
(2000) 07 KAR CK 0094
In the Karnataka High Court
Case No : Writ Petition No. 24477 of 1999

H. Surendra Shetty

APPELLANT

Vs

Vijaya Bank, M.G. Road, Bangalore and Another

RESPONDENT

Date of Decision : 05-07-2000

Acts Referred:

Citation : (2000) ILR (Kar) 2413 : (2000) 5 KarLJ 419 : (2000) 4 KCCR 264 SN

Hon'ble Judges : A.V. Srinivasa Reddy, J

Bench : Single Bench

Advocate : Sri H. Subramanya Jois, for the Appellant; Sri S.S. Ramadas, for the Respondent

Judgement

1. The petitioner has filed this writ petition praying for issuing of a writ in the nature of mandamus directing the respondents to forthwith open the sealed cover and issue consequential order of promotion to the petitioner in Senior Management Scale IV in the service of first respondent-Bank.

In the course of arguments in order to highlight certain aspects of his case Sri Ramadass, learned Counsel for the respondent, submitted to the Court a bunch of papers relating to the case on hand, a copy of which has not been furnished to the petitioner as they are confidential documents. Some of the facts narrated hereunder are obtained from those documents and, therefore, they do not bear reference to the petition averments or the Annexures produced along with the writ petition. The learned Counsel for the petitioner also had not objected to the Court looking into those documents and relying on their contents, if need be.

2. The facts leading to this writ petition, briefly stated, are as under:

(i) The petitioner is a Scale III Officer. When he was working as Branch Manager at Gandhi Bazaar branch of the Bank in Bangalore, he was served with a letter as per Annexure-D, dated 19-5-1995, alleging certain irregularities against him. The petitioner submitted his detailed explanation as per Annexure-E to the writ petition on 15-7-1995. On 31-1-1996, as per Annexure-F, the General Manager

administered censure upon consideration of the explanation offered by the petitioner and the matter was closed.

(ii) On 19-11-1996 the Ministry of Finance, Government of India is stated to have received an anonymous letter. The said letter was forwarded to Reserve Bank of India for looking into the same. The Reserve Bank of India, in turn forwarded the letter to the respondent-Bank calling for its remarks. On receipt of the first respondent-Bank's remark, Reserve Bank nominated one Sri S. Sampath, AGM of the Bank to examine the matter and submit a report. On receipt of the report from Sri S. Sampath, the RBI forwarded extracts from the report to the Vijaya Bank by letter dated December 20, 1997 to re-examine the issue of irregularities committed by the petitioner afresh. The letter was addressed to the Chief Vigilance Officer of the respondent-Bank. On 15-6-1998 the Chief Vigilance Officer of Vijaya Bank submitted his memorandum to the Board of Directors of the Bank furnishing reply to the allegations and seeking for directions from the Board as to what should be done next. The Board directed the Vijaya Bank by its resolution bearing No. C-80/98, dated 15-6-1998 to re-examine the issue.

(iii) Consequent upon the resolution by the Board dated 18-08-1998, a committee was formed and the matter was gone into once again by the committee. The committee submitted a detailed report to the Board on 24-12-1998 inter alia stating that it would not be appropriate to disagree with the decision already taken while concluding the matter. The Board, on examination of the report of the committee felt that a deeper probe into the acts of commission and omission in several accounts some of which are in NPA category is called for and also resolved that disciplinary proceedings have to be initiated against the petitioner. The resolution of the Board was brought to the notice of Deputy General Manager and Disciplinary Authority. The Deputy General Manager and Disciplinary Authority opined by his letter dated 16-6-1999 that initiation of disciplinary proceedings afresh is not legally tenable.

3. When the matter was pending thus, the Departmental Promotion Committee ("DPC" for short) met to consider the promotion of 13 officials to the Senior Management Grade, Scale IV and the petitioner was also one of the candidates for promotion. The promotion of the officers was ordered on 19-6-1999. One post was kept vacant and the result of the interview conducted by the DPC in respect of the petitioner was put in a sealed cover pending the outcome of the disciplinary enquiry to be conducted in respect of the irregularities alleged against him. It is this action of the respondents in adopting the "sealed cover" procedure in the matter of promoting the petitioner that is under challenge now.

