

(2006) 10 DEL CK 0037

In the Delhi High Court

Case No : Writ Petition (C) No. 2730 of 2004

Sh. Ved Prakash

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 19-10-2006

Acts Referred:

Central Industrial Security Force Rules, 1969 — Rule 29A, 31

Citation : (2006) 10 DEL CK 0037

Hon'ble Judges : Swatanter Kumar, J;G.S. Sistani, J

Bench : Division Bench

Advocate : Reetesh Singh, for the Appellant; Nitinjya Choudhary, for the Respondent

Judgement

Swatanter Kumar, J.—The petitioner was appointed as a Constable in the Central Industrial Security Force (for short "CISF") in the year 1970. The petitioner claims that he worked honestly and sincerely to the satisfaction of all concerned and was promoted to the rank of Inspector in the year 1981. Being a member of the force, the petitioner is governed by the provisions of the CISF Act and the Rules framed there under. On 26.1.1989, the petitioner was posted at CISF Unit at DAE, Kalpakkam. On 2/4-12-1989 the respondent No. 2 promoted the petitioner to the post of Assistant Commandant in the CISF. It was stated in the said order that the order of promotion would be given effect to, subject to the Departmental Enquiry pending against the petitioner. It is further the case of the petitioner that on the date of passing of the order of promotion, neither any departmental enquiry was pending against the petitioner nor any show cause notice was issued to him. However, after passing of the order of promotion on 6.12.1989, the petitioner was served with a memorandum of charge dated 5.12.1989, to which the petitioner submitted a detailed Explanation on 13.12.1989 denying the article of charges. Without taking into consideration the case put forward by the petitioner, an order dated 30.12.1989 was passed imposing a punishment upon the petitioner that his promotion be withheld for a period of one year with effect from 30.12.1989. The petitioner preferred an

appeal against the said order to the prescribed authority, which was partially accepted by the authority vide its order dated 5.2.1990 wherein the period in the order of punishment was modified to the extent that the period of "withholding the promotion" was reduced from one year to 9 months.

2. Though the punishment awarded to the petitioner was for withholding promotion of the petitioner for a period of 9 months with effect from 30.12.1989, which expired on 30.9.1990, but still the petitioner was not promoted for the reasons best known to respondent No. 2. Vide an order dated 18.9.1990, it was directed that the petitioner would be considered afresh by the DPC for promotion to the post of Asst. Commandant as and when convened. By another order dated 5.12.1990, the petitioner's promotion was cancelled, though no reasons for cancellation of the promotion of the petitioner was mentioned in the said order. It is submitted that probably the "sealed cover procedure" had been followed as per OM No. 22011/2/86.Estt.(A) dated 12.1.1988 and those principles were applied to the case of the petitioner. Aggrieved from the action of the respondents, the petitioner filed a Civil Writ Petition being CWP No. 18574/1990 in the Madras High Court, which was dismissed by the said Court vide its order dated 17.11.1994, as having become infructuous. The Special Leave Petitions filed against the said order were dismissed by the Supreme Court vide order dated 10.7.2002. It is the case of the petitioner that he is entitled to be promoted to the post of Asst. Commandant on or immediately after 30.9.1990 i.e. after the period of punishment of withholding the promotion of the petitioner, i.e. 9 months, had expired. It is further stated that the Respondent No. 2, in an arbitrary and discriminatory manner granted promotion to him to the post of Asst. Commandant only with effect from 17.11.1994 i.e. after a period of 5 years. Against this action of the respondents, the petitioner made a representation dated 6.2.1995 and he received a communication on 6.5.1997 that the same was rejected. This resulted in filing of the present writ petition.

3. The facts averred in the writ petition are not really in dispute, but the stand of the respondents in the counter affidavit filed by them is that vide order dated 18.9.1990, the authorities had directed the case of the petitioner to be considered by a subsequent DPC as his order of promotion was cancelled vide order dated 5.12.1990. It is stated that the petitioner was considered for promotion from the date of expiry of his punishment, but could not be promoted till 1993 due to his low merit position. According to the respondents, the order of cancellation dated 5.12.1990 was considered by the Hon'ble High Court of Judicature at Madras and as such the petitioner cannot question the correctness or validity of the said order in the present writ petition. It is admitted that in the DPC meeting held under the aegis of UPSC on 27.7.1989, the petitioner was empanelled for promotion to the rank of Asstt. Commandant on regular basis against the vacancies of 1988. The recommendations of the DPC were approved by the competent authority and transfer of the petitioner on promotion was issued vide order dated 4.12.1989. However, before the petitioner could take over the charge of the promoted post, he was served with charge sheet dated

