

(2005) 03 GUJ CK 0097

In the Gujarat High Court

Case No : Special Civil Application No. 9827 of 2004

Kishorchandra Gandulal Pethani

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-03-2005

Acts Referred:

Bombay Police Act, 1951 — Section 135

Penal Code, 1860 (IPC) — Section 114, 294, 307, 323, 506(2)

Citation : (2005) 03 GUJ CK 0097

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : B.M. Mangukiya, for the Appellant; S.P. Hasurkar, AGP, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—Rule. Learned AGP Mr. Hasurkar waives service of notice of rule on behalf of the respondents. At the joint request of the learned advocates appearing for the parties, the petition is taken up for final disposal today.

2. In the present petition, the petitioner has complained about his non-promotion by the Government from the post of Legal Superintendent (Junior Duty) Class-II in the pay-scale of Rs.6500-10500 to the next promotional post of Legal Superintendent (Senior Duty) Class-II in the scale of Rs.8000-13500.

3. The short facts leading to the present petition are that the petitioner who is working with the Government as Legal Superintendent (Junior Duty) Class-II was due for consideration for his promotion to the next higher post of Legal Superintendent (Senior Duty) Class-II. On availability of vacancy, meeting of the Departmental Promotion Committee was held on June 18, 2003. It is the case of the petitioner, with which there is no serious dispute raised by the respondents, that the DPC considered the case of the petitioner for promotion and he was also placed in the select list. It is also the case of the petitioner that as required under the Rules, the proposed promotion of the petitioner was also approved by

the Gujarat Public Service Commission (hereinafter to be referred to as GPSC) on 22.8.03. The petitioner has further contended that the General Administration Department also cleared the proposal for promotion of the petitioner and the said proposal was also approved by the Minister concerned.

4. While this process was going on, on 26.9.03 a criminal complaint being CR No.II-259/2003 came to be filed before Madhavpura Police Station against the petitioner by the wife of a co-Government employee alleging offences punishable u/s 307, 323, 294, 506(2) and 114 of the Indian Penal Code as also u/s 135 of the Bombay Police Act. The petitioner was arrested pursuant to the said criminal complaint on 26.9.03 and was released on bail on 7.10.03. On 14.10.03, the petitioner was placed under suspension. His suspension was, however, subsequently revoked on 15.1.04 and the petitioner was reinstated in active service.

A chargesheet came to be filed against the petitioner on 8.11.03 in the criminal case, FIR for which was filed on 26.9.2003 as noted above. This has been averred by the respondents in the affidavit in reply and though the learned advocate for the petitioner submitted that the petitioner has not so far received any chargesheet from the criminal court, he did not dispute the averments made by the respondents in this regard in the affidavit in reply. Thus it is clear that a chargesheet in the criminal case came to be issued against the petitioner on 8.11.03.

5. In view of the above factual averments, the petitioner contends that it was not open for the respondents to withhold his promotion in view of the fact that on the date of convening of the meeting of the DPC no chargesheet was issued against the petitioner in the criminal case. It is further contended that not only that the DPC considered the case of the petitioner for promotion and found him fit for promotion; but also placed the petitioner in the select list. It is additionally pointed out that after the DPC found the petitioner fit for promotion, further steps were also taken in the form of obtaining approval from the GPSC and General Administration Department and the concerned Minister to promote the petitioner. It was, therefore, submitted on behalf of the petitioner that when no chargesheet was filed against the petitioner before the criminal court right up to the stage when his name was cleared by all other authorities for promotion, it was not open for the respondents to withhold his promotion on mere filing of the FIR.

In the affidavit in rejoinder, the petitioner has further stated to the effect that Mr. Jha whose wife has lodged the criminal case against the petitioner is known to the Secretary of the Department concerned and that therefore, to ascertain full facts, the departmental files should be called for.

The petitioner has also given instances in his petition wherein despite pendency of criminal cases, the Government has thought it fit to promote the employees to the higher levels.

6. Learned counsel for the petitioner has placed reliance on a decision of the learned single Judge of this Court in the case of *M.A. Vyas v. State of Gujarat* 2003 (3) GLH 721 in support of his contention that in absence of any chargesheet in the criminal case or departmental inquiry, promotion of a Government servant cannot be withheld by the Government. Reliance is also placed on the decision of the Hon''ble Supreme Court in the case of *Union of India Vs. K.V. Jankiraman, etc. etc.*, for the same purpose.