4. I have heard the learned Counsel on both sides at length.

5. The point that arises for my consideration is:

Whether the respondents' recourse to the "sealed cover" procedure is proper and legally justifiable, in the facts and circumstances of the case?

6. I have referred to the factual situation in detail. The answer to the question in issue is linked to and dependent upon the finding as to when exactly for the purposes of sealed cover procedure a disciplinary proceedings can be said to have commenced.

7. The procedure is a well-recognized one and the right of management to have resort to it is not disputed. The question is when and under what circumstances it should be resorted to. This question has been dealt with and answered by series of decisions of Supreme Court beginning with a three Judges Bench of the Apex Court in *Union of India Vs. K.V. Jankiraman, etc. etc.*, . After considering the case in detail the Apex Court laid down the law as under:

"It is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee it can be said that the departmental proceedings 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".

(emphasis supplied)

While so laying down the principle as above, the Apex Court dismissed as untenable the plea of the Union of India 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 purity of administration to reward the employee with a promotion.

8. The next in the line of cases dealing on this aspect is *Union of India and Others Vs. Dr. (Smt) Sudha Salhan*, . The Apex Court consisting of two Judges Bench directed the opening of the sealed cover, on finding, as a fact that on the date on which the Departmental Promotion Committee met to assess the case of the petitioner, she was neither under suspension nor was any charge-sheet issued to her. In so directing, the Apex Court followed with approval the dicta laid down in *K.V. Jankiraman's* case, *supra*. As could be seen the emphasis laid by the Apex Court in *Dr. Sudha Salhan's* case, *supra*, is on the state of affairs that existed as on the date when the procedure was adopted. The Apex Court observed:

"If on the date on which the name of a person is considered by the DPC for promotion to a 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 DPC 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 order has not been passed by the appropriate authority".

9. If, I have to proceed relying on the principle laid down in *K.V. Jankiraman's*

case, supra, that initiation of disciplinary proceedings and service of the charge-sheet on the delinquent official are conditions precedent for resorting to the sealed cover procedure, there would be no difficulty for disposing of this petition holding in favour of the petitioner but, then, there has been a slight departure from the principle laid down in K.V. Jankiraman's case, supra.

10. In State of Madhya Pradesh and another Vs. Syed Naseem Zahir and others, , yet another Bench of three Judges of the Apex Court had occasion to deal with a case involving the sealed cover policy. The respondent in the said case Syed Naseem Zahir was included in the panel for promotion to the post of Chief Engineer. The Departmental Promotion Committee (DPC) met on October 28, 1987 and considered his name for promotion. Since disciplinary proceedings were contemplated against him, the recommendation of the DPC qua him was kept in "sealed cover". On April 15, 1988 he was served with a charge-sheet. The Apex Court on the basis of the facts of that case making a slight deviation to the principle laid down in K.V. Jankiraman's case, supra, held:

"Keeping in view the facts of this case we are of the view that the "sealed cover" containing recommendations of the DPC in respect of respondent-Syed be not opened till the departmental proceedings against him are concluded. As mentioned above the enquiry report has already been received by Syed and it is a matter of days before the disciplinary proceedings would come to an end. In case he is completely exonerated, the sealed "cover" shall be opened and if the recommendation is in his favour shall be notionally promoted with effect from the date when a person junior to him was promoted to the post of Chief Engineer".

Before laying down the principle as above, the Apex Court, in reference to the view in K.V. Jankiratnan's case, supra, stated as follows:

"It is no doubt correct that in view of Jankiraman's case, supra, the DPC was not justified in keeping the recommendation pertaining to Syed in a "Sealed Cover", but it is difficult to ignore glaring facts in a given case and act mechanically".

11. What prompted the Apex Court in that case to deviate from the principle laid down in K.V. Jankiraman's case, supra, was the fact that a report was received from the Chief Engineer in charge on January 30, 1987 that respondent-Syed committed irregularities which resulted in a loss to the State Government to the tune of rupees eighty lakhs. After examining the report, the State Government ordered on the file on September 30, 1987 that departmental proceedings be initiated against him. The Departmental Promotion Committee (DPC) met on October 28, 1987 that is more than one month after a decision was taken by the State Government to hold enquiry. It is in the light of these peculiar facts of the case, as could be gathered from the very words employed in the judgment, that the Apex Court has deviated from the principle laid down in K.V. Jankiraman's case, supra. The words, "but it is difficult to ignore glaring facts in a given case and act mechanically" would go to show that the Apex Court was impelled by the facts governing the case rather than on interpretation of any legal principle to

deviate from the principle laid down in K.V. Jankiraman's case, supra. It is pertinent to note that their Lordship have not dwelt with the principle laid down in Janakiraman's case, supra, to either agree or disagree with it.

