

(2022) 08 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 2610 Of 2021

Som Dutt Sharma

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 02-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 16
Central Civil Services (Classification, Control And Appeal) Rules, 1965 — Rule 14, 19, 29A

Citation : (2022) 08 SHI CK 0004

Hon'ble Judges : Sabina, J; Satyen Vaidya, J

Bench : Division Bench

Advocate : Dilip Sharma, Manish Sharma, Ashok Sharma, R.N. Sharma

Final Decision : Allowed/Disposed Of

Judgement

Satyen Vaidya, J

1. By way of instant petition, petitioner has prayed for following substantive reliefs:

“(a) That the respondent no.3 may be restrained from dealing with the service matters of the petitioner.

(b) That the competent authority may be directed to open the recommendations of DPC held on 28.2.2019 (Annexure P-18) kept in sealed cover qua the assessment of the petitioner for promotion to the post of Assistant Excise and Taxation Commissioner (now re-designated as Deputy Commissioner of State Taxes and Excise) including promotion from the date persons junior to the petitioner were promoted vide notification dated 28.2.2019, (Annexure P-18/A), with all consequential benefits.”

2. Petitioner is working as Excise and Taxation Officer in the Department of State Taxes and Excise, Government of Himachal Pradesh. Petitioner, in the capacity of Assessing Officer, had passed an Assessment Order dated 18.3.2010 (Annexure

P-3) (for short "AO") in the matter of M/s Budget Signs, Plot No.76, EPIP, Phase-II, Thane, Baddi, District Solan for assessment years 2005-06, 2006-07, 2007-08 and 2008-09.

3. The then Excise and Taxation Commissioner, Himachal Pradesh set aside the 'AO' vide order dated 15.3.2011 (Annexure P-5) by exercising his suo moto revisional powers and remanded the matter back to the Assistant Excise and Taxation Commissioner, Baddi, District Solan (for short 'AETC'). In compliance, the AETC, Baddi passed fresh order dated 10.01.2012. The Revisional order (Annexure P-5) passed by the Excise and Taxation Commissioner was assailed by the assessee M/s Budget Signs before the Himachal Pradesh Tax Tribunal. The appeal of the assessee was decided vide order dated 29.8.2013 (Annexure P-9) and the order dated 10.01.2012 passed by AETC, Baddi was set-aside. The matter was remanded with direction to constitute a committee of members of Tax Research Unit. Thereafter, more than twelve years have elapsed but the merits of 'AO' are still unresolved.

4. The 'AO' also gave rise to initiation of disciplinary proceedings against petitioner. Charge Memo dated 27.2.2012 (Annexure P-8) was served upon the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short 'Rules'). Inquiry was conducted and the Inquiry Officer submitted his report dated 03.01.2015 whereby none of the charges were held substantially proved. The Appointing-cum-Disciplinary Authority accepted the inquiry report vide order dated 06.02.2015 (Annexure P-11) and the petitioner was exonerated. 5. On 05.01.2019, almost after four years, another Charge Memo (Annexure P-17) was served upon petitioner relating back to the alleged misconduct arising from the 'AO'. Petitioner submitted his reply and a representation seeking dropping of charges against him on the basis of his exoneration from same charges.

6. In the meantime, petitioner had acquired eligibility for being promoted to the post of AETC. On 28.2.2019 the Departmental Promotion Committee (DPC) held meeting for considering the promotion of Excise and Taxation Officers to the post of AETC (Class-I Gazetted). Total five (5) officers were promoted, out of which three (3) were junior to the petitioner. The last promoted official was promoted on officiating basis against the vacancy kept reserved for the petitioner. The matter relating to promotion of petitioner was kept in sealed cover on the basis of charge memo dated 5.1.2019.

7. Petitioner was served with yet another charge-sheet dated 30.03.2019 (Annexure P-19) again based on charges arising out the 'AO'. Petitioner again submitted his representations for dropping of charges.

8. The competent authority dropped the charge memo dated 05.01.2019 (Annexure P-17) vide order dated 04.01.2020 (Annexure P-20) and charge memo dated 30.03.2019 (Annexure P-19) vide order dated 27.5.2020 (Annexure P-23).

9. Petitioner submitted his representations dated 06.01.2020 (Annexure P-21) and 30.5.2020 (Annexure P-24) with a prayer to open sealed cover in the matter of his promotion. On 03.06.2020, the Excise and Taxation Commissioner, Himachal Pradesh forwarded integrity certificate of petitioner and recommended opening of sealed cover vide letter Annexure P-25.