6.12.1989 which resulted in passing of the order of punishment dated 30.12.1989, as modified by the Appellate Authority vide order dated 5.2.1990. Upon serving the order of punishment, the petitioner came under the purview of para 7 of the memorandum dated 12.1.1988. Accordingly, the case of the petitioner was placed in a "sealed cover" by the DPC and the DIG/DAE vide his letter dated 18.9.1990 informed the Commandant of the petitioner's unit that the case of the petitioner would be considered afresh by the DPC as and when convened for promotion. In light of these circumstances and while relying upon the relevant clauses of the OM No. 22011/2/86.Estt.(A) dated 12.1.1988, the petitioner could not have been promoted earlier than 15.12.1994. Therefore, according to the respondents, the petitioner's writ petition is liable to be dismissed.

4. Before we proceed to examine the merits of the rival contentions raised by the learned Counsel appearing for the respective parties before us in the present case, it will be appropriate to refer to an interim order dated 8.11.1991 which was passed by the Madras High Court as well as the order dated 17.11.1994 which finally dismissed the petition of the petitioner as having become infructuous:

Order dated 8.11.1991

This petition coming on for hearing upon perusing the petition and the affidavit filed in support of W.P. No. 18574 of 1990 on the file of the High Court and upon hearing the arguments of Mr. V. Prakash, Advocate, for the petitioner and of Mr. K. Ilias Ali, Additional Central Government Standing Counsel on behalf of the respondents, it is ordered that the operation of the order of the 4th respondent Ref. No. V-15014/Min.25/89-PA/111/5-2-90 in so far as it has confirmed the withholding of the promotion for a period of 9 months and the order of the 5th respondent bearing ref. No. V. 015014/Min/25/Pa/1062 dt. 30-12-89 and the consequential adverse remark in the office memorandum No. E/15015/2/90 PA 310 dt. 27/ 31-3-90, be and hereby is stayed pending further orders on this petition.

Order dated 17.11.1994

This Writ Petition coming on for hearing on this day, in the presence of Mr. V. Prakash Advocate for petitioner in W.P. No. 18574 of 1990 and W.M.P. No. 3233 of 1993, and of Mr. K. Ilias Ali Additional Central Government Standing Counsel on behalf of the Respondents in W.P. No. 18574 of 1990 and W.M.P. No. 3233 of 1993 the court made the following order:

This is a petition to direct the writ petition to be dismissed as infructuous. The Writ Petition is directed against an order of punishment withholding promotion to the petitioner. The argument of the petitioner in this W.M.P. is that the petitioner was considered for promotion and he was found unfit for promotion. On this account the writ petition itself has become infructuous.

Accordingly writ petition is dismissed.

5. A bare reading of the above order shows that the main relief claimed by the petitioner was with regard to the punishment inflicted upon the petitioner vide order dated 30.12.1989, while in the present writ petition the petitioner is challenging the correctness of the order dated 5.12.1990 cancelling his promotion and the arbitrary action of the respondents in not giving promotion to the petitioner despite implementation of the order dated 5.2.1990 withholding his punishment. In substance, the writ petition was decided by the Madras High Court for the reasons that the period withholding the promotion had expired and the respondents had agreed to consider the petitioner for promotion. The learned Counsel appearing for the petitioner while relying upon the judgment of the Supreme Court in the cases of State of Punjab Vs. Khemi Ram, and Union of India Vs. K.V. Jankiraman, etc. etc., argued that there was no occasion for the respondents to adopt the "sealed cover procedure" when the petitioner had been awarded the punishment. Furthermore, recourse to the "sealed cover procedure" process can be made only if at the time of promotion, the chargesheet had been served upon the petitioner. It is also argued on the strength of these judgments that the order could become effective only when the same was served upon the petitioner. The learned Counsel also relied upon the judgment of the Supreme Court in the case of Union of India and Others Vs. Dr. (Smt) Sudha Salhan, in this regard.

6. The Counsel for the Petitioner while further relying upon the judgment of the Supreme Court in the case of Bank of India and Another Vs. Degala Suryanarayana, contended that at the time of promotion, neither the chargesheet had been served upon the petitioner nor any proceedings were pending and even subsequent thereto, the same could not have been cancelled in view of the order of punishment. The cumulative effect of these would be that the petitioner could not have been denied the promotion.

