
(2015) 08 GUJ CK 0041

In the Gujarat High Court

Case No : Special Civil Application No. 4251 of 2015

Kiran Surendrabhai Sheth

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)

Prevention of Corruption Act, 1988 — Section 12, 13(1)(D), 13(2), 15, 19

Citation : (2015) 08 GUJ CK 0041

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Harshal N. Pandya, for the Appellant

Final Decision : Allowed

Judgement

J.B. Pardiwala, J—By this writ-application under Article 226 of the Constitution of India, the petitioner serving as an Assistant Engineer (Civil), has prayed for the following reliefs:-

"6. The petitioner respectfully prays that, on the basis of the facts and circumstances as mentioned hereinabove and which may be urged at the time of hearing, the Honourable Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to the respondent authorities and may be pleased to:-

(A) declare and hold that the action of the respondent authorities of superseding the petitioner in promotion on the post of Deputy Executive Engineer (Civil) is illegal and arbitrary, and

(B) direct the respondent-authorities to give promotion to the petitioner on the post of Deputy Executive Engineer (Civil) w.e.f. 31.05.2013, the date on which the junior to the petitioner is promoted, with all consequential benefits, and

(C) award the cost of the present petition, and

(D) pending admission and final disposal of this petition, the Honourable Court may be pleased to direct the respondent authorities to promote the petitioner on the post of Deputy Executive Engineer (Civil) on ad-hoc basis as petitioner is about to retire in 2017, and/or

(E) pending admission and final disposal of this petition, the Honourable Court may be pleased to restrain the respondent authorities from giving further promotions on the post of Deputy Executive Engineer (Civil) without first considering the case of the petitioner for the same, and/or

(F) grant any other relief or pass any other order which the Honourable Court may consider as just and proper, in the facts and circumstances of the case.

And for this act of kindness and justice the petitioner shall as in duty bound for ever pray."

2. The facts giving rise to this writ-application may be summarized as under:-

3. The petitioner was appointed as the Assistant Engineer (Civil) on 11th August, 1982 after the due process of selection. The next promotional post is that of the Deputy Executive Engineer.

4. On 1st March, 1993, the final seniority list of the Assistant Engineer (Civil) for the period between 1st April, 1979 and 31st December, 1989 was published. The petitioner figured at the serial No. 670 and his immediate junior namely Shri Haresh Bhatt figured at the serial No. 671. On 17th September, 2011, the First Information Report being C.R. No. I-8/2011 came to be registered against the petitioner for the offence punishable under Sections 7, 12, 13(1)(D) read with Section 13(2) and 15 of the Prevention of Corruption Act, 1988. On 26th September, 2012, the Departmental Promotion Committee considered the case of the petitioner for promotion to the post of the Deputy Executive Engineer since on the date of the meeting of the DPC, neither any adverse remarks were there in the ACR nor any departmental inquiry was pending against the petitioner. The matter was referred to the Gujarat Public Service Commission for consultation.

5. On 27th December, 2012, the petitioner was arrested. He was therefore, released on bail.

6. On 14th February, 2013 sanction to prosecute the petitioner for the alleged offence was accorded under Section 19 of the Act, 1988.

7. On 1st March, 2013, the petitioner was placed under suspension.

8. On 31st May, 2013, the employees junior to the petitioner were promoted.

9. On 5th July, 2013, the charge-sheet was filed in the Special Court for the offence punishable under the Corruption Act.

10. On 26th September, 2013, the suspension of the petitioner from service was revoked.

11. On 24th April, 2013, the GPSC called for certain details from the State Government regarding the case of the petitioner.

12. On 19th November, 2013, the State Government provided the necessary information to the GPSC.

13. On 12th February, 2014, the GPSC considering the information provided by the State Government accepted the proposal and recommended the name of the petitioner for promotion.

14. On 1st March, 2014 one another order was issued promoting the juniors to the petitioner.

15. On 2nd February, 2015, the present writ-application was filed.

16. Ms. Pandya, the learned advocate appearing for the petitioner submitted that as there was nothing against her client at the time when the Departmental Promotion Committee considered the case of the petitioner, the subsequent registration of the FIR could not have been considered for denying the promotion to the petitioner. She submitted the promotional post for the cadre of the Assistant Engineer is Deputy Executive Engineer. According to the recruitment rules of the cadre of Deputy Executive Engineer (Civil) an employee working in the cadre of the Assistant Engineer (Civil) having experience of five years of service is eligible for being promoted on the post of the Deputy Executive Engineer.

