

(2017) 12 AHC CK 0003
In the Allahabad High Court
Case No : 23751 of 2017

Dineshwar Shukla

APPELLANT

Vs

State Of U.P. Thru Prin.Secy.Irrigation Deptt.

RESPONDENT

Date of Decision : 04-12-2017

Acts Referred:

Citation : (2017) 12 AHC CK 0003

Hon'ble Judges : Dr. Devendra Kumar Arora, Rajnish Kumar

Bench : Division Bench

Advocate : Ashok Shukla

Final Decision : Disposed Off

Judgement

1. Heard Sri Rakesh Bajpai and Sri Ashok Shukla, learned Counsel for the petitioner and the learned Standing Counsel.
2. Petitioner, who is working as Superintending Engineer in Irrigation Department, has filed instant writ petition for a mandamus to the opposite party/ concerned authority to issue promotion order w.e.f. 16.02.2017, the date on which junior to the petitioner, Sri Balram Singh Yadav was promoted, to the post of Chief Engineer-Level-II in view of the recommendation made by the Departmental Promotion Committee in its meeting dated 07.09.2016 with all consequential benefits.
3. Submission of learned Counsel for the petitioner is that the petitioner was appointed as Assistant Engineer in Irrigation Department on 20.04.1982. In the year 2008, he was promoted to the post of Executive Engineer and later on, was promoted to the post of Superintending Engineer in the year 2014.
4. Learned Counsel for the petitioner has submitted that a meeting of Departmental Promotion Committee took place on 07.09.2016 under the Chairmanship of the Chief Secretary in which candidature of 49 Superintending Engineers including the petitioner was considered for promotion to the post of

Chief Engineer, Level-II. The criteria for promotion is merit. After considering the candidature, the Departmental Promotion Committee recommended the name of 26 Superintending Engineers in which the name of the petitioner finds place at Sl. No.18 and the Principal Secretary, Irrigation Department was informed accordingly on 15.09.2016 for further action.

5. It has been contended by the learned Counsel for the petitioner that juniors to the petitioner, namely, Balram Singh Yadav and Vinay Kumar Srivastava, whose names find place at Sl. Nos.19 and 21 respectively, have been promoted to the post of Chief Engineer, Level-II vide order dated 16.02.2017 and on being approached, he was informed that though he is found fit for promotion to the post of Chief Engineer, Level-II but on account of pendency of departmental inquiry, order for promotion has not been issued to him.

6. Learned Counsel for the petitioner vehemently contended that the charge-sheet dated 28.09.2016 was served upon the petitioner vide letter dated 17.10.2016 of the Inquiry Officer whereas the meeting of Departmental Promotion Committee was convened on 07.09.2016, therefore, the concerned authority has illegally denied promotion to the petitioner as at the time of considering the candidature, there was nothing adverse against him nor any departmental or criminal proceeding was pending. It has also been submitted that the charge-sheet was served upon the petitioner with vague allegations. The petitioner submitted its reply and after submission of the reply, the proceeding was dropped by awarding censure entry vide order dated 30.06.2017.

7. To substantiate his submissions, learned Counsel for the petitioner has relied upon the judgments of Hon''ble Apex Court in the case of Bank of India and another Vs. Degala Suryanarayana; (1999) 5 SCC 762 and in the case of Union of India and others Vs. Dr. Sudha Salhan (Smt.); (1998) 3 SCC 394. In the backdrop of the aforesaid facts, it has been vehemently argued that denial of promotion on flimsy ground is wholly unjustified and smacks of arbitrariness.

8. Learned Standing Counsel while opposing the writ petition has submitted that the recommendation of the Departmental Promotion Committee could not be given effect on account of issuance of charge-sheet on 28.09.2016 which resulted in awarding censure entry for slackness in his supervisory duties. Learned Standing Counsel has invited attention of this Court towards the Government Order dated 28.05.1997 wherein it has been provided that close envelope proceeding can be adopted while considering the candidature of a candidate for promotion in three conditions, namely, (i) when the employee is under suspension; (ii) when the departmental proceedings are pending against the employee, to which a charge-sheet has been issued and (iii) when the charge-sheet has been filed in the court against the employee and the same is pending. Learned Standing Counsel invited attention of this Court towards para 11 of the Government Order dated 28.05.1997 and submitted that even after the selection and before the appointment letter is issued, if it comes to the notice of the Appointing Authority that there is a charge-sheet pending against the

concerned employee, then also in that event, the sealed cover procedure must be followed. Para 11 of the Government Order dated 28.05.1997 reads as under: "VERNACULAR MATTER OMITTED"

9. In these background, learned Standing Counsel has submitted that the petitioner has legally not been issued promotional order for the post of Chief Engineer, Level-II and none of the grounds as urged by the petitioner is tenable in the eyes of law.

10. We have examined the submissions of learned Counsel for the parties and gone through the record.

11. Admittedly, on 07.09.2016 when the Departmental Promotion Committee considered the candidature of 49 Superintending Engineers for making promotion to the post of Chief Engineer, Level-II, the candidature of the petitioner was also considered and was placed at Sl. No.18 as there was nothing adverse against the petitioner and also no enquiry of any nature was pending against him. The recommended candidates were given appointment/ promotion on the availability of vacancy and the petitioner's appointment/ promotion was withheld on account of issuance of charge-sheet dated 28.09.2016 which ultimately culminated into awarding censure entry vide order dated 30.06.2017. The reliance placed by the learned Standing Counsel on para 11 of the Government Order dated 28.05.1997 has been examined by this Court. Para 11 provides that if recommendation has been made for promotion of any personnel by the Selection Committee, but before implementation of order of promotion, something as contained in Paragraph-2 comes out in the knowledge, and had the same been before the Selection Committee at the time of selection, then it would have been necessary to keep the recommendation of the Selection Committee in a sealed cover, the concerned personnel shall not be promoted and on receipt of the final result of such proceedings, the recommendation of the Selection Committee in respect of such personnel will be implemented in such a manner under the provisions of this Notification, as if the recommendation of the Selection Committee was kept in a sealed cover in respect of such personnel.