12. Again in Union of India and Another Vs. R.S. Sharma, , the Apex Court relying on the fact that on the date when DPC decided to put the recommendations concerning the respondent therein in the sealed cover, criminal investigation into the case was already pending and a FIR was lodged in respect of the case, declined to rely and act upon the principle laid down in K.V. Jankiraman's case, supra. The precise words employed by the Apex Court in R.S. Skarma's case, supra, declining to interfere and order opening of the sealed cover are as follows:

"Learned Counsel for the respondent made an endeavour to contend that in the light of the decision of this Court in K.V. Jankiraman's case, supra, the sealed cover procedure can be resorted to only after Charge Memo is received or a charge-sheet is filed and that unless such an event had happened at the relevant time the Government employee cannot be denied of his promotion, if he is otherwise entitled to it. Learned Counsel also submitted that K.V. Jankiraman's case, supra, was since followed in Dr. Sudha Balkan's case, supra, Bank of India and Another Vs. Degala Suryanarayana, . The clauses of second paragraph of the sealed cover procedure considered in K.V. Jankiraman's case, supra, were not those involved in the present case and hence that decision is of no avail for the respondent. In the other two decisions the facts warranted application of the ratio contained in K.V. Jankiraman's case, supra. The added factor in these two cases was that the public servant concerned had been exonerated of the charges framed by the Criminal Courts. In the present case the respondent is still facing the trial for serious offences, and hence the situation is different".

(emphasis supplied)

13. In the case of R.S. Sharma, supra, the deciding factor was the pendency of the trial for serious offences by the officer concerned and that tilted the scales against the officer. The conclusions of the Apex Court in the subsequent decisions after the decision in K.V. Jankiraman's case, supra, may seem to be inconsistent as contended by the learned Counsel for respondent but they are not difficult to reconcile. As could be seen from the above in cases where the Apex Court departed from the principle laid down in Jankiraman's case, supra, one of the following factors was invariably present viz., (i) either enquiry proceedings were pending or a charge-sheet has already been issued though not served on the delinquent Delhi Development Authority Vs. H.C. Khurana, ; (ii) a complaint to police is under investigation or criminal proceedings against the official were pending regarding the very charges which were later made the subject of enquiry R.S. Sharma's case, supra, Union of India Vs. Kewal Kumar, and Bank of India's case, supra; (iii) where neither the enquiry proceedings are begun nor a charge-sheet issued, a decision had been taken at the departmental level to proceed against the official even prior to taking recourse to the procedure. (Syed Naseem

Zahir"s case, supra).

14. In Bank of India"s case, supra, a three Judges Bench of Apex Court was seized of a case where the official was found fit for promotion with effect from 1-1-1986 but not given effect to on account of pendency of criminal case against him and the result was kept in a sealed cover. The criminal proceedings ended in acquittal in 1988. Subsequently, the departmental proceedings were initiated with the delivery of the charge-sheet on 3-12-1991. The Apex Court held that the only proceedings that was pending at the time of promotion was the criminal proceedings which ended in acquittal, thereby wiping out with retrospective effect the adverse consequences, if any, flowing from the pendency thereof and, therefore, after the acquittal, the sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 withheld for the D.E. proceedings initiated at the fag end of the year 1991.

15. Let me now examine the case on hand keeping in view the above guiding factors to determine and decide whether the adoption of the "Sealed Cover Procedure" by the Department is just and proper in the circumstances of the case. The case on hand clearly does not fall under the categories (i) and (ii) stated supra. The controversy, herein, is confined to category (iii). The learned Senior Counsel for the respondent Mr. S.S. Ramadass made an earnest endeavour to bring this case under category (iii) on the ground that in fact on 15-4-1999 the Board of Directors contemplated to have a deeper probe into the matter and it was also resolved to initiate disciplinary proceedings. According to learned Counsel for the respondent, this amounts to a "decision taken" in the matter prior to the meeting of DPC on 18-6-1999 and, therefore, the recourse to the sealed cover procedure by the respondents is perfectly legal and proper.