17. Ms. Pandya pointed out that in 2011, the State Government had called for the information with regard to the Annual Confidential Report of the persons working in the cadre of the Assistant Engineer. On the basis of the information received a list of suitable Assistant Engineers who were to be considered for the promotion was prepared and the name of the petitioner was included in the said list.

18. Ms. Pandya invited my attention to the Government Resolution dated 4th August, 2007 providing for the procedure to be followed by the DPC in cases of the Government employees/officers under suspension and/or against whom the departmental inquiry/prosecution is pending/contemplated. Ms. Pandya by placing reliance on the said Government Resolution submitted that the date on which the committee had met there was no prosecution or any departmental inquiry against the petitioner and therefore he was entitled to be promoted to the post of the Deputy Executive Engineer.

19. Ms. Pandya in support of her submission has placed reliance on the decision of the Supreme Court in the case of Union of India Vs. K.V. Jankiraman, etc. etc., AIR 1991 SC 2010 : (1991) 63 FLR 767 : (1991) 3 JT 527 : (1991) 2 LLJ 570 : (1991) 2 SCALE 423 : (1991) 4 SCC 109 : (1991) 3 SCR 790 and two decisions of this Court in the case of (i) Sardar Mohmed Umerbhai Makrani v. Gujarat Rural Housing Board and others, 2012 (3) GLR 2050 and (ii) N.M. Yadav v. State of Gujarat and others, SCA No. 568 of 2013, decided on 13th January, 2014.

20. On the other hand, this writ-application has been vehemently opposed by Mr. Swapneshwar Gautam, the learned AGP appearing for the State-respondents. He submitted that the date on which the case of the petitioner was considered for promotion he was under suspension. He submitted that since the petitioner was under suspension on that date the case of the petitioner was not considered in view of the Government Resolution dated 23rd September, 1981. He submitted that in such circumstances the juniors were considered ahead of the petitioner and were promoted.

21. Mr. Gautam has placed reliance on the averments made in the affidavit-in-reply filed on behalf of the respondent No. 1. The averments made in the reply are as under:-

"6.2 The DPC first met on 26.09.2012. Where the case of the petitioner was duly considered by the committee and subsequently the name was recommended to the Gujarat Public Service Commission for recommendation/consultation as per the rules (hereinafter as referred as "GPSC"). At this juncture, it is clarified that there was a First Information Report (hereinafter referred as FIR) registered against the petitioner for asking bribe of Rs. 75,00,000/-. The FIR came to be registered against the petitioner in Vadodara, ACB, Criminal Case bearing No. 8/2011 on 17-09-2011. At this juncture it is pertinent to note herein that, on 01.03.2013 the petitioner was suspended by the deponent office with effect from 27.12.2012. The copy of the suspension letter is annexed herewith and marked as ANNEXURE-R-1.

6.3 Then, on 14.02.2013 the State Government gave sanction to ACB for prosecution against the petitioner.

6.4 Subsequently, on 26-09-2013, the petitioner was conditionally reinstated into service as per the GR dated 20-07-07 of the State Government copy of the order is annexed herewith and marked as ANNEXURE-R-II.

6.5 Subsequently, as the case was under consultation of the GPSC, after careful scrutiny of the document by the GPSC on 20-04-2013, GPSC wrote a letter to the State Government asking clarification apropos the note in the confidential report of the petitioner qua FIR being registered against the petitioner during the period of 01.04.2011 till 29.09.2011. The GPSC sought clarification from the state in what sense petitioner is fit for promotion as there is an FIR against him. Copy of the aforesaid letter is annexed herewith and marked as ANNEXURE-R-III.