12. We have also examined the contents of para 2 of the Government Order dated 28.05.1997 which provides for three conditions (1) if employee is under suspension; (2) if disciplinary is pending against him or any proceeding in Administrative Tribunal is pending for which charge-sheet had been issued; and (3) if proceeding of prosecution is pending against the employee on the ground of criminal charges or the charge-sheet was submitted in court for prosecution.

13. Dealing with certain issues regarding promotion/nonpromotion of an employee on the next higher post in case of pendency or initiation of disciplinary or criminal proceeding, Hon'ble Apex Court in the case of Union of India vs. K.V. Jankiraman AIR 1991 (4) SC 2010 has inter-alia held that in case of pendency of criminal prosecution, the sealed cover procedure is to be resorted to. The Apex Court has approved the conclusions arrived at in the said case by the Full Bench

of Central Administrative Tribunal wherein it was inter-alia held that consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of disciplinary or criminal proceedings against an official. Relevant paragraph-6 of the aforesaid judgment is quoted hereinbelow:- "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 800 instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a, remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2).....

(3).....

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before."

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has

intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo /charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

We, therefore, repel the challenge of the appellant- authorities to the said finding of the Full Bench of the Tribunal."

14. Based on the aforesaid judgment of Hon''ble Apex Court, the personnel department of Government of U.P. has issued an office memorandum dated 28.05.1997 which is applicable to promotion of the government servants.

15. The said Government Order dated 28.05.1997 provides that the Selection Committee shall consider the case for promotion of all the eligible employees, though against some of them some kind of enquiry such as miscellaneous enquiry, preliminary departmental enquiry, vigilance enquiry, formal disciplinary/departmental enquiry or criminal prosecution may be pending or even if he is under suspension. The Government Order further provides that in case candidate concerned, whose case has been considered by the Selection Committee constituted for considering promotion, is under suspension or against whom departmental proceedings or proceedings of Administrative Tribunal are pending for which charge sheet has been issued or against whom criminal prosecution is pending i.e. to say charge sheet in the concerned court has been submitted, the recommendation of the Selection Committee shall be kept in a sealed cover. It further provides that in such a situation where sealed cover procedure is adopted, one vacancy shall be kept reserved which shall be filled in only in a stop-gap-arrangement so that after conclusion of the enquiry against such a person, recommendation made by the Departmental Promotion Committee may be given effect to. The Government Order dated 28.05.1997 further provides that in case even after expiry of one year, the departmental proceeding or criminal prosecution is not concluded, the Selection Committee shall consider promotion of such an employee on ad hoc basis taking into account certain factors which have been given in the said Government Order. The said consideration is to be made only in case the delay is not caused on account of nonco- operation of delinquent/charged employee. The Government Order also provides that in case on technical grounds if such an ad hoc promotees is exonerated by the Court, then the competent authority will consider as to whether ad hoc promotion of such an employee is to continue or not and thereafter, final consideration is to be made only once the departmental proceeding/criminal prosecution is concluded.

16. In the case of Union of India and others Vs. Dr. Sudha Salhan (Smt.); (1998) 3 SCC 394 the Apex Court after considering the observation made by a Three Judge decision in Union of India and Ors. Vs. K.B. Jankiraman & Ors. (1991 (4) SCC 109, held that if on the date on which the name of a person is considered by

the Departmental Promotion Committee for promotion to the higher post, such person is neither under suspension nor has any departmental proceedings been initiated against him, his name, if he is found meritorious and suitable, has to be brought on the select list and the "sealed cover" procedure cannot be adopted. The recommendation of the Departmental Promotion Committee can be placed in a "sealed cover" only if on the date of consideration of the name for promotion, the departmental proceedings had been initiated or were pending or on its conclusion, final orders had not been passed by the appropriate authority. It is obvious that if the officers, against whom the departmental proceedings were initiated, is ultimately exonerated, the sealed cover containing the recommendation of the Departmental Promotion Committee would be opened, and the recommendation would be given effect to.

17. Admittedly, at the time of considering the candidature of the petitioner i.e. on 07.09.2016, for promotion to the post of Chief Engineer Level-II nothing adverse was existing on record against the petitioner as the charge-sheet dated 28.09.2016 was served upon him vide letter dated 17.10.2016 of the Inquiry Officer. As a matter of fact, the Departmental Promotion Committee in its meeting dated 07.09.2016 had already considered and recommended the name of the petitioner for promotion. Subsequent issuance of charge-sheet and punishment has no relation with the recommendation of the Departmental Promotion Committee for promotion to the post in question and, therefore, there is no justifiable reason for denying promotion to the petitioner.

18. For the reasons stated above, the State Government is directed to examine the claim of the petitioner for promotion to the post of Chief Engineer, Level-II in the light of the observation made hereinabove together with the recommendation of the Departmental Promotion Committee dated 07.09.2016 and if any person junior to the petitioner has been promoted on the post of Chief Engineer, Level-II, the petitioner shall also be promoted to the said post from the same date. The exercise in this regard shall be completed within a fortnight from the date of production of certified copy of this order.

19. With the aforesaid observations/ directions, the writ petition is disposed of.