

(2022) 12 GAU CK 0025

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1855 Of 2021

UBC 1332 Hanif Choudhury

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 08-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Indian Penal Code, 1860 — Section 34, 420, 468

Citation : (2022) 12 GAU CK 0025

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : D Borgohain

Final Decision : Disposed Of

Judgement

1. Heard Ms. D. Borgohain, the learned counsel for the petitioner and Mr. J.K. Parajuli, the learned counsel appearing on behalf of the respondents.

2. The petitioner herein has filed the instant writ petition seeking a mandamus thereby directing the respondents to consider the case of the petitioner for promotion to the post of Assistant Sub-Inspector(UB) of Police w.e.f the date when his juniors were promoted to the post of Assistant Sub Inspector(UB) of Police and accordingly release the financial benefits due to the petitioner from the date of promotion.

3. The case of the petitioner in brief is that by an order dated 12/4/1992 issued by the Superintendent of Police, Nagaon, Assam, the petitioner was appointed as an AB Constable w.e.f. 12.4.1992 vide D.O. No. 1246 dated 16.4.1992. After four years of service, vide an order dated 13/3/1996 the petitioner was transferred from Armed Branch to Unarmed Branch along with other persons with immediate effect against existing vacancies. The petitioner continuously worked as UB Constable since the date of his transfer from AB to UB on 13.3.1996. Subsequent thereto on 28/4/2005, the petitioner along with other persons were declared to

have passed in the departmental qualifying exam for promotion to the rank of ASI of police.

4. In the meantime, in the year 2012 when the petitioner was working as the Nagaon D.E.F. a case was registered against him alongwith other persons which was registered and numbered as Nagaon P.S. Case No. 1284/2012 under Sections 420/468/34 of the Indian Penal Code. The said FIR, however, has not been enclosed to the instant writ petition but from a perusal of paragraph No. 6 of the affidavit-in-opposition filed by the respondent No. 2, it transpires that the said case was registered against the petitioner for submission of false HSLC Pass Certificate and Mark Sheets. It further transpires from the materials available on record that the petitioner was suspended for criminal misconduct as well as for involvement in the Nagaon PS Case No. 1284/2012 vide an order dated 4/10/2012. Subsequent thereto on 21/1/2013, the Superintendent of Police, Nagaon released the petitioner along with other suspended persons from suspension with immediate effect in view of the shortage of man power for the Panchayat Elections 2013. It also transpires from the records that vide an office order dated 24/6/2013, the Superintendent of Police, Nagaon, in pursuance to the order dated 10/6/2013 by the Additional Director General of Police (TAP), Assam, the petitioner along with other persons of the UBC of Nagaon D.E.F. were deputed to report before the Principal, PTC, Dergaon for undergoing the 38th Batch Pre Promotion Cadre Course w.e.f. 24/6/2013 for a period of 12 weeks. The said promotional cadre course of the UB constable was duly held at PTC, Dergaon with effect from 24/6/2013 to 30/9/2013 and the petitioner along with other persons were declared passed and the name of the petitioner was duly reflected at Serial No. 66.

5. Subsequent thereto on the basis of an order dated 13/2/2015 issued by the Superintendent of Police, Nagaon, it was notified that the departmental proceedings No. 7/2012 which was initiated against the petitioner was disposed off and a punishment of stoppage of two increments with cumulative effect for his indiscipline conduct being a member of the discipline police department was imposed. However, the period of suspension have been treated to be on duty.

6. The petitioner being aggrieved preferred an appeal against the order dated 13/2/2015 before the Deputy Inspector General of Police, Assam which was registered and numbered as C.R./57-NGN/2021/286. The said appeal which was pending at the time of the filing of the writ petition was subsequently disposed off vide an order dated 15/3/2021 whereby the Deputy Inspector General of Police vide an order dated 15/3/2021 found that the charges framed against the petitioner was beyond any reasonable doubt and deserved to be awarded with major punishment. However, the quantum of punishment imposed on him by the authority appeared to be quite harsh and as such the appellate authority awarded a punishment with stoppage of one increment with cumulative effect for his indiscipline conduct being a member of the discipline police department.

