(2022) 04 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition No.113 Of 2020

Pramod Kumar APPELLANT

Vs

Oriental Insurance Co. Ltd. And Another RESPONDENT

Date of Decision : 06-04-2022

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 420
Prevention Of Corruption (Amendment) Act, 2018 — Section 13(1)(d), 13(2)

Citation : (2022) 04 BOM CK 0016

Hon'ble Judges : Prasanna B. Varale, J;S. M. Modak, J

Bench : Division Bench

Advocate : Avinash K. Jalisatgi, Vaibhav Jagdale, A.S. Khandeparkar, Vilas Warekar

Final Decision : Dismissed

Judgement

S.M. Modak, J

1. Head by consent finally. Rule.

2 The Petitioner appeared for departmental promotional examination for the post of Scale V conducted by Oriental Insurance Company Limited. The Petitioner's name did not appear in final merit list. He was orally told that his name was withheld by applying "Sealed Cover Procedure". He felt aggrieved. The Petitioner tried to pursue his candidateship with higher officers. However, he was not successful. Hence, this Petition for writ of mandamus. Respondent No.1 is Oriental Insurance Co. Ltd., Respondent No.2 is General Manager of Respondent No.1. They have supported the decision not to promote the Petitioner. They have written to Chief Chittewan Vigilance Commissioner and they have referred the matter to Central Bureau of Investigation. It is this reason which compelled Respondents to withheld Petitioner's name from promotion.

3 We have heard Mr. Avinash K. Jalisatgi, learned Counsel for the Petitioner. Mr. A.S. Khandeparkar learned Counsel for Respondent No.1. Also gone through the

Judgments and Office Memorandums issued by Department of the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training), which are placed before us. We are supposed to decide this Petition on following issues :-

(a) Whether the Petitioner can claim vested right of promotion ?

(b) Whether Respondents were justified in withhelding the name of the Petitioner for being promoted ?

(c) Whether Petitioner approached this Court belatedly and whether the Petitioner is not entitled to relief due to delay and latches in approaching this Court ?

4 For deciding these issues, it will be material to consider the background and certain dates / events.

Background

5 The Petitioner is working as a Manager in Scale IV Class I employee category with Respondent No.1-Insurance Company. There is "Promotion Policy for Officers-2006" in Vogue. There was a promotion process initiated by Respondent No.1 in the year 2017 for Scale V. The promotion programme was declared. The Petitioner has participated in that selection process. However, he was not selected in the final merit list. The relevant dates are as follows :-

(a) 7 April 2017

Calling applications for the post of Scale V Officers – published

(b) No date

Petitioner applied for that post

(c) No date

Provisional List of eligible candidates for online test (Petitioner's name at Sr. No.36- published (pg.37)

(d) No date

Interview schedule published containing names of Petitioner (pg.38)

(e) 22 June 2017

Result – List of selected Officers published

6 According to the Petitioner, he was not being informed about why his name does not appear in the merit list. He was told orally by Offices of Respondent No.1 that Sealed Cover Procedure was followed. When the Petitioner could not succeed in convincing Officers of Respondent No.1, this Petition is filed. The Petitioner has asked for following reliefs :-

(a) writ of mandamus thereby disclosing the decision of DPC to the Petitioner;

(b) to issue writ of mandamus directing Respondents to open Sealed Cover Procedure;

(c) to issue writ of mandamus against the Respondents to promote the Petitioner to the Scale V Post.

7 The Respondents have appeared and contested the Petition.

8 It will be material to consider the averments made in their affidavit-in-reply. They have pleaded the following facts :

(a) Sealed Cover Procedure was followed in promotional exercise of 2017-18;

(b) Vigilance Department has not given vigilance clearance in the name of the Petitioner as its mandatory requirement;

(c) Vigilance Department remarked that "Case was referred to CVC for first stage advice on 15 June 2016 with recommendations of CVO and DA;

(d) CVC vide letter dated 20 October 2016 handed over case to SP Bank Securities CBI New Delhi for detailed investigation.