6.6 Thereafter, on 19.11.2013 the State wrote a letter to the GPSC explaining that at the time of DPC first met and when the case of the petitioner was considered for promotion there was no information with respective branch which deals with promotion that an FIR is registered against the petitioner. At very belated stage it came to the knowledge of the relevant branch dealing with promotion that there is a case which is registered against the petitioner in ACB in which State Government sanction prosecution against the petitioner on 14-02-2013. In that letter information regarding petitioner's suspension and

petitioner was under suspension on 31-05-2013, the date on which the petitioner's junior was promoted, was not provided to GPSC mistakenly. It was bona fide oversight.

6.7 Subsequently, on 12-02-2014 the GPSC recommended the name of the petitioner as fit for being promoted on 31.05.2013 which included the name of the petitioner. However, Department had not given promotion to petitioner because petitioner was under suspension on 31.05.2013, the date on which his junior engineer was promoted as per GR dated 23-09-1981 than after, Petitioner was reinstated by revoking his suspension in service on 26.09.2013 as per term and condition wrote in order.

6.8 Later, it was clarified by the Government to GPSC on 9-3-2015 that due to lack of information that the same could not be informed to the GPSC and inadvertently, there was no mention of petitioner's suspension. Subsequently on 17.04.2015 the GPSC informed to the deponent office that for considering the case of the petitioner to be kept in seal cover, it is not required to consult GPSC as per the Government Resolution dated 23.09.1981. The copy of the both letters are annexed herewith and marked as ANNEXURE-R-IV and ANNEXURE-R-V respectively.

7. The answering respondent respectfully submitted that day when the promotion order was being considered to be given at that time the petitioner was under suspension.

8. By way of this petition, the petitioner has contended that the suspension of the petitioner was completely revoked. The answering respondent respectfully submits that the petitioner suspension order was revoked as per GR dated 20-07-07. But it is clarified herein order dated 26-09-2013, that it was conditional revocation of the petitioner suspension and on following ground below:

- a. That the suspension period shall not be regularized till final outcome of the criminal proceeding before the Ld. Competent Court.
- b. That the petitioner shall not be entitled for any claim against the same; and
- c. That the petitioner was asked to give undertaking for the same.

Copy of the same is annexed as ANNEXURE R-II.

9. I respectfully say and submit that as per the Government Resolution dated 23.09.1981 delineates and defines specifically in proviso-7 not to promote the petitioner.

The Proviso 7 (Quoted as under)

"The Government servant whose name is included in the select list who is subsequently placed under suspension order against whom Criminal Proceedings/ Departmental proceedings have been initiated should not be promoted on the

basis of the his inclusion in the select list until he is completely exonerated of the charges against him. If the Government servant is completely exonerated from the charges, he will be promoted on the basis of his position in the select list, to the post which has been filled on a temporary basis pending disposal of the charges against him. If the exoneration is not complete, the question of his suitability for promotion will have to be adjudged afresh as mentioned in para-5 above."

As it is evident from the aforesaid that no promotion can be granted until the petitioner is completely excluded on the charges against him; it is crystal clear from the GR aforementioned that in all the case where A government has been subsequently placed under suspension or against whom the criminal proceedings/ departmental proceedings have been initiated should not be promoted on the basis of his inclusion in the select list. In the instant case the petition name is included in the select list for promotion but his case can't be considered until he is all free of charges and exonerated. Copy of the GR is annexed hereto and marked as Annexure R-VI.

10. I respectfully say and submit that the Ld. Competent Court of has also issued charge sheet against the petitioner on 5-7-2013 and the matter is pending before the Ld. Competent Court (sp.) ACB case No. 1/2013. As per the above mentioned GR of 23.09.1981 the case of petitioner can't be considered till he is completely exonerated. Copy of the charge sheet is annexed hereto and marked as Annexure R-VII.

11. I respectfully, say and submit that as the petitioner was under suspension on the day on which the promotion order of his junior was passed therefore, by virtue of the Government Resolution dated 23.09.1981, the petitioner's case cannot be considered for the promotion till he is completely exonerated.

12. I respectfully say and submit that in light of the aforesaid discussion and ground mentioned below the petitioner case should be dismissed in limine.

a. The petitioner was under suspension at the time of issuance of promotion (31-5-2013)

b. As per the Government Resolution dated 23.09.1981 clearly mentions in Proviso-7 that no promotion shall be given unless the person is completely exonerated."

