who have been recommended for higher Board-level positions, the vigilance clearance may be ascertained, besides other sources, from the Central Vigilance Commission. As regards the persons who are holding below Board-level positions in public sector enterprises, the CVO in the Ministry/Department concerned should be consulted, besides the CVO in the public sector enterprise where the candidate may be working for the present.

The Ministry of Industry (Department of Public Enterprises) etc. may comply with the abovementioned guidelines while sending proposals to the Establishment Officer to the Government of India for being placed before the Appointments Committee of the Cabinet for its consideration."

24. Office memorandum dated December 14, 2007 is on the subject of "Guidelines regarding grant of vigilance clearance to members of the Central Civil Services/Central Civil posts". Relevant portions of such office memorandum are quoted below:

"The undersigned is directed to say that the matter regarding guidelines for giving vigilance clearance to members of the Central Civil Services/ Central Civil post has been reviewed by the Department of Personnel & Training and it has been decided that the following guidelines for the grant of vigilance clearance to the Government servants belonging to the Central Civil Services/Central Civil

posts shall be applicable with immediate effect:

1. These orders regarding accordance of vigilance clearance to members of the Central Civil Services/posts shall be applicable with respect to (a) empanelment (b) any deputation for which clearance is necessary, (c) appointments to sensitive posts and assignments to training programmes (except mandatory training). In all these cases, the vigilance status may be placed before and considered by the Competent Authority before a decision is taken.

2. The circumstances under which vigilance clearance shall not be withheld shall be as under:

a) *****

b) *****

c) Vigilance clearance shall not be withheld unless (i) the officer is under suspension (ii) a chargesheet has been issued against the officer in a disciplinary proceeding and the proceeding is pending (iii) orders for instituting disciplinary proceeding against the officer have been issued by the Disciplinary Authority provided that the chargesheet is served within three months from the date of passing such order (iv) chargesheet has been filed in a Court by the Investigating Agency in a criminal case and the case is pending (v) orders for instituting a criminal case against the officer have been issued by the Disciplinary Authority provided that the chargesheet is served within three months from the date of initiating proceedings (vi) sanction for investigation or prosecution has been granted by the Competent Authority in a case under the PC Act or any other criminal matter (vii) an FIR has been filed or a case registered by the concerned Department against the officer provided that the charge sheet is served within three months from the date of filing/registering the FIR/case and (viii) The officer is involved in a trap/raid case on charges of corruption and investigation is pending.

d) *****

e) *****

3. *****

4. *****

5. While considering cases for grant of vigilance clearance for the purpose of empanelment of members of the Central Civil Services/Central Civil posts of a particular batch, the vigilance clearance/status will continue to be ascertained from the respective Cadre Authority. In all such cases, the comments of the Central Vigilance Commission will be obtained. However, if no comments are received within a period of three months, it will be presumed that there is nothing adverse against the officer on the records of the concerned body.

6. *****

7. Vigilance clearance will not normally be granted for a period of three years after the currency of the punishment, if a minor penalty has been imposed on the officer. In case of imposition of a major penalty, vigilance clearance will not normally be granted for a period of five years, after the currency of punishment. During the period, the performance of the officer should be closely watched.

8. *****

9. All the Ministries/Departments are requested to bring the above guidelines for the notice of all concerned for information and compliance."

25. I am inclined to agree with Mr. Bhattacharya that office memorandum dated July 29/August 4, 1988 stands superseded by the office memorandum dated December 14, 2007. While issuing the latter memorandum, all previous guidelines for giving vigilance clearance were reviewed by the department and it was decided that the guidelines contained therein would be applicable with immediate effect. It stands to reason that a comprehensive guideline was framed for uniform application. Reliance placed by Mr. Tiwari on the office memorandum dated July 29/August 4, 1988 is, thus, misconceived.

26. The decision in Y.N.P Sinha (supra) proceeded to consider office memorandum dated July 29/August 4, 1988. There cannot be any quarrel with whatever was observed by Hon'ble Justice A. K. Sikri (as His Lordship then was) in Y.N.P Sinha (supra) relying on the said office memorandum but having regard to the contents of the office memorandum dated December 14, 2007, the ratio of such decision may not apply here. I am, therefore, dissuaded to consider the said decision as a guide for resolving the controversy involved herein.