7. Appearing for the respondents, learned AGP supported the Government action of not promoting the petitioner. It is contended that though on the date of DPC, there was no chargesheet filed against the petitioner in the criminal case, subsequent events cannot be ignored while the case of the petitioner for actual promotion is to be taken up by the Government. He contended that before the petitioner was actually promoted, he was first placed under suspension and while under suspension, chargesheet in the criminal case came to be issued against the petitioner.

8. In view of the above factual background and the submissions made, the short question that calls for consideration is whether the Government erred in not promoting the petitioner in the facts of the present case and whether the petitioner has a legal right to insist that he ought to have been promoted despite pendency of the criminal case against him and the issuance of chargesheet therein.

9. In service law, the procedure for considering the cases of Government servants facing departmental proceedings or criminal cases is governed by the Government circulars as interpreted by the Hon''ble Supreme Court from time to time. This procedure, which has popularly come to be known as "sealed cover procedure", came up for consideration before the Hon''ble Supreme Court in the case of *Jankiraman (supra)*. The Hon''ble Supreme Court held that it would not be open for the DPC to keep its recommendations in sealed cover only on the ground of contemplated departmental inquiry. It was held that only when the departmental proceedings are initiated by issuance of a chargesheet or a chargesheet has been issued against the Government servant in a criminal case that the recommendations of DPC can be kept in sealed cover. It was observed that sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. Pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. In para 6 of the said decision the Hon''ble Supreme Court observed as follows:-

"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 further observed 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."

9.1 In the decision of Union of India and Others Vs. Dr. (Smt) Sudha Salhan, , this view was reiterated by the Hon"ble Supreme Court. This was also reiterated in the subsequent decision in the case of Bank of India and Another Vs. Degala Suryanarayana, In case of Union of India v. Dr. Sudha Salhan (supra) it was observed that "We are in respectful agreement with the above decision. We are also of the opinion that if on the date on which the name of a person is considered by the Departmental Promotion Committee for promotion to a higher post, such person is neither under suspension nor has any departmental proceedings 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".

9.2 The decision of the Hon"ble Supreme Court in Jankiraman's case (supra) once again came up for consideration before the Hon"ble Supreme Court in the case of Delhi Development Authority Vs. H.C. Khurana, wherein the Hon"ble Supreme Court held that to issue a chargesheet in the context of decision taken to initiate departmental proceedings must mean the framing of the chargesheet and taking of necessary action to despatch the chargesheet to the employee informing him of the charges framed against him and not also the further fact of service of chargesheet on the employee. It was also observed that giving

promotion to the Government servant after taking the decision to initiate disciplinary proceedings, would be incongruous and against public policy and principles of good administration.

9.3 In the decision of Union of India and Another Vs. R.S. Sharma, the Hon''ble Supreme Court took note of para 7 of the Government of India Circular which reads as follows:-

"Sealed cover applicable to officer coming under cloud before promotion:- A Government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this O.M. will be applicable in his case also."

Interpreting the said provisions, the Hon''ble Supreme Court held that the Government action in not promoting the officer concerned was justified since before he was actually promoted, sanction for prosecution was already issued. In para 15, following observations were made:

"15. We are not impressed by the said arguments for two reasons. One is that, what the Department did not do is not the yardstick indicated in paragraph 7 of the Sealed Cover Procedure, what is mentioned therein is that it cannot apply to the Government servant who is not "actually promoted" by that time. Second is that, the stand taken up by the Department is that in spite of deletion of clause (iv) of the second paragraph, the recommendations of the DPC must remain in the sealed cover on account of the conditions specified in clause (iii) of the said paragraph by virtue of the operation of paragraph 7 thereof. We cannot say that the said stand was incorrect and, therefore, we are unable to blame the Department for not opening the sealed cover immediately after 31.7.1991."

One may notice at this stage that the State Government has issued GR dated 23.9.81 which contains instructions for regulating sealed cover procedure of the employees of the State Government. In the GR dated 23rd September 1981 also, it is provided that a Government servant whose name is included in the select list but who is subsequently placed under suspension or against whom criminal proceedings/departmental proceedings have been initiated should not be promoted on the basis of inclusion in the select list until he is completely exonerated of the charges against him. Para 7 of the said GR reads as follows:-

"A Government servant whose name is included in the select list but who is subsequently placed under suspension or against whom criminal proceedings/departmental proceedings have been initiated should not be promoted on the basis of his inclusion in the select list until he is completely exonerated of the charges against him. If the Government servant is completely exonerated of 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."