16. Learned Counsel sought to draw support to this effect from Rule 3.5.1 of the promotion policy of the Bank. The said Rule reads:

"3.5.1 Such of those officers against whom investigations are ordered by the Bank/CBI/Police, etc., or charge- sheets are pending or contemplated or are under suspension from service or against whom criminal proceedings are pending will not be eligible to be considered for promotion. However, the Competent Authority shall assess the suitability of the officer coming within the purview of the circumstances mentioned above, along with other eligible candidates without taking into consideration, the disciplinary case/criminal prosecution pending. The assessment of Competent Authority and the ratings awarded by it will be kept in a sealed cover. The cover will be superscripted "findings regarding suitability for promotion to the grade/scale of.....in respect of..... (name of the official). The sealed cover shall not be opened till the completion of the disciplinary proceedings/criminal prosecution against Sri. . . .". The proceedings of the Competent Authority/DPC shall contain the note "the findings are contained in the attached cover"."

(emphasis supplied)

It is the contention of Mr. Ramadass that the procedure adopted in the present case is strictly in accordance with Rule 3.5.1 in the light of contemplation by the Board of Directors to start inquiry proceedings and since charge-sheet was contemplated the Bank was fully justified in taking recourse to the sealed cover policy and the same cannot be found fault with.

17. Learned Senior Counsel Mr. Subramanya Jois who appeared for the petitioner, submitted that contemplation of the Board of Directors to probe deeper into the matter and also to start inquiry proceedings against the petitioner would not amount to a "decision taken" in the matter, as the matter was still at the stage of consideration as could be seen from the developments that took place immediately after 8-5-1999 when the Board decided to hold inquiry proceedings and just prior to the meeting of DPC on 18-6-1999. It is the contention of Mr. Subramanya Jois that as things stood on 18-6-1999 when the DPC met the matter was still in fluid state and irrespective of what happened later on, there was no justification to take recourse to the "sealed cover policy". It is his contention that the contemplation by the Board of Directors to start inquiry proceedings, therefore, would not amount to a decision, in the eye of law, to justify taking recourse to the "sealed cover policy".

18. I would first deal with that portion of para 3.5.1 of the promotion policy on which heavy reliance is placed by Sri Ramadass for justifying the action taken by the management. The portion of policy reading, "such of those officers against whom investigations are ordered by the bank" and "charge-sheets are pending or contemplated", according to Sri Ramadass, leaves no room to doubt that the resort to the "sealed cover policy" by the bank is in pursuance of the policy of the bank and, therefore, in accordance with law and the petitioner cannot be allowed to dispute the authority of the bank to take recourse to such procedure.

19. I am unable to agree with the learned Counsel on this count. The policy envisaged by the bank will hold good in law so long as it does not interfere with or opposed to the legal right of an employee. In the light of the principle laid down by the Apex Court in K.V. Jankiraman's case, supra, a mere ordering of investigation by the bank or contemplation of issuance of charge-sheet cannot serve as a basis to support the adoption of the "sealed cover procedure". If such an interpretation can be permitted in law, then anyone and everyone can be denied a promotion on the mere assertion by the Bank that it is contemplating issuing of charge-sheet. This is opposed to all canons of service jurisprudence. In law a regular departmental enquiry can be said to have begun only when a charge-sheet is drawn up and served upon the delinquent.

19-A. In this connection it is relevant to refer to the decision in Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee, wherein the Apex Court held:

"A regular departmental enquiry takes place only after the charge-sheet is drawn up and served upon the delinquent and the latter's explanation is obtained".

In the case on hand, admittedly, the charge-sheet not having been drawn up and served upon the delinquent, it can be safely assumed that there was no departmental enquiry pending on 18-6-1999 when the DPC met for considering the case of the officials for promotion to the higher cadre and that the enquiry was only under contemplation.

20. The meaning given in Black's Law Dictionary, 5th edition (1979) for the word "contemplation" is as follows:

"The act of the mind in considering with attention. Continued attention of the mind to a particular subject. Consideration of an act or series of acts with the intention of doing or adopting them. The consideration of an event or state of facts with the expectation that it will transpire".