22. Thus, according to Mr. Gautam, the petitioner has no case and the writ-application deserves to be rejected.

23. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the petitioner is entitled to the relief prayed for in this writ-application.

24. The submission of Mr. Gautam, the learned AGP, that since the petitioner was under suspension he was rightly not considered for being promoted to the post of

the Deputy Executive Engineer deserves to be outright rejected. The Departmental Promotion Committee had met on 26th September, 2012. On that day there were no adverse remarks in the ACR nor any departmental inquiry pending against the petitioner. The only thing against the petitioner was the registration of the FIR being C.R. No. I-8/2011. Therefore, the moot question that falls for my consideration is whether the case of the petitioner could have been rejected only on the ground that one FIR had been registered against him for the offence under the Corruption Act.

25. At this stage, I must look into the Government Resolution dated 4th August, 2007, referred to above. The same reads as under:-

"RESOLUTION"

Government in General Administration Department has issued from time to time, general guidelines to be followed in the matters of promotions of Government employees/officers against whom disciplinary/court proceedings are pending/contemplated and/or who are under suspension

2. The Hon"ble Supreme Court of India has, in the case of Union of India Vs. K.V. Jankiraman, etc. etc., AIR 1991 SC 2010 : (1991) 63 FLR 767 : (1991) 3 JT 527 : (1991) 2 LLJ 570 : (1991) 2 SCALE 423 : (1991) 4 SCC 109 : (1991) 3 SCR 790 , held that the disciplinary proceedings or prosecution against Government employee/officer should be treated to have commenced only from the date of issuance of charge-sheet (in the case of Departmental Inquiry) or from the date of filing of charge-sheet in the appropriate Court of Law (in the case of prosecution) and not from any earlier stage, and that the "sealed cover procedure" should be resorted to only if the charge-sheet has been issued to the concerned Government employee/officer in the case of a Departmental Inquiry or the charge-sheet has been filed in the appropriate Court of Law in the case of prosecution, on or before the date of meeting of the Departmental Promotion Committee.

3. In the light of the above referred to judgment of the Apex Court, the instructions regarding following of the "sealed cover procedure" need to be amended suitably. Therefore, in amplification of the general instructions/guidelines issued by the Government In GAD from time to time on the subject of "sealed cover procedure" to be followed by the DPC, it is clarified that at the time of consideration of the cases of Government employees" officers, the "sealed cover procedure" shall be followed by the concerned DPC only in the cases falling under one of the following categories:-

- (1) Government employee/officer under suspension;
- (2) Government employee/officer in respect of whom a charge-sheet has been issued and the disciplinary proceedings are pending; and
- (3) Government employee/officer in respect of whom prosecution for a criminal charge is pending.

4. Further procedure in regard to the "sealed cover" cases shall remain the same as stipulated in GR GAD No. CRR/102005/1008/G.2 dated 1st September, 2006."

26. Thus, the plain reading of the aforesaid resolution makes it clear that the "Sealed Cover Procedure" should be followed by the concerned DPC only in the cases wherein the government officer is under suspension or against whom a charge-sheet has been issued and the disciplinary proceedings are pending or against whom prosecution for a criminal charge is pending.

27. Mr. Gautam tried his best to persuade me to take the view that the case of the petitioner would fall in the 3rd category i.e. officer against whom prosecution for a criminal charge is pending. According to Mr. Gautam the mere registration of the FIR would amount to a criminal charge pending as also the prosecution.

28. I am afraid I am unable to agree with the submission of Mr. Gautam as the resolution makes it clear that it is only when the charge-sheet is filed in the competent Court of law in the case of criminal prosecution that the "Sealed Cover procedure" has to be followed. It is pertinent to note that the Government Resolution referred to above is on the basis of the decision of the Supreme Court in the case of Union of India Vs. K.V. Jankiraman, etc. etc., AIR 1991 SC 2010 : (1991) 63 FLR 767 : (1991) 3 JT 527 : (1991) 2 LLJ 570 : (1991) 2 SCALE 423 : (1991) 4 SCC 109 : (1991) 3 SCR 790 .

29. The Supreme Court in the case of Jankiraman (supra) made the following observation:-

"6. 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 charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc., does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it would 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."