The State Government issued another G.R. dated 5.8.1992. It provides inter alia that :

(i) The concerned Department should place before the DPC latest information regarding the Departmental Proceedings against Government servants who are in the zone of consideration.

(ii) If after collecting the said information there is any delay in holding the meeting of the DPC, latest updated information regarding departmental proceedings should be placed before the DPC.

(iii) Even after approval of the select list before issuing promotion orders also latest information should be gathered regarding departmental inquiry against officials placed in the select list and only if no adverse material is found, further procedure for granting promotion should be undertaken.

This G.R. dated 5.8.1992 also envisages that even after being placed in the select list, but before being promoted if there is adverse material in the form of initiation of a departmental inquiry found against the Government servant, his promotion can be withheld.

10. From the above legal as well as rule position, it is clear that if on the date of meeting of DPC there is neither a departmental chargesheet issued against a Government servant nor a chargesheet issued in the criminal case, recommendations of the DPC cannot be kept in sealed cover only on the ground of contemplated departmental inquiry and his name if found fit for promotion shall have to be brought in the select list. Thus the recommendations of the DPC can be kept in sealed cover only if a departmental chargesheet has been issued against the Government servant or a chargesheet in criminal case is issued against him or he is suspended from service.

Being on the select list pursuant to the recommendations of the DPC is however only the first step towards ultimate promotion of a Government servant. It is by now well settled that the Government is not bound by the recommendations of the DPC and in a given case for reasons to be recorded the Government can disagree with the recommendations also [see State of Rajasthan Vs. Aruna Devi and Others, Quite apart from the decision of the Government whether or not to accept the recommendations of the DPC for promotion of a particular Government servant, number of other administrative steps have to be taken before the recommendations of the DPC culminate into promotion of a Government servant. Therefore, before a Government servant is actually promoted, if any of the above factors, namely, his suspension, or issuance of chargesheet in the departmental proceedings or issuance of a chargesheet in a criminal case intervene, his promotion can be withheld till he is exonerated of

those charges. That is the true import of para 7 of the GR dated 23rd September 1981. It would however not be open for the Government to deny promotion to a Government servant on a contemplated departmental inquiry when the select list prepared by the DPC is being operated and when his juniors are being promoted. Thus on the date when the Government servant's rights get crystallized for seeking promotion if there was no departmental chargesheet or chargesheet in a criminal case, it would not authorise the Government to withhold his promotion. In the decision of this Court in the case of *M.A. Vyas v. State of Gujarat* (supra), this was precisely the factual background. The petitioner was denied promotion on the ground of contemplated inquiry while his juniors were promoted and the petitioner was superceded. It was in this background that this Court found the action of the Government impermissible and illegal.

In the present case, however, facts are somewhat different. As noted earlier, though the DPC was held on 18th June 2003 and steps were being taken to clear the files to promote the petitioner, he was actually not promoted till the filing of chargesheet in the criminal case. In fact, even before the chargesheet was filed in the criminal case, the petitioner was suspended from service on 14.10.03. While under suspension, chargesheet in the criminal case was issued on 8.11.03. Till 14.10.03 when the petitioner was placed under suspension, the recommendations of the DPC were not acted upon and no promotion orders were issued in favour of any person. Counsel for the petitioner points out that the petitioner was the only person in the select list and therefore there was no question of his juniors being promoted in supersession of the petitioner. Be that as it may, the fact remains that the petitioner was neither actually promoted nor was his legal right to insist that on a particular date he ought to have been promoted got crystallized into a concrete right. In that view of the matter, subsequent developments in the form of suspension of the petitioner and eventual issuance of chargesheet in the criminal case cannot be ignored since before the petitioner could be actually promoted, these factors have intervened and I do not find any illegality having been committed by the Government in not promoting the petitioner.

11. Though certain allegations have been made in the affidavit in rejoinder regarding the interest taken by Shri Jha whose wife has filed the criminal case against the petitioner, no allegations of malafides have been made against any of the Government officers by joining them in personal capacity to demonstrate that solely with a view to deny promotion to the petitioner to await issuance of chargesheet in the criminal case that his promotion was withheld or delayed. In that view of the matter, I have confined my enquiry into the facts arising on record and given my decision accordingly.

12. Learned counsel for the petitioner though made certain suggestions regarding consideration of the case of the petitioner for adhoc promotion as per the Government circulars and also cited instances in the past when the Government had given such promotions to other officers, for want of sufficient

material on record and matching prayers in this regard, I refrain from making any observations in this regard.

13. In the result, the petition fails and is hereby rejected. Rule is discharged with no order as to costs.