Thus contemplation is a process that goes on in the mind and falls far short of a "decision" which refers to the culmination of the process of contemplation in arriving at a definite conclusion as to the next course of action to be taken under a set of facts with the intention of carrying out a certain act. Thus mere contemplation cannot serve as the basis for adopting the sealed cover procedure as it does not answer to the tests adopted in the decisions relied upon by learned Counsel Ramadass to justify the adoption of the sealed cover procedure.

21. There is yet another reason why in the present case of taking recourse to this procedure on the ground that investigations were ordered by the bank or charge-sheet was contemplated, was not justified. It is now well-settled law that the duty to comply with natural justice is implied where the administrative function affects the civil rights of an individual or inflicts consequences upon him. It is so, even where the duty to act judicially is not laid down by statute, for the obligation of the authority to act fairly is always implied and the civil right of a party so aggrieved by any unfair action is always well-ensconced by the principles of natural justice. The doctrine of natural justice is no longer limited to Courts in their application as it has now been extended to statutory authorities and administrative authority who perform the function of determining the civil rights or obligations. If the petitioner is denied promotion merely on the basis that a charge-sheet is contemplated or some investigation is ordered by the bank, it would amount to interfering with or denying a right to which the petitioner was rightfully entitled to which is per se improper and opposed to principles of natural justice. No man can be denied his due without even letting him have an inkling as to why he is being denied it.

22. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, , the first respondent joined the service of the State Government in 1938. In 1961, the Government held an enquiry into her date of birth. She was then asked to show cause why a certain date should not be taken as her date of birth. The report of the enquiry officer was not disclosed, and the first respondent was not given an opportunity to meet the evidence used against her. The Government refixed the date of birth of the first respondent and ordered that she be compulsorily retired.

The first respondent then filed a writ petition which was allowed. The State appealed. The Apex Court while dismissing the appeal, held:

"An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon.

Duty to act judicially would therefore arise from the very nature of the function intended to be performed; it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case".

Though the principle has been laid down in a different context it applies on all fours to the facts of the present case. Even in the case on hand the petitioner was blissfully kept unaware of what transpired after the matter of irregularities alleged against him was closed and he was censured. The decision by the respondents to resort to the procedure, impugned herein, must have hit the petitioner as a bolt from the blue. It is precisely in such situations the principles of natural justice come into play. The denial of a right to which he may have been rightfully entitled to is an arbitrary exercise of power to the prejudice of the petitioner and, therefore, is a nullity.

23. Sri Ramadass proceeded on the premise that adopting of sealed cover procedure does not amount to damning of the petitioner as in the event of the petitioner being cleared of the charges held against him, he would be entitled to all benefits including the promotion. It is not so in the present case. Regulation 4 of the Vijaya Bank Officer Employees" (Conduct) Regulations, 1981 spells out the list of penalties and their categorisation. The following penalties are to be found under the head of Minor Penalties:

"(a) Censure;

(b) Withholding of increments of pay with or without cumulative effect;

(c) Withholding of promotion;

(d) Recovery from pay or such other amount as may be due to him of the whole or part of any pecuniary loss caused to the Bank by negligence or breach of orders".

In effect, therefore, what has been done by the respondents is that they have imposed a minor penalty on the petitioner without hearing him which goes against the time tested principle of audi alteram partem which is impermissible in law.

24. While on this subject, it would be useful to refer to the Office Memorandum issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training dated 14th September, 1992 which lays down the procedure to be adopted in the case of Government servants who are under a cloud in the matter of their promotion. The relevant portion is extracted and it reads:

"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 servant under suspension;
- (ii) Government servants in respect of whom a charge 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 case I 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 superscripted "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".

(emphasis supplied)

This memorandum has been addressed to the Chairman and Managing Director of all the Nationalised Banks, including the respondent. In enclosing this Official Memorandum by the letter dated 8th December, 1992 it has been observed by the Ministry that the revised guidelines/instructions are issued in supersession of all the other earlier guidelines/instructions issued in this regard earlier. When this is the position, how the respondent-Bank could include "contemplating of a charge" and "investigations by the Bank" also as disabilities for promotion is not explained by the learned Counsel for the respondent. It is not the case of the respondents that the guidelines have been revised yet again after 14th September, 1992 to include the above factors as disabilities for promotion. The policy adopted by the respondent-Bank, therefore, is in derogation of the

directives issued by the Government of India extracted hereinabove. This is another reason why the respondent-Bank cannot draw sustenance from the policy on which Mr. Ramadass relied heavily to substantiate his contention that the resort to the impugned procedure was well-within the authority of the respondent-Bank. Thus, it would not be open to the respondents to justify taking recourse to the procedure either on the ground that investigation was ordered by the bank or on the ground that charge-sheet was contemplated.