10. Instead of promoting the petitioner, he was served with yet another charge-sheet dated 16.3.2021 (Annexure P-28) again relating to the alleged misconduct arising out of 'AO'.

11. We have heard Sh. Dilip Sharma, learned Senior Advocate assisted by Sh. Manish Sharma, Advocate, learned counsel for the petitioner and Sh. Ashok Sharma, Advocate General assisted by Sh. R.N. Sharma, Advocate, for respondents No. 1 and 2 and have gone through the records of the case carefully.

12. Initially, the petitioner had impleaded the officer by name, who had remained as Excise and Taxation Commissioner and Principal Secretary, Excise and Taxation, Himachal Pradesh and against whom the petitioner had alleged personal vendetta. However, on 20.04.2022 the name of said respondent was deleted from the array of the parties on the asking of learned counsel for the petitioner. We have also been informed that the originally impleaded respondent No.3 has retired after filing of this petition. Relief (a) prayed in the petition has thus become redundant.

13. This Court on 24.4.2021 had passed the first order as under:

"CWP No.2016/2021 & CMP No.5025/2021

Notice. The learned Additional Advocate General waives service of notice on behalf of respondents No.1 and 2. Notice on behalf of respondent No. 3, on steps being taken within one week, returnable within three weeks thereafter. Reply by filed within four weeks. List on 28.5.2021.

In the meanwhile, the respondents concerned shall appoint a fresh disciplinary authority in place of, respondent No.3, and the disciplinary authority, shall work only respect to the nowat articles of charges framed against the applicant, and, for enabling by the inquiry officer concerned, make appropriate orders thereon.

The Chief Secretary, Government of Himachal Pradesh is also directed to make a forthwith decision upon the representation made by the applicant against the article of charges now drawn against the applicant. It is certified that till the representation made against the article of charges now drawn against the applicant is decided by the latter, co-respondent No.3 shall not deal in any manner with the afore. It is further directed that a copy of the decision made by the Chief Secretary, upon, the representation of the applicant shall be produced before this Court on the next date of hearing."

14. In compliance to aforesaid order the Chief Secretary decided the representation of petitioner but refrained from taking any final decision quoting

pendency of multifarious proceedings. Thus, the inquiry in pursuance to charge memo dated 16.03.2021 (Annexure P-28) is continuing against the petitioner. The charge memo dated 16.03.2021 or the proceedings initiated in pursuance thereto are not in question before us in this petition.

15. Shri Dilip Sharma, learned Senior Advocate has confined his submissions to the extent only that after dropping of charges against petitioner by the competent authority vide orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23), the proceedings of the DPC held on 28.02.2019 (Annexure P-18) and kept in sealed cover are liable to be opened. It has been contended that the inquiry now being faced by the petitioner in pursuance to charge memo dated 16.03.2021 (Annexure P-28) is a fresh inquiry for all intents and purposes. It has further been submitted that neither the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) have been reviewed nor set-aside in any proceedings. As per petitioner, he came to know for the first time from charge memo dated 16.03.2021 (Annexure P-28) that the aforesaid orders had been reviewed, however, on an enquiry, no order of Review was found to exist. It has been categorically submitted on behalf of the petitioner that he had never been associated in any proceedings for review of aforesaid orders, if any. Our attention was drawn to the relevant extract of Charge Memo dated 16.3.2021 which reads as under:

"Whereas the orders withdrawing the charge sheets dated 5.01.2019 and 30.03.2019 against Shri Som Dutt Sharma, Assistant Commissioner of State Taxes and Excise, conveyed vide Memorandum No. EXN-B(14)-1/2020, dated 01.04.2020 and 27.05.2020 have been reviewed by the competent authority and accordingly, it has been directed to expeditiously inquire into the charges as made out at Annexure-I....."

16. In response, learned Advocate General has drawn our attention to para 58 (B) and (C) of reply, wherein a specific mention about review of aforesaid orders by the competent authority has been made. Perusal of the contents of reply submitted on behalf of the respondents reveals that the respondents have placed entire emphasis on the alleged misconduct of petitioner arising from order dated 18.03.2010 (Annexure P-3).

17. In view of the confinement of submissions by the petitioner and also in the nature of relief prayed in the petition the issue precisely required to be adjudicated by us is whether the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) were ever reviewed, so as to nullify their effect? The merits of the allegations of misconduct against petitioner are not required to be gone into by us. In any case, the inquiry in pursuance to charge memo dated 16.03.2021 is stated to be pending against petitioner and it will have its own course, permissible under law.