27. Assuming arguendo that the office memorandum dated July 29/August 4, 1988 holds good as on date, I am still of the view that nothing turns on it for the reason that it simply empowers scrutiny of antecedents of persons recommended for Board level posts in public sector enterprises. The mechanism that was evolved has been made a part of the subsequent office memorandum and, therefore, is not crucial for a decision on this appeal.

28. The learned judge while dismissing the writ petition recorded that Mr. Sood had not been able to demonstrate any rule or service condition under which a minor penalty awarded to an employee could be disregarded while considering the suitability of such employee to another post. Bearing such omission/failure in mind, it was also observed that the recommendation of the Board dated October 30, 2012 was made under the constraint of a subsisting interim order in W.P. 1202(W) of 2012, thus, robbing the selection process of all sanctity. Such an observation, may not be justified in the light of paragraph 7 of the office memorandum dated December 14, 2007. Even if no ad-interim/interim order had been made by the writ court on Mr. Sood's first writ petition or no writ petition were ever filed at that stage, the position would not have been too different. The order of censure was passed on January 28, 2005 and the adverse effects of such censure could not have been carried over beyond three years, if one

proceeds by the terms of paragraph 7 of the office memorandum dated December 14, 2007. Considering that the said office memorandum was not in existence on the date Mr. Sood suffered the penalty of censure, even by stretching the period of three years from the date it took effect, Mr. Sood could not have suffered its adverse effect beyond December 14, 2010. Obviously, the said office memorandum was not placed before His Lordship leading to a view being taken that the order imposing penalty of censure could not have been wiped out of consideration at the time Mr. Sood's candidature was under consideration of the Board. In view of paragraph 7 of the office memorandum, the adverse effect of the order of censure imposed on Mr. Sood ceased on December 14, 2010, if not on January 28, 2008. Irrespective of the ad-interim/interim order passed on W.P. 1202 (W) of 2012, the order of censure could not have operated to the detriment and prejudice of Mr. Sood on October 30, 2012. I am not prepared to give any importance to the submission of Mr. Tiwari that the appeal remained pending till September 28, 2011 and since the appeal was dismissed on that date, the period of three years should be reckoned from the date of dismissal of the appeal. This is for the simple reasons that first, one cannot be worse off for filing an appeal, and secondly, Mr. Tiwari could not place any material before me to prove that the respondents had not given effect to the order of censure against Mr. Sood till such time his appeal against it was dismissed. On the contrary, the appeal was belatedly presented and condonation of delay was sought for by Mr. Sood on the ground which I have referred to above. Grant of the prayer for condonation on such ground presupposes that the appellate authority was satisfied of Mr. Sood's claimed ignorance. Had censure not been a factor, condonation of delay could have been refused only on the said ground.

29. The further observation of the learned judge that on March 5, 2012 when the interim order was passed in W.P. 1202(W) of 2012 Mr. Sood's appeal against the order of censure was pending and that despite the appeal having since been disposed of against Mr. Sood and the propriety of such appellate order had not been questioned, are of little relevance apart from being factually erroneous. The appeal against the order of censure was dismissed on September 28, 2011, much before the first writ petition was presented. Nothing, therefore, turned on dismissal of the appeal.

30. The reasons that formed the plinth for dismissal of the writ petition being erroneous in law and on facts, the same cannot be sustained.

31. Equally unappealing is the reasoning of the learned judge of the appellate Bench, who ultimately concurred with the learned judge of the writ court and ordered dismissal of the appeal. There cannot be any doubt that an aspirant for a top level post in the Government or, for that matter, in a Government undertaking/enterprise should be a man of sterling character and impeccable integrity. The character records ought to bear testimony to the same which, as of necessity, ought to be looked into. However, without looking into such records