25. That leaves me with the last of the circumstances under which this procedure could be resorted to i.e., on the ground that a decision had in fact been taken to initiate disciplinary action and that circumstance, in the light of the decisions referred to supra, would serve as sufficient basis for adopting the procedure. The decision in this case has been taken by the Board of Directors and not the Disciplinary Authority. Annexure-I to the Vijaya Bank Officer Employees" (Discipline and Appeal) Regulations, 1981 lists out the Competent Authorities appointed by the Board of Directors as the Disciplinary Authorities. The Disciplinary Authority insofar as Officer Scale-III is concerned is the Deputy General Manager (Personnel). Section 5 of the Vijaya Bank Officer Employees" (Discipline and Appeal) Regulations, 1981 reads:

"Authority to institute disciplinary proceedings and impose penalties:

(1) The Managing Director or any other authority empowered by him by general or special order may institute or direct the Disciplinary Authority to institute disciplinary proceedings against an officer-employee of the Bank.

(2) The Disciplinary Authority may himself institute disciplinary proceedings.

(3) The Disciplinary Authority or any authority higher than it, may impose any of the penalties specified in Regulation 4 on any officer-employee".

As could be seen from the above regulation it is either the Managing Director or the Disciplinary Authority who is statutorily authorised to institute disciplinary proceedings. The decision to initiate disciplinary action should emanate from either of the said two authorities in order to say that there was in fact "a decision taken" by the proper authority. The facts in the present case clearly go to establish that even when the Board of Directors decided to initiate proceedings against the petitioner, the Disciplinary Authority had written back to them about the futility of such an exercise by saying that such a procedure would not stand the test of law, the petitioner having been once tried and imposed with a minor penalty and a retrial on the said same charge not being permissible.

26. The general rule is that where a statute directs that certain acts shall be done by a specified person, their performance by any other person is impliedly prohibited. In the case on hand the decision which is taken by the Board of Directors becomes non est in law. It is by now well-established that where the power to do a specified act is vested in a inferior authority by statute or rules or bye-laws having statutory force, a superior authority cannot do that act directly.

It is so even where a superior authority is vested with the revisional powers. Though there may be vesting of revisional power in the superior authority, the superior authority cannot exercise that power in the absence of a revisional proceedings in terms of the statute. Though the statutory authority may take the help of ministerial officers to make an inquiry and report, the consideration and the ultimate decision must be the concern of the statutory authority alone. In the present case, as could be seen from the material available on record, the act of taking decision has been done not by the Deputy General Manager who is the appropriate authority but by the Board of Directors which is a superior body and, therefore, such a decision cannot be made the basis for taking resort to the sealed cover procedure (see Administrative Law by D.D. Basu, IV Edition, page 194).

27. In *Bar Council of India and Another v Surject Single and Others*, the Apex Court while dealing with the question whether a mere approval by the Bar Council of India of a rule passed by the State Bar Council, which is otherwise ultra vires, could make the impugned rule valid, observed:

"Any rule made by the State Bar Council cannot have effect unless it is approved by the Bar Council of India. But the approval of the Bar Council of India can make the rule made by the State Bar Council valid and effective only if the rule made is within the competence of the State Bar Council, otherwise not. Mere approval by the Bar Council of India to a rule ultra vires the State Bar Council cannot make the rule valid. Nor has it the effect of a rule made by the Bar Council of India".

In the present case the Competent Authority was the Deputy General Manager. The decision to initiate disciplinary action would be valid and effective only if it emanates from the Disciplinary Authority. The decision by the Board of Directors being ultra vires the regulation, would not be valid. Merely because the Disciplinary Authority did abide by the decision of the Board of Directors and took a decision, later on, to initiate an inquiry into the regularities would not amount to a "decision taken" in the matter by the appropriate authority. Mere abiding by the direction of the Board of Directors by the Disciplinary Authority would not render the decision by the Board of Directors valid as under the regulations it is non est.