30. In the case of Sardar Mohmed Umerbhai Makrani (supra), the learned single Judge of this Court placing reliance on the case of Jankiraman (supra) made the following observations as under:-

"9. Now, coming to the next question of examining the challenge by the petitioner to the legality of the departmental enquiry initiated against him vide charge-sheet dated 7.5.1999 and its ultimate conclusion, culminating into punishment order dated 30.9.2000, at the outset it needs to be recorded that, the respondent authorities are right in contending that the scope of judicial review in disciplinary matters is very narrow. It is settled position of law that the courts of law would not interfere in disciplinary matters lightly, it would neither act as appellate authority nor would it substitute the satisfaction of the disciplinary authority, about the guilt. At the same time, disciplinary authority, can also not claim that its action is immune from any scrutiny, howsoever illegal and arbitrary it may be.

10. At this juncture, some of the observations of the Honourable the Supreme Court of India are required to be noted here.

10.1 In the case of M.V. Bijlani Vs. Union of India (UOI) and Others, AIR 2006 SC 3475 : (2006) 102 CLT 635 : (2006) 109 FLR 717 : (2006) 4 JT 469 : (2006) 2 LLJ 800 : (2006) 4 SCALE 146 : (2006) 5 SCC 88 : (2006) SCC(L&S) 919 : (2006) 3 SLJ 184 : (2006) AIRSCW 2096 : (2006) 3 Supreme 393 , it is observed as under.

25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceeding, however, being quasi-criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e. beyond all reasonable doubts, we can not lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he can not take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.

26. The report of the Enquiry Officer suffers from the aforementioned vices. The orders of the disciplinary authority as also the appellate authority which are based on the said Enquiry Report, thus, cannot be sustained. We have also noticed the way in which the Tribunal has dealt with the matter. Upon its findings, the High Court also commented that it had not delved deep into the contentions raised by the Appellant. The Tribunal also, thus, failed to discharge its functions properly."

10.2 In the case of Kuldeep Singh Vs. The Commissioner of Police and Others, AIR 1999 SC 677 : (1999) 81 FLR 630 : (1999) 8 JT 603 : (1999) 1 LLJ 604 : (1998) 6 SCALE 588 : (1999) 2 SCC 10 : (1999) SCC(L&S) 429 : (1998) 3 SCR 594 Supp : (1999) AIRSCW 129 : (1998) 9 Supreme 452 , it is observed by the Supreme Court, as under.

"42. The Enquiry Officer did not sit with an open mind to hold an impartial domestic enquiry which is an essential component of the principles of natural justice as also that of "Reasonable Opportunity", contemplated by Art. 311(2) of the Constitution. The "Bias" in favour of the Department had so badly affected the Enquiry Officer's whole faculty of reasoning that even non-production of the complainants was ascribed to the appellant which squarely was the fault of the Department. Once the Department knew that the labourers were employed somewhere in Devil Khanpur their presence could have been procured and they could have been produced before the Enquiry Officer to prove the charge framed against the appellant. He has acted so arbitrarily in the matter and has found the appellant guilty in such a coarse manner that it becomes apparent that he was merely carrying out the command from some superior officer who perhaps directed "fix him up."

10.3 The aspect of delay in initiation and continuation of departmental enquiry is considered by the Honourable the Supreme Court of India in various judgements, some of which are, (1) P.V. Mahadevan Vs. M.D., Tamil Nadu Housing Board, AIR 2006 SC 207 : (2005) 4 CTC 403 : (2005) 7 JT 417 : (2005) 3 LLJ 527 : (2005) SCC(L&S) 861 : (2005) 2 SCR 474 Supp : (2006) 1 SLJ 67 : (2005) AIRSCW 5690 : (2005) 5 Supreme 611 , (2) State of Andhra Pradesh Vs. N. Radhakishan, (1998) 3 AD 581 : AIR 1998 SC 1833 : (1998) 3 JT 123 : (1998) 2 SCALE 672 : (1998) 4 SCC 154 : (1998) SCC(L&S) 1044 : (1998) 2 SCR 693 : (1998) 1 UJ 693 : (1998) AIRSCW 1629 : (1998) 3 Supreme 584 , (3) State of Madhya Pradesh vs. reported in The State of Madhya Pradesh Vs. Bani Singh and another, AIR 1990 SC 1308 : (1990) CriLJ 1315 : (1990) 60 FLR 824 : (1990) 2 JT 54 : (1990) LabIC 1488 : (1990) 2 LLJ 529 : (1991) 2 SCALE 744 : (1990) 1 SCC 738 Supp : (1990) SCC 738 Supp : (1990) 1 UJ 583 , and (4) M.V. Bijlani Vs. Union of India (UOI) and Others, AIR 2006 SC 3475 : (2006) 102 CLT 635 : (2006) 109 FLR 717 : (2006) 4 JT 469 : (2006) 2 LLJ 800 : (2006) 4 SCALE 146 : (2006) 5 SCC 88 : (2006) SCC(L&S) 919 : (2006) 3 SLJ 184 : (2006) AIRSCW 2096 : (2006) 3 Supreme 393 , which has to be kept in mind.