and referring to certain personal character or traits of an individual which are highlighted by a party to the proceeding leading to formation of opinion based on a cursory glance or routine perusal ought to be avoided. The weight to be attached to the points raised by the respondents would depend on the totality of the facts and circumstances, viewed in the correct perspective. The opinion is silent on several relevant aspects. There has been no consideration worth the name as to why the disciplinary authority of Mr. Sood did not initiate proceeding for taking action against him immediately or soon after his statement dated December 20, 2010 was obtained, which provided material for initiation thereof. No light was asked to be shed as to why it was thought necessary to spring into action only after October 30, 2012, when Mr. Sood was recommended by the Board. An inference can legitimately be drawn that none in the organization was expecting Mr. Sood to be recommended for the post of Director (Technical), SECL and hence were in a state of deep slumber; however, the recommendation in his favour having seen the light of the day, it was considered time to wake up, rake up the incident of 2008, and seek advice by the letter dated November 27, 2012 to somehow create an impediment so as to ensure denial of vigilance clearance to the disadvantage of Mr. Sood. There being no finding of guilt recorded in a duly constituted disciplinary proceeding on the material date of consideration of vigilance clearance that Mr. Sood intended to get rid of the punishment of censure by paying money to the appellate authority and/or by influencing him, much of what has been said in the opinion of the learned judge pales into insignificance. What is the law that would govern the situation ought to have been ascertained, which unfortunately was not.

32. The learned presiding judge, in my opinion, rightly disagreed with such view of the learned companion judge but did not record his opinion as to whether Mr. Sood, on facts and in the circumstances, was entitled to relief or not.

33. It is in view thereof that I shall now proceed to record my independent reasons for my conclusions.

34. It needs no emphasis that the question of appointment of an in-service officer on a selection post or promotion of an officer in the service to a higher post is inextricably linked with the evaluation of suitability of the concerned officer for such appointment/promotion. It is in the context thereof that vigilance clearance assumes relevance. The position of the CVC in the system is not that of an armed intruder but that of a watch-guard. It is its duty to clear officers who are honest and men of rectitude from the vigilance angle without much ado, when it is time for such officers either to be appointed on a selection post or promoted to a higher post. It is also its duty to make the appointing authority aware of any perceived misconduct on the part of an officer that has attracted disciplinary proceeding or criminal prosecution, which is pending, or has culminated in disciplinary action taken against such officer in the past, or when disciplinary proceeding is in active contemplation, with only the charge-memo left to be served on the officer. It is in such cases that clearance may be denied

from vigilance angle. Even if office memorandum dated July 29/August 4, 1988 is considered to be still in operation, in terms thereof the CVC would also be entitled to look into the antecedents of the officer but care must be taken not to deny vigilance clearance based on a punishment which might have spent out its force. It is axiomatic that denial of vigilance clearance should not be used as a weapon but only as a shield to safeguard the nation's interest by standing against any process of scheming persons in authority to reward the guilty.

35. What would be the crucial date for consideration while granting or denying vigilance clearance, should be the next question to answer. To answer this question, reference to the office memorandum dated December 14, 2007 placed by Mr. Tiwari seems imperative. But before I venture in that direction, it is also necessary to ascertain whether the principle relevant for promotion applies *ex proprio vigore* to appointment on a selection post or not.

36. Insofar as promotion is concerned, K.V. Jankiraman (*supra*) and the decision reported in (2007) 9 SCC 625 (Coal India Limited v. Saroj Kumar Mishra) are authorities to the effect that only when a charge-memo in a disciplinary proceeding or a charge-sheet in a criminal prosecution is issued/submitted that a disciplinary proceeding/criminal prosecution is said to have been initiated/launched and, therefore, the sealed cover procedure may be resorted to. It has also been held in the former decision that pendency of preliminary enquiry/investigation prior to the charge-memo/charge-sheet will not be sufficient and it would not be proper to withhold promotion on account thereof. The latter decision, i.e. Saroj Kumar Mishra (*supra*), referred to and dealt with certain relevant circular letters, which are similar to those under consideration here. It was held that the circular letters that were issued by the appellants therein put restrictions on a valuable right of an employee and hence were required to be construed strictly; and so construed, the conditions precedent must be satisfied before any action can be taken to deny promotion on the ground of pendency of disciplinary proceeding. It has also been held there that the actions of the "State" must conform to the tests of fairness and reasonableness.

37. Different considerations do apply in respect of appointment on promotion and appointment on a selection post. While fair consideration of one's candidature for appointment on a selection post is as much a right that an officer can claim to be considered for promotion, the merit factor and administrative exigencies play important roles in respect of appointment on a selection post whereas continuous creditable performance in the feeder post along with a host of other factors assumes significance for promotion. The two cannot be equated; yet, the similarity in the extant guidelines relating to obtention of vigilance clearance cannot be wholly ignored. Nevertheless, the issue emerging here can be decided by reference to the office memorandum dated December 14, 2007; hence; one need not seek guidance from the decision in K.V. Jankiraman (*supra*).