28. Mr. Ramadass relied on a decision in *R. v Waltham Forest London Borough Council, ex parte Baxter and Others*, to drive home the point that where a subordinate acts in accordance with a superior's direction it would not amount to a fetter on the discretion of the subordinate and therefore any action by the subordinate in consonance with the direction is valid. The ruling in the above case clearly goes against the principle laid down by the Apex Court in the case referred to supra. But that apart, the case on hand can be clearly distinguishable on facts. In *Waltham Forest London Borough Council's* case, supra, a local authority resolved by vote at a council meeting to fix the general rate for the borough at a level which represented an increase over that for the previous year

of 56.6% in the non-domestic rate and 62% in the domestic rate. The majority group on the council belonged to a particular political party and operated a "whip" system under their party's standing orders which required members to refrain from opposing or voting against decisions of the group except in certain specified circumstances. At a meeting of the majority group prior to the council meeting some six or seven councillors voted against the proposed rate increase because they thought it was too high but at the council meeting they all voted for the increase. The applicants, who were members of a rate payers' group opposed to the rate increase, applied for a judicial review of the council's resolution on the ground that certain councillors who had voted in favour of the resolution had taken into account an irrelevant factor, namely the party whip, and had fettered their discretion by obeying the whip. The Divisional Court dismissed the application and the applicants appealed. In the appeal it was held:

"Although when voting to set a rate a local authority councillor was entitled to give weight to the views of colleagues in the same party and to the party whip a councillor was under a duty to make up his own mind on how to vote on a particular issue and could not abdicate that personal responsibility to the extent of voting blindly in support of a party policy. On the evidence, however, it was clear that the councillors who initially opposed the majority view had nevertheless retained an unfettered discretion in the council chamber and their decision to vote in line with the majority group was the exercise of a free choice. It followed that the resolution could not be impugned and the appeal would therefore be dismissed".

(emphasis supplied)

29. Thus, from the portion underlined it becomes obvious that the Court on evidence found that though initially the corporators opposed the rise, later on they, in exercise of an unfettered discretion, voted for the raise. It is primarily on consideration of this important factor, which is totally absent in the case on hand, that the appeal came to be dismissed. The material available on record in the present case clearly points to the contrary. Not only the Disciplinary Authority wrote back to the Board of Directors stating that no action could be taken in the light of the fact that the matter had been gone into once and a finality readied by censuring the petitioner, he also mentioned the futility of instituting a fresh disciplinary enquiry as, according to him, it would not be valid in law. I refrain from dealing with this aspect in detail as it is the subject-matter of an appeal pending consideration. But suffice, for my purpose, to hold that the facts in the present case are directly in contrast with the facts in Waltham Forest London Borough Council's case, *supra*, and, therefore, the decision in that case would not be applicable to the facts of the present case. While in the said case the change of heart in favour of the rise in taxes was wrought by exercise of free choice, in the case on hand as the events that transpired after 18-6-1999 go to show, the decision to initiate disciplinary proceedings against the petitioner was the outcome of a fettered discretion.

30. Thus, in the ultimate analysis, I find that the adoption of the "sealed cover policy" in the present case is bad for the following reasons as, on the facts of the present case, the disciplinary proceedings could not be said to have commenced on 18-6-1999 for purposes of sealed cover procedure when the DPC met to decide on the promotions:

(i) No disciplinary proceedings were initiated or pending against the petitioner on the date when the procedure was adopted.

(ii) No investigation was ordered by the CBI, Police etc., and no charge-sheet was pending or contemplated by any of these agencies.

(iii) No criminal proceedings were pending against the petitioner on the crucial date.

(iv) There was no "decision taken" to bring the case within the ambit of the pronouncement of law in Syed Naseem Zahir's case, supra.

31. In the facts and circumstances of this the case, the principle in K.V. Jankiraman's case, supra, alone would apply and applying the principles in K.V. Jankiraman's case, supra, it has to be held that the adoption of the "sealed cover procedure" is not valid in law and has to be struck down.

32. In the result, for the reasons stated above, the writ petition is allowed and the respondents are directed to open the sealed cover and announce the result of the interview held for promotion in respect of the petitioner within a week from the date of receipt of the certified copy of this order.

No order as to costs.