18. The respondents had not placed any tangible material on record to substantiate their plea regarding review of orders dated 04.01.2020 (Annexure

P-20) and 27.05.2020 (Annexure P-23) by the competent authority. During the course of hearing, a compendium has been placed on record which according to respondents are the note-sheets and proceedings evidencing review of aforesaid orders.

19. The power of review is provided under Rule 29-A of the Rules, which reads as under:

"29-A Review:

The President may, at any time, either on his own motion or otherwise review any order passed under these rules, when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case, has come, or has been brought, to his notice:

Provided that no order imposing or enhancing any penalty shall be made by the President unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed or where it is proposed to impose any of the major penalties specified in rule 11 or to enhance the minor penalty imposed by the order sought to be reviewed to any of the major penalties and if an enquiry under rule 14 has not already been held in the case, no such penalty shall be imposed except after inquiring in the manner laid down in rule 14, subject to the provisions of rule 19, and except after consultation with the Commission where such consultation is necessary and the Government servant has been given an opportunity of representing against the advice of the Commission."

20. We have carefully gone through the compendium of documents placed on record on behalf of the respondents during hearing of the case but have not found the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) having been reviewed in exercise of powers under Rule 29-A *ibid*. The compendium includes the official note-sheets dealing with the situation after the dropping of charges against petitioner vide orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23). It starts with the opinion of Addl.LR-cum-Addl. Secy. (Law) to the Government of Himachal Pradesh dated 11.01.2021. The matter appears to have been dealt with thereafter by the Addl. Chief Secy. (E&T) to the Govt. of Himachal Pradesh recommending serving of fresh charge sheet against the petitioner. The Addl. Chief Secy.(E&T) to the Govt. of Himachal Pradesh, was the same person whom petitioner had initially impleaded as respondent No.3 in this petition. This fact has been admitted by the respondents in their reply also.

21. On 12.03.2021 vide N/125, it was noted as under:

"Action with respect to the order/memo dated 27.5.2020 for dropping the charges needs to be taken first before issuing the charge sheet as discussed N-89 ante, please put up a note."

Evidently the legal implications for initiating fresh inquiry without reviewing the earlier orders had been visualised.

22. Thereafter, the matter was again dealt with at various levels. On 15.03.2021 vide N/141, a proposal was made to review and rescind the orders dated 04.01.2020 and 27.05.2020 and also to issue a fresh charge sheet. It was on such proposal that a note at N/142 was placed as under:

"As discussed, to ensure the delivery of this charge sheet we may send this to the Joint Commissioner, State Taxes & Excise, NZ, Palampur for service and furnishing it evidence/receipt, the DFA is submitted for signature please."

23. The documents noticed above cannot be said to be an order of review under Rule 29-A of the Rules. There is no order on record which satisfies the requirements of Rule 29-A of the Rules. The fact that a fresh charge sheet had been framed itself suggests that the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) had not been reviewed. In case the said orders had been reviewed, the action, if any, would have been taken on earlier charge memos dated 05.01.2019 (Annexure P-17) and 30.03.2019 (Annexure P-19).

24. Even otherwise, there is nothing on record to suggest the existence of any new material or evidence which could not be produced or was not available at the time of passing of the orders under review and which had the effect of changing the nature of the case, having come or brought to the notice of the competent authority named in Rule 29-A of the Rules. The power of Review, as aforesaid, cannot be recognized to be available as one-sided administrative exercise. Since it tends to affect the valuable rights having accrued in favour of the person, such exercise cannot be said to be available without complying with the principles of natural justice. It is not in dispute that petitioner had no notice of any order amounting to Review of orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23).

25. As a consequence of above, we have no hesitation to hold that the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) were never reviewed and, therefore, their efficacy cannot be said to have faded. The exoneration of the petitioner from charges supplied to him vide charge memo dated 05.01.2019 (Annexure P-17) would mean that no such charge existed against the petitioner. The consideration of petitioner for promotion by the DPC dated 28.02.2019 (Annexure P-18) was kept in sealed cover only due to pendency of chargesheet dated 05.01.2019 (Annexure P-17). It is more than settled that once the petitioner was exonerated, there was no legal impediment in opening the sealed cover.