38. The said office memorandum makes it clear in paragraph 2 that vigilance clearance can be withheld in at least eight situations. While hearing a challenge

to denial of vigilance clearance, it is important to locate the crucial date for attracting the disqualifying factors spelt out in paragraph 2 thereof. In a case of the present nature where the recommendation precedes vigilance clearance, should the date of consideration by the Board or the date on which the CVC upon application of mind actually denies vigilance clearance be reckoned to be the crucial date? The said office memorandum does not specifically say that vigilance status as on date the Board recommends an officer for appointment or draws up a panel for appointment would be the crucial date. It also does not say that the date on which the CVC considers the aspect of granting clearance would be the crucial date. The said office memorandum is silent on the point of the crucial date, although paragraph 5 thereof provides an outer limit of three months. If comments are not received from the CVC within such period, it has to be presumed that there is nothing adverse against the officer on the records of the body concerned.

39. To my mind, the date on which the suitability aspect for appointment is considered or the actual date of denial of vigilance clearance, as the case may be, may not to be regarded as the crucial date in all cases that come up for consideration. On a purposive approach being adopted based on threadbare reading of the office memorandum dated December 14, 2007, I am of the firm opinion that the crucial date would vary according to the facts and circumstances of each case. The date on which the Board recommends an officer or empanels him must be the crucial date for considering his vigilance status in case on that date the officer recommended (i) is under suspension; or, (ii) has been facing disciplinary proceeding for major/minor penalty, i.e. a charge-memo has been issued; or (iii) is charge-sheeted in a criminal case and such case is pending; or, (iv) has suffered an order of sanction granted by the competent authority for investigation/prosecution in a case under the Prevention of Corruption Act or any other criminal matter; or, (v) if the officer is involved in a trap/raid case on charges of corruption and investigation is pending.

40. However, on the date of recommendation or empanelment, as the case may be, if (i) an officer is subjected to an order for initiation of disciplinary proceeding by his disciplinary authority without the charge-memo being served, or, (ii) an officer is under similar disability as above, in respect of a criminal case, where the disciplinary authority has passed an order for instituting a criminal case against the officer, or, (iii) if the officer is an FIR named accused at the instance of the concerned department, ~ in all such situations, if the charge-memo is ultimately served on the officer within three months of such order of initiation [for situation (i)]/the chargesheet is served within three months from date of institution of proceedings [for situation (ii)]/the charge-sheet is served within three months of registration of the FIR [for situation (iii)], and the officer's case comes up for vigilance clearance before the CVC, obviously the CVC would have the authority to deny clearance. In case the CVC has to apply its mind before expiry of three months from the date of the order of the disciplinary authority ordering initiation of proceeding/institution of proceedings or from the date of

registration of the FIR and some time is left for such period of three months to expire, it (the CVC) can certainly wait for the follow-up step of the relevant order of initiation of disciplinary proceeding/institution of proceedings/investigation of the FIR being taken. Necessarily, as a consequence thereof, the date of consideration of the officer's case for grant of vigilance clearance would stand deferred and the date(s) of service of charge-memo/chargesheet would assume importance for deciding whether vigilance clearance should at all be granted or not. Reference to the period of three months in situations (iii), (v) and (vii) of paragraph 2 of the said office memorandum is very vital in the circumstances and has a close nexus with the same period mentioned in paragraph 5 thereof. If the chargememo/ chargesheet is not issued within three months, vigilance clearance should not be denied notwithstanding that order for initiating disciplinary proceeding/instituting proceedings has been passed by the disciplinary authority.

41. Stated differently, on the date the CVC applies its mind, it must search as to whether any of the disqualifying factors is appearing in the records against the officer or not. If any of the five situations as indicated above is found to be present as on date the Board has recommended the officer for appointment or has prepared a panel for appointment, the CVC would derive the authority under paragraph 2 of the said office memorandum to withhold vigilance clearance. In all such cases, the date must relate back to the date of recommendation/preparation of panel and not any point of time thereafter. In regard to the other three situations, the CVC being under an obligation to furnish its comment within the ceiling of three months (as in paragraph 5 of the office memorandum), it has to ascertain two factual aspects : first, whether any order passed by the disciplinary authority for instituting disciplinary proceeding/initiating proceedings against the officer exists or not, on the date recommendation for appointment is made or on the date of empanelment; or an FIR against the officer has been registered or not; if the answer is in the affirmative, it has to be ascertained next whether the charge-memo/chargesheet has been served within three months of the order of initiation of disciplinary proceeding/institution of proceedings/registration of the FIR or not, as the case may be. If so, most certainly vigilance clearance may be denied; if not, denial on the ground that there is an order for instituting disciplinary proceeding/initiating proceedings or an FIR has been registered even on the date the Board made its recommendation or empanels the officer, would not meet the test of fairness and reasonableness.