9 The Petitioner has filed a copy of FIR registered on 12 January 2018 with CBI, New Delhi. It is under Section 120-B read with 420 of IPC and under Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act 2018. According to the Petitioner, the Petitioner has not been named directly or indirectly in that FIR and this FIR was not lodged when Departmental Promotion Committee selected the names. Whereas, according to the Respondents, though the Petitioner has not been named in the FIR, there are two other Officers of the Insurance Company, who have been named and there is involvement of two companies through their Directors. Furthermore, it is alleged that other persons are involved and involvement of the Petitioner is there and investigation will make all the things clear. The Respondents contend that initially the apprehension of the company gets fortified as sanction was sought to prosecute the Petitioner and it was granted on 11 May 2020 by Chairman-cum- Managing Director (Pg.75).

10 Certain Office Memorandums (OMs) issued by Department of Personnel are referred to by the both sides. Prior to dealing with them, it will be material to consider the law laid down by the Hon'ble Supreme Court in case of Union of India Vs. K.V. Jankiraman And Others(1991) 4 Supreme Court Cases 109. In that matter, the Hon'ble Supreme Court dealt with various civil appeals arising out of different orders passed by Central Administrative Tribunal. In para-8 questions involved in those appeals were narrated. They are :-

(1) from which date the disciplinary or criminal proceeding can be said to be pending against an employee;

(2) when the employee is held guilty, what is a course to be adopted and;

(3) when employee is exonerated what are the benefits which enures to him.

11 While dealing with those questions, Hon’ble Supreme Court has considered the provisions of Office memorandum dated 13 January 1982 and 26 September 1986 issued by Government of India. It was held that from the date of issuance of a charge-sheet or a charge memo, Sealed Cover Procedure needs to be followed. It was observed that employee is not having a right to promotion, but certainly he has right to be considered for promotion. The contingencies under which Sealed Cover Procedure is to be followed was reiterated.

12 It is true that after considering OMs, the Hon’ble Supreme Court has observed that Sealed Cover Procedure is required to be followed only when the charge memo or charge-sheet is issued. It can be followed also when employee is suspended. Both sides have also relied upon certain other OMs. The Petitioner in his affidavit-in-rejoinder has relied upon the OM dated 14 September 1992 (Pg.92), whereas, the Respondents have relied upon OM dated 2 November 2012 (Pg.68) and OM dated 23 January 2014 (Pg.73). It will be material to consider what are the instructions issued in that OMs. It is no doubt true that these instructions are required to be followed by the concerned representative before taking decision. It will be material first to consider the contents of OM dated 14 September 1992. The particulars are as follows :-

Office Memorandum dated 14 September 1992

(1) Para-2 :

The details of employees belonging to three categories need to be brought to the notice while considering the names of Government Servants for promotion. The categories are as follows :-

(i) Government servants under suspension;

(ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and

(iii) Government servants in respect of whom prosecution for criminal charge is pending.

(2) Para-2.1 :

The employees falling under any of the three categories need to be dealt with as per Sealed Cover Procedure;

(3) Para-7 :

Sealed Cover Procedure is deemed to have been applied in respect of an employee, whose name is cleared by DPC, but before giving actual promotion he is subjected to any of the three categories referred to in paragraph-2.

13 According to the learned Counsel for the Petitioner, the Petitioner does not come within either of three categories mentioned in paragraph-2. On this

background, it will be material to consider the particulars of OM dated 2 November 2012. The details are as follows :-

Office Memorandum dated 2 November 2012

(a) Vigilance clearance needs to be denied, if employee falls within any of the three categories;

(b) Vigilance clearance cannot be denied to an employee, who does not fall under any of the three contingencies;

(c) Due to delayed initiation of departmental enquiry or delayed filling of a charge-sheet, there is a possibility of such employee under cloud to be considered for promotion;

(d) Particular portion from Para No.2 is reproduced as below :

“It becomes essential in respect of officer(s) in whose case disciplinary proceedings are contemplated or pending are are included in consideration zone of promotion, necessary action be taken for placing the proposal before the DPC so that vigilance clearance is not allowed as per conditions mentioned in para 1 above.”