10.4 In the case of P.V. Mahadevan (supra), while interfering in the initiation of departmental inquiry after ten years, the Hon"ble Supreme Court, inter alia, observed as under:

"11. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."

10.5 Further, this court, while following the judgement recorded in Special Civil Application No. 3834 of 1998 dated 14.9.2004, in the subsequent unreported decision rendered in case of H.M. Shah v/s. State of Gujarat in Special Civil Application No: 15128 of 2005, observed as under:

"... He invited attention to Rule 9(17) of the Rules, (i.e. Gujarat Civil Services (Discipline and Appeal) Rules, 1971), which reads as under:

"9(17): The Inquiry Authority may, after the government servant closes his case,

and shall if the Government servant has not examined himself, generally, question him on the circumstances appearing against him in the evidence for the, purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him."

6. On the facts of the case it is found that there is non-compliance of Rule 9(17) of the Rules. This fact is not disputed by learned Assistant Government Pleader. It is also admitted that the petitioner had not examined himself during the inquiry. I am, therefore, of the opinion that the Disciplinary Authority's order is therefore vitiated on this ground..."

10.6. Keeping these broad principles in mind, while examining the impugned action of the authorities, the following picture emerges.

11. It is alleged against the petitioner that while the petitioner was working as Deputy Executive Engineer at Vallabh Vidhyanagar in the year 1985, the cement remained unused, and therefore, cement lost its strength and it became useless and thereby financial loss was caused to the Board. For this purpose, a show-cause notice was also given to the petitioner in the year 1991, which, he had responded immediately. Under these circumstances, the say of the authorities, that at the time of promotion of the petitioner in the year 1998, now we intend to initiate departmental enquiry for the said alleged irregularity, that too, after about 15 years, is the exercise of power more as a tool to withhold the promotion than to find out the truth. It is not the case of the respondent Board that they were not aware of this aspect, and therefore, there is delay. As a matter of fact, as noted above, a show-cause notice was issued in the year 1991 which was responded immediately by the petitioner. Under these circumstances, the action of the authorities just to keep that issue alive for years and decades and to pull it out from drawer at the time of his promotion, if not malafide, is certainly an exercise which lacks bonafide. Therefore, on this count alone, the inquiry in question can be interfered with. However the matter does not stop there. On merits, the case of the petitioner before the respondent authorities was that he had sent periodical statements to the higher authorities from time to time about the stock lying at the station where he was working. It is pertinent to note that not only at his place, but at other places also, under the administrative control of the respondent Board, cement was lying unused and had not remained usable, and therefore, even the policy decision was taken to write off the said loss. The said decision was taken by the highest decision making authority of the Board on 4.2.1997 after recording the fact that the activity of the Board had slowed down and new work did not come to the Board and therefore cement remained unused and became useless. This problem was at seven different stations including at the station where the petitioner was working. Based on this decision of the Board, consequential office order was issued on 4.4.1997, which inter alia records facts/reasons, for the loss in question, to the effect that, the cement supplied to different stations of the Board was bought from the Gujarat State Civil Supply Corporation. The activity of the Board had slowed down and

new work did not come to the Board and therefore cement remained unused and became useless. The details of such stock was as under.