7. In the backdrop of these enunciated principles of law, we must look into the order of punishment which was inflicted upon the petitioner by the respondents. The relevant portion of the order of punishment dated 30.12.1989 reads as under:

The other contentions/submissions of the delinquent have no meaning or value or any relevance to the issue in question. I, Therefore, in exercise of powers conferred under Rule-29-A and 31 of CISF Rules 1969, withheld his Promotion for a period of year from the date of issue of this order.

He is further informed that he may prefer an appeal against the above order and any such appeal should be made in writing (sic) to Commandant, CISF Unit, DAE Kalpakkam, within 20 days of the receipt of this order.

8. This order of punishment was modified by the First Appellate Authority which reads as under:

I have no reasons to interfere with the orders of the Asst. Commandant. However, considering his case sympathetically, I take a lenient view and I tone down the Order of withholding his Promotion for a period of one year wef 30.12.89 as withholding his promotion for a period of nine months from 30.12.89.

9. The disciplinary authority had imposed a punishment as a result of the Departmental proceedings. This punishment attained finality and was not set aside by any Court of competent jurisdiction. The punishment clearly states that the promotion of the petitioner is withheld for a period of one year from the date of issuance of the order, which period was reduced to 9 months by the Appellate Authority. In unambiguous terms, the punishment was not to cancel the promotion but to withhold the promotion for the period mentioned in the order. This order of punishment could not be extended or interpreted so as to direct a fresh selection of the petitioner. The petitioner had already been found fit and was empanelled by UPSC for promotion to the higher rank. This recommendation had been duly approved by the competent authority and in fact an order dated 2/4-12-1989 had been issued actually promoting the petitioner to that post. However, before the petitioner could join his promotion post, the chargesheet was sent to him on 6.12.1989. We are certainly not impressed with the contention of the petitioner that the order of chargesheet would take effect only when it is served upon the petitioner. Unlike an order of promotion, nothing is required to be done by the petitioner where a chargesheet has to be served upon him. The issuance of chargesheet would have been sufficient for the authorities to adopt a "sealed cover procedure" in the case of the petitioner. But in the facts of the case, where the promotion order had already been made, the question of adopting or taking recourse to "sealed cover procedure" would hardly arise. The petitioner would have been entitled to join his promotion post but for issuance of the charge sheet dated 5.12.1989. To read or convert the said order of punishment as an order which has the effect of cancelling the promotion of the petitioner or completely debarring the petitioner from promotion, would be misconstruction of the order. Once the disciplinary authority in its wisdom has imposed a punishment, then another punishment cannot be inflicted upon the petitioner by the authorities by misconstruing the order. While the disciplinary authority has directed withholding of the order of promotion for a period of 9 months, the authorities concerned have construed the same as an order cancelling the promotion in its entirety. In other words, the benefit which had accrued to the petitioner and had not been taken away by the disciplinary authority in exercise of its discretion has been taken away by the authorities in an arbitrary manner and upon misconstruction and misunderstanding of the order of punishment. The order dated 18.9.1990 directing the case of the petitioner to be considered afresh by the DPC, is again without any substance. Once the order of punishment dated 5.2.1990 had been enforced and executed, the authorities could not, by an indirect method, impose another punishment of cancellation of the promotion of the petitioner. "Cancellation of promotion" already granted to a person amounts to taking away a right which has accrued in

favor of a person, which except for due process of law cannot be done. There is not only a fine, but a substantial distinction between the expression "withholding" and "cancellation". The effect of "cancellation" would be to divest a person of a vested benefit or right while "withholding" would be deferment of such a benefit or right. The benefit or right that has accrued is not taken away in case of "withholding". "Withholding" presupposes acceptance of the order of promotion. Thus, the action of the authorities, cancelling the promotion of the petitioner is without any basis and the petitioner is entitled to get the benefit after a lapse of the period indicated in the order of punishment.

10. For the reasons afore-stated, we partially allow this writ petition and quash the order cancelling the promotion of the petitioner which apparently, is in conflict with the order of the punishing authority dated 5.2.1990. We further direct the respondents to consider and grant promotion to the petitioner in terms of the order of promotion dated 2/4-12-1990.

11. Accordingly, the petition stands disposed of, while leaving the parties to bear their own costs.