(e) There was an issue, whether to grant promotion or not in view of the doubtful integrity even though his name is cleared from vigilance angle was also considered;

(f) In no case, the promotion can be withheld merely on the basis of suspicion or doubt or where the matter is under preliminary investigation and has not reached the stage of issue of charge-sheet. In such case, even the option of suspending employee can be obtained so that automatically his case falls under Sealed Cover Procedure (Para-5). There is also insistence on suspending an employee if the charges are serious and charge-sheet is not issued. Sealed Cover Procedure need not be followed when preliminary investigation is pending (Para-6);

(g) Review DPC shall take into consideration circumstances mentioned at the time of original DPC and subsequent situation will not come in the way of vigilance clearance for review DPC. However, there is an insistence on examining the file from vigilance angle and para-7 of OM 14 September 1992 are not attracted (Para-9). (This is applicable when review DPC is concluded).

Office Memorandum dated 23 January 2014

14 Whereas, OM dated 23 January 2014 give guidelines what line of action is to be followed in respect of an employee, who is cleared by DPC but either of the three contingencies occur subsequently (para-2). It also gives guidelines what course of action is to be followed in case of review DPC. It talks about two contingencies, they are follows :-

(a) when junior to an employee aggrieved has been promoted by the original

DPC - employee aggrieved can be considered with clear vigilance angle subsequently and his name has to be considered on the date of promotion of the junior.

(b) when junior has not been promoted - the administration has to ensure that the provisions of para-7 of OM. dated 14 September 1992 are not attracted on the date when an official is actually promoted.

15 These are the only OMs which are brought to our notice. If we read following contingencies occur -

a) whether three contingencies exit

OR

b) whether the investigation is pending or when initiation of disciplinary proceeding is in the offing in respect of an employee under cloud.

16 So far as the first category is concerned, there is no question of ambiguity about the line of action to be proposed in respect of such an employee. Dispute arose only in respect of an employee falling under the second category. We are dealing with that category. It is very well true that an employee has got right to be considered for promotion (though he has no right of promotion). At the same time, it is true that any organization should promote only such an employee whose record is clear. Even though he fits into all criterias fixed for promotion, but if he is having blemished record, certainly an organization may not consider him for promotion at least till the time, he is cleared from all the allegations.

17 It is true that functioning of any organization is governed by set of rules. They are binding on an organization as well as on employees working in it. So if an organization want to deny promotion to an otherwise eligible employee the person at the helm of the affairs of the organization can not arbitrarily deny the promotion. If there are allegations of misuse of official position by an employee, the person at the helm of affair need to verify and scrutinize the allegations. Such allegations may lead to initiation of disciplinary inquiry and sometime also may lead to initiation of criminal prosecution.

18 In the present case the Petitioner is subjected to departmental inquiry and he is also facing a criminal prosecution. These facts were not in existence at the time, DPC hold its meeting. The Petitioner is exonerated in the departmental inquiry. The Inquiry Report dated 28 October 2021 is shown to us during hearing. Respondents claim that yet the findings given (exonerating the Petitioner and two others) is not confirmed by disciplinary authority.

About FIR

19 Foundation of the Respondents' case is based on FIR registered with CBI Delhi Unit. (It is filed by the Petitioner only). The Petitioner contend that he is not named in the FIR and he is not remotely concerned. Whereas the Respondents contend that when FIR is lodged, apart from narrated accused, there is

involvement of other unnamed accused suggested in it. As said above initiation of departmental inquiry/criminal prosecution was not in existence at the time of holding of DPC. Admittedly, the minutes of meeting of DPC were neither produced nor shown to us. So what prompted the administration of Respondent No.1-company to place materials before DPC and which compelled DPC not to include name of the Petitioner in the promotion list?