12. Thus, it is evident that the cement, at seven different head quarters, totaling to more than 515 MT got spoiled which also included Vallabh Vidhyanagar where the petitioner was working. Even the reasons to write off this loss caused to the respondent Board as reflected in the office order are also that the Gujarat Civil Supplies Corporation had supplied this cement to the respondent Board, some part of which according to the respondent Board, was of poor quality, and therefore, some part thereof was replaced by the Gujarat Civil Supplies Corporation, but for some part, it had not agreed, and therefore, two corporations of the State Government i.e. Gujarat Civil Supplies Corporation and the respondent Board had entered into litigation which created a very bad scene before the Court and ultimately, the Chief Secretary vide letter dated 26.7.1993 intervened and the dispute was put to an end. The said office order further records that at the relevant time, the construction activity of the Board had slowed down, and therefore, the cement at all centres had remained unused. In this back-ground, when the turn of the petitioner for promotion on the post of Executive Engineer came, this chapter is used as a misconduct on the part of the petitioner to deny him the promotion. It is pertinent to note that, learned counsel for the respondent Board was at loss to respond to the query put by the Court, as to whether all officers of the seven centers were charge-sheeted, since the wastage of the cement is at seven different head quarters.

14. In the present case, from the record, it is evident that, the Enquiry Officer has not only not acted as a judge, not even as a prosecutor, but has acted more as a complainant. The attempt on the part of the Enquiry Officer was not to find out the truth but anyhow to reach to the conclusion how the charge can be held to be proved against the petitioner. The reasonings and conclusion recorded by the Enquiry Officer is such, where no prudent man would arrive at. In this back ground, the following observation of Honourable the Supreme Court of India in case of M.V. Bijlani (*supra*), which is already noted above, would apply with full force.

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceeding, however, being quasi-criminal in nature, there should be some evidences to the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e. beyond all reasonable doubts, we can not lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he can not take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not

been charged with.

26. The report of the Enquiry Officer suffers from the aforementioned vices. The orders of the disciplinary authority as also the appellate authority which are based on the said Enquiry Report, thus, cannot be sustained. We have also noticed the way in which the Tribunal has dealt with the matter. Upon its findings, the High Court also commented that it had not delved deep into the contentions raised by the Appellant. The Tribunal also, thus, failed to discharge its functions properly."

15. Considering the totality of the facts and circumstances and position of law, with regard to departmental enquiry in question, as discussed above, I find that the very initiation and continuation of the departmental enquiry in question was bad on the ground of delay as well as on merits, further this is the case of no evidence, the approach of enquiry officer was biased and perverse, the Enquiry Officer has not only not acted as a judge, not even as a prosecutor, but has acted more as a complainant. The attempt on the part of the Enquiry Officer was not to find out the truth but anyhow to reach to the conclusion how the charge can be held to be proved against the petitioner. The reasonings and conclusion recorded by the Enquiry Officer is such where no prudent man would arrive at, and while doing so even statutory rules are also flouted. The orders of the disciplinary authority as also the appellate authority which are based on the said Enquiry Report, thus, cannot be sustained. Further the timing demonstrates that the respondent authorities used this entire exercise as a tool to salvage the first illegality of withholding of promotion and thus it also smacks of lack of bonafide, and the same is required to be interfered with on more than one count."

31. In view of the settled position of law and the undisputed facts I have no hesitation in coming to the conclusion that this petition deserves to be allowed and the same is accordingly allowed.

32. The respondents are directed to consider the case of the petitioner on the basis of the recommendations made by the DPC for promotion to the post of the Deputy Executive Engineer (Civil) Class-II and to give benefit of the deemed date to the petitioner with effect from the date his juniors were promoted i.e. 31st May, 2013 without actual benefits of the salary till the petitioner is given the actual promotion to the post of the Deputy Executive Engineer (Civil) Class-II. The respondents shall pass the appropriate order in this regard within a period of one month from the date of the receipt of the writ of this order. Rule is made absolute to the aforesaid extent.

After the order is pronounced Mr. Gautam, the learned AGP appearing for the State-Respondent requested that some more time may be granted to consider the case of the petitioner for the deemed date of promotion.

Considering the request made, time period of two months is granted to the respondents to pass the appropriate order of the deemed date of promotion to the petitioner.