26. In Delhi Jal Board vs. Mahinder Singh (2000) 7 SCC 210, the question before the Hon'ble Supreme Court was with respect to the binding precedents of the judgments in (1999) 5 SCC 762, Bank of India vs. Degala Suryanarayana and (1998) 4 SCC 154, State of A.P. vs. N. Radhakishan, whereby it was held that once the first disciplinary inquiry resulted in favour of writ petitioner, the benefit

of the findings of DPC should be given to the writ petitioner notwithstanding the pendency of second inquiry. In above noted judgments it was held that if a person's case had been considered for promotion by the DPC and because of pendency of certain charges, the findings of DPC were kept in sealed cover, he was entitled to the benefit of the findings of the selection, if the disciplinary inquiry ended in his favour notwithstanding the fact that by that date, some other inquiry might have been pending against him. A submission was made before the Hon'ble Supreme Court that the aforesaid two judgments required consideration. Negating such contention and upholding the dictum of aforesaid judgments, it was held as under:

"5. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the Disciplinary Enquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any Disciplinary Enquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer. If he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time when the DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection. There is, therefore, no question of referring the matter to a larger Bench.

6. In the SLP, we have not thought it fit to send matter back to the Division Bench which had dismissed the appeal as time barred and on the ground that the Advocate was not present. In our view, this is not a fit case to remand the matter to the High Court because the only argument addressed by the learned Additional Solicitor General before us is that the earlier judgments of this Court cited above and relied upon by the learned Single Judge require reconsideration and that question cannot obviously be raised before the Division Bench of the High Court. We have, therefore, considered the correctness of the judgment of the learned Single Judge on merits."

27. Learned Advocate General has contended before us that even the pendency of subsequent inquiry is the deterrent for petitioner to pray for opening of sealed cover. In support of such submission, reliance has been placed on the judgment passed by the Hon'ble Supreme Court in *State of Madhya Pradesh and another vs. Syed Naseem Zahir and others* 1993 Supp.(2) Supreme Court Cases, 225. In

that case, the facts were entirely different and on the basis of such difference, the judgments so relied cannot be applied in the instant case. Though the charge memo in that case was issued after DPC proceedings but the referred judgment was passed at a stage when the charges were already found proved against the person after inquiry. The matter was pending before the Appointing-cum-Disciplinary Authority. It was in the backdrop of such facts that the Hon'ble Supreme Court held as under:

"7. It is no doubt correct that in view of Union of India vs. K.V. Jankiraman (1991) 4 SCC 109, the DPC was not justified in keeping the recommendation pertaining to Syed in a "sealed cover", but it is difficult to ignore glaring facts in a given case and act mechanically. Even in Jankiraman's case while dealing with Civil Appeal Nos. 51-55 of 1990 this Court observed as under: (SCC p.126, para 39)

"In view of the aforesaid peculiar facts of the present case, the DPC which met in July, 1986 was justified in resorting to the sealed cover procedure, notwithstanding the fact that the charge sheet in the departmental proceedings was issued in August/December, 1987. The Tribunal was, therefore, not justified in mechanically applying the decision of the Full Bench to the facts of the present case and also in directing all benefits to be given to the employees including payment of arrears of salary".

Keeping in view the facts of this case we are to the view that the "sealed cover" containing recommendations of the DPC in respect of respondent Syed be not opened till the departmental proceedings against him are concluded. As mentioned above the enquiry report has already been received by Syed and it is matter of days before the disciplinary proceedings would come to an end. In case he is completely exonerated, the "sealed cover" shall be opened and if the recommendation is in his favour, he shall be notionally promoted with effect from the date when a person junior to him was promoted to the post of Chief Engineer. In that event, he shall be entitled to all consequential benefits including back wages. In case, respondent Syed Naseem Zahir is punished in the proceedings, then action would be taken in accordance with the guidelines as laid down by this Court in Jankiraman's case."

28. On the basis of above analysis, we have no hesitation to hold that the orders dated 04.01.2020 (Annexure P-20) and 27.05.2020 (Annexure P-23) exonerating the petitioner were intact meaning thereby the petitioner stood exonerated from charges issued to him vide charge memos dated 05.01.2019 (Annexure P-17) and 30.03.2019 (Annexure P-19). That being so, there is no legal impediment in opening the sealed cover in respect of the findings of the DPC relating to petitioner.

29. Accordingly, the petition is allowed. The respondents are directed to open the recommendations of the DPC held on 28.02.2019 (Annexure P-18) kept in sealed cover in respect of assessment of the petitioner for promotion to the post of

Assistant Excise and Taxation Commissioner (now re-designated as Deputy Commissioner of State Taxes and Excise) and in case the findings are in his favour to promote him from the date when persons junior to the petitioner were promoted vide notification dated 28.02.2019 (Annexure P-18/A), with all consequential benefits.

30. The petition is disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.