20 If we will read the averments from the Respondents' affidavit, we may finding following particulars :-

a) The result of the Petitioner was kept in a sealed cover by Departmental Promotion Committee because Vigilance Department has not given the vigilance clearance, which is mandatory requirement;

b) Vigilance remarked that "the case was referred to CVC for First Stage Advice on 15 June 2016 with recommendation of CVO and DA. CVC vide letter dated 20 October 2016 handed over the case to SP, Bank Securities and Fraud Cell, CBI, New Delhi for detailed investigation;

c) Sanction for prosecution has been accorded by C.A. vide letter dated 11 May 2020.

21 Even those correspondence were not filed on record. They are referred in para No.10 of the affidavit-in-reply of Respondents. The Petitioner has filed an affidavit-in-rejoinder.

22 The Petitioner has made grievance that Respondents have not obtained vigilance clearance for more than three years and the Respondents ought to have taken decision with sufficient promptitude. He has further pleaded that officers junior to him have been promoted, whereas the Petitioner is denied the same. Awaiting vigilance clearance, amounts to denial of promotion to him.

23 Nowhere, the Petitioner has denied the averments relating to pending case with Chief Vigilance Commissioner and handing over the case to Superintendent of Police, CBI, New Delhi.

24 So now the issue is whether this material is sufficient for DPC not to include Petitioner's name in the promotion list. For that purpose, we will again have to see those guidelines given in OMs.

Guidelines in OM

25 OM dated 14 September 1992 speaks about applying Sealed Cover Procedure and contingencies, wherein Sealed Cover Procedure is deemed to have been applied. It nowhere speaks about the contingencies, wherein what course of action is to be followed, if an employee is under cloud or decision about initiation of disciplinary inquiry is pending. Whereas OM dated 2 November 2012 has emphasized on delay caused in initiation of the disciplinary proceeding or in issuing chargesheet. It further says such delays allow an officer whose conduct is under cloud to be considered for promotion. There is emphasize on placing the

proposal before the DPC so that vigilance clearance is not allowed (para-2). Even it further says that if there is serious complaint and matter is under investigation, the Government may justified in suspending the official and so that automatically Sealed Dover Procedure is applicable (para-5). There is also emphasize that merely pendency of preliminary investigation is not sufficient to adopt the Sealed Cover Procedure (para-6).

26 When we have considered all these OMs cumulatively, we may find that Ministry of Personnel has tried to balance the rights of an employee to get the promotion on one hand and also tried to protect the interest of administration to get the candidate promoted, who is having unblemished record. It is the delicate job on which the administration has to do. The difficulty arises when case of a particular employee does not fall within either of the three contingencies. But one can very well say that there is insistence on the vigilance clearance (where the case falls under either of the three categories or otherwise). It is true that when Hon'ble Supreme Court dealt with the case of Union of India Vs. K.V. Jankiraman And Others (supra), three OMs referred by us were not in force.

27 It is very well true that averments by the Respondents about sending the case to Chief Vigilance Commissioner and referring the matter to CBI were not disputed by the Respondents. The copy of the FIR dated 12 January 2018 was filed by the Petitioner himself. This FIR is lodged by Deputy Superintendent of Police, CBI, New Delhi. It is filed on the basis of the preliminary inquiry dated 14 November 2017. Whereas the remark of Vigilance Department of sending the case to CVC dated 15 June 2016 and CVC has handed over the case to CBI vide dated 20 October 2016. Though the date of meeting of DPC is not available, we may find that the list of successful candidates was declared on 22 June 2017.