42. If the guideline is not construed as above and it is left to the whims of any particular officer of the CVC to decide the aspect of vigilance clearance treating the date of consideration by the CVC as the crucial date in all cases which come up for clearance, it would be fraught with high risks of arbitrariness, discrimination, mala fide and the like.

43. The second and the third situations mentioned in paragraph 2 of the office memorandum dated December 14, 2007 i.e. a charge-sheet has been issued

against the officer in a disciplinary proceeding and the proceeding is pending, or an order for instituting disciplinary proceeding against the officer has been issued by the disciplinary authority, provided that the charge-sheet is served within three months from the date of passing such order, could be relevant for the present case. The other five situations relate to criminal prosecution and admittedly, are not applicable here as situation (i) since Mr. Sood was not under suspension.

44. It is not the case of the respondents that any disciplinary proceeding was pending on October 30, 2012 when the Board recommended Mr. Sood. It is also not their case that pursuant to or in furtherance of the statement obtained from Mr. Sood on December 20, 2010, the competent authority/disciplinary authority had reached clear and complete satisfaction that a disciplinary proceeding ought to be initiated against Mr. Sood by issuing a charge-sheet; on the contrary, the letter of the Chief Vigilance Officer, CIL dated November 27, 2012 makes the position clear that the concerned respondents were in a fix as to whether there was sufficient material warranting initiation of disciplinary proceeding against Mr. Sood or not. If the cited office memoranda were construed in a manner so as to empower the CVC to deny vigilance clearance on the basis of commencement of disciplinary proceeding after the recommendation for appointment is received, or without there being a prior order of the nature referred to in clause (iii) of paragraph 2 of the office memorandum dated December 14, 2007, that would create a potential situation for abuse/misuse of power. As in the present case, to thwart the recommendee from reaping the benefits of the recommendation, old incidents could be dug up and proceeding initiated to frustrate the aspirations of the concerned officer. Viewed on the touchstone of Article 14, such an action cannot pass muster.

45. Unhesitatingly, I hold that vigilance clearance to Mr. Sood was unjustly, unfairly and arbitrarily denied.

46. However, the next important question that would arise is what relief can be extended to Mr. Sood. Certain events during the pendency of the proceedings before the writ court as well as the appellate court need to be borne in mind. As has been submitted by Mr. Majumder, Mr. Sood has been punished a second time but because of the order dated February 16, 2015 the order imposing penalty of stoppage of increments could not be given effect. That apart, the post of Director (Technical), SECL for which Mr. Sood was an aspirant is no longer vacant. The incumbent on such post is not a party here. He cannot be dislodged behind his back. That apart, Mr. Sood has less than three months service left. In such situation, I have no other option but to remind myself of the law laid down by the Supreme Court in paragraph 7 of the decision reported in (2003) 1 SCC 726 (Beg Raj Singh v. State of Uttar Pradesh & ors.). The Court speaking through Hon'ble R. C. Lahoti, J. (as His lordship then was) had the occasion to rule as follows: "7. *** The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief

should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him.***"

(underlining for emphasis by me)

47. In view of the peculiar facts and circumstances, it would be inequitable to grant relief to Mr. Sood. No direction is passed for his appointment on the post of Director (Technical), SECL. However, having regard to the injustice meted out to him, Mr. Sood shall be entitled to seek damages by instituting appropriate proceedings in accordance with law.

48. The order of penalty dated February 11, 2015 being a post-writ petition development is obviously beyond the scope of this appeal and hence, no opinion is expressed. While Mr. Sood shall be at liberty to challenge its propriety and/or correctness before the appropriate forum according to law, the respondents are also left free to implement the same.

49. The judgment and order dated January 30, 2015 under challenge in this appeal stands set aside and the appeal stands disposed of with the aforesaid observations.

50. In the circumstances, the parties shall bear their own costs.