28 There were in all seven candidates. So one may very well say that two letters of 2016 were very much in existence prior to preliminary inquiry is registered on 14 November 2007. It is true that name of the Petitioner has not been named in the FIR. It is very well true that at the time of lodging of an FIR and particularly, when it involves documents, name of each and every culprits may not be known. It is part of an investigation. If one reads FIR, we may find modus-oparandi. One of the business of the Respondent-company is Marine Insurance. The vessels are insured. The FIR alleges that there was reinsurance taken from private companies by Respondent No.1-company. There is allegation that infact the original Marine Insurance Policies were not issued and forged documents were prepared and premium was parted away from funds of the Respondent-company to private insurance companies and as such Respondent No.1 company was duped. In that exercise, some of the named officers of the company, representatives of the private companies were involved. Admittedly, a Chairman has granted sanction to prosecute the Petitioner vide Order dated 11 May 2020. It is but natural to grant sanction if the materials placed before him warrant and it is the requirement under the provisions of Prevention of Corruption Act.

29 Now we have got Inquiry Report dated 29 October 2021, thereby exonerating

the Petitioner. The decision taken by Disciplinary Authority is not made known. It is very well true that one cause of action may lead to initiation of Departmental Enquiry on one hand and launching criminal prosecution on the other hand. Both these proceedings are required to be tried on the basis of available material and nature of inquiry, purpose of inquiry and outcome are different. Finding in one of them is not binding in other proceedings.

30 After considering all materials, what we feel is that the DPC is justified in not considering name of the Petitioner for promotion. This is the case which does not either fall under any of the three categories, nor it can be said that there is no suspicion over behavior of the Petitioner. The fact that Chief Vigilance Commissioner had sent case to CBI itself indicate that there is a criminal element involved in it. The case of the Respondents is fortified by the act of granting sanction subsequently. The fact that the sanction is granted itself suggest that there is sufficient material to file chargesheet against the Petitioner. Every time DPC may not deal with a clear case. Here we are affirming decision of the DPC also due to non-rebuttal by the Petitioner about sending case to CVC and to CBI.

Delay and latches

31 The Respondent No.1-company opposed the prayer also on the ground of delay and latches. Learned Counsel appearing for Respondent No.1-company relied upon the following judgments :

(1) Chairman/Managing Director, UP Power Corporation Ltd And Others Vs. Ram Gopal Civil Appeal No.852 of 2020 with Criminal Appeal No.204 of 2020 Supreme Court of India, judgement dated 30.01.2020.

(2) P.S. Sadasivaswamy Vs. State of Tamil Nadu1974 AIR (SC) 2271

(3) City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala 2009(1)CTC 174

(4) Shiba Shankar Mohapatra Vs. State of Orrisa 2010(1) KLT 1(SN)

32 We have perused the judgments relied upon by the Respondents on the point of delay. On facts, learned Counsel for the Petitioner differentiated the ratios laid down in those judgments. It is true that in approaching the writ court diligence is very decisive factor in favour of the Petitioner. The observations in those judgments are on the basis of facts of those cases. The conclusion cannot be applied universally. The bottom line is that the writ court needs to consider whether the Petitioner has approached the court after inordinate delay which is unexplained and unjustified.

33 On this background, if facts of this petition are perused, we may find that the DPC was conducted on 22 June 2017, whereas the Petitioner is filed in the year 2019. It is undisputed fact that the Respondents have not informed to the Petitioner in writing why he was denied the promotion. Prior to filing the petition, the Petitioner has started pursuing with the higher officials. There are the

correspondence starting from 11 March 2019 and last correspondence is of 30 August 2019 made with PMO. It shows that the Petitioner was not sitting idle and he has chosen to approach the court when he could not get justice from the higher officials. For these reasons, we do not think that on the ground of delay, the Petitioner is required to be non-suited.

34 At the same time, we hope the Respondents to take review of the situation including progress in the criminal trial. We hope that they will review the situation within time limit fixed in various Office Memorandums. If there is no time limit fixed in those memorandums, we direct the Respondents to review the situation within one year from today. At that time, if there is no reason to put on hold the promotion of the Petitioner, the Respondents are directed to open the Sealed Cover Procedure and to promote the Petitioner, if he otherwise fits in the norms fixed by the Respondents.

35 For the above discussion, we are not inclined to allow the Petition. The Petition is dismissed. No Order as to costs.