7. As the petitioner had qualified in the 38th Batch Pre-promotion Cadre Course

of UB Constable held at PTC, Dergaon w.e.f. 24/6/2013 to 30/9/2013, the petitioner also became eligible for being promoted from the post of a Constable (UB) to the ASI(UB). However, the respondent authorities promoted various persons who were even below the rank of the petitioner but did not promote the petitioner on the ground that there was a criminal proceedings pending against the petitioner i.e. Nagaon P.S. Case No. 1284/2012. Being aggrieved, the petitioner has approached this court under Article 226 of the Constitution seeking the relief as abovementioned.

8. This Court vide an order dated 19/3/2021 issued notice making it returnable by 4(four) weeks. The records further reveals that the respondent No. 2 had filed an affidavit-in-opposition. In the said affidavit-in-opposition, it was stated that the case of the petitioner was not considered on the ground that the Nagaon P.S. Case No. 1284/2012 registered under Sections 420/468/34 of the Indian Penal Code was pending against him. It was further stated that the case was charge-sheeted after completion of investigation and in terms to the Office Memorandum No. ABP. 29/2006/38 dated 9/5/2006 of the Government of Assam, the petitioner could not be promoted as there was a prosecution of criminal charges were pending against him before the Trial Court.

9. To the said affidavit-in-opposition, the petitioner has filed an affidavit-in-reply wherein it was mentioned that the Office Memorandum dated 9/5/2006 was issued on the basis of the judgment of the Apex Court in the case of Union of India Vs. K.V. Janakiraman reported in (1991) 4 SCC 109. In the said judgment of the Supreme Court, it was clearly mandated that pending finalization of the criminal proceedings the procedure of ad hoc appointment can be resorted to when the disciplinary/court proceedings are not concluded even after the expiry of two years from the date of the DPC and as such the respondent authorities could have considered the case of the petitioner in that respect. In the said affidavit-in-reply, the order dated 15/3/2021, whereby the appellate disciplinary authority have reduced the punishment upon the petitioner, have been enclosed.

10. In the backdrop of the above pleadings of the parties, let this court take into consideration the relevant submissions made by the learned counsel for the parties. Ms. D. Borgohain, the learned counsel appearing on behalf of the petitioner submitted that the Office Memorandum dated 9/5/2006 was issued on the basis of the law laid down by the Supreme Court in the case of Union of India Vs. K.V. Janakiraman (supra) wherein, it was held that in the circumstance where the disciplinary proceedings as well as the criminal proceedings are not finalised within a period of two years, the respondent authorities would be within its power to give ad hoc appointment pending finalisation of such enquiry or trial. She further submitted that a Coordinate Bench of this Court in the case of Deben Bora Vs. State of Assam (W.P.(C) No. 6517/2018) dated 8/4/2019 have also held that although the Office Memorandum dated 14/9/1992 may not strictly be applicable in the State of Assam but the principles and objectives underlying the issuance of the said Office Memorandum can be made applicable and accordingly

had directed the authorities to examine from the records of the criminal proceedings as to the culpability of the petitioner and if the authorities were satisfied on the basis of the materials available on record that there is a likelihood of the petitioner being acquitted, the authorities will open the seal cover proceedings in respect to the petitioner and if recommended by the selection committee, shall give him promotion on ad hoc basis, which however, will be subject to final order that may be passed by the concerned Court in the pending criminal case. The learned counsel for the petitioner therefore, submitted that in terms with parity also the petitioner is also entitled to similar orders.

11. On the other hand, Mr. J.K.Parajuli, the learned counsel appearing on behalf of the respondents submitted that the State of Assam had adopted a particular Office Memorandum in terms to the judgment of the Supreme Court in the case of K.V. Janakiraman(supra). The said office memorandum has not been put to challenge and as such the said Office Memorandum holds the field and not the Office Memorandum issued by the Central Government. Drawing the attention of this Court to the various paragraphs of the said Office Memorandum dated 9/5/2006, the learned counsel submitted that it is only when the delinquent employee is exonerated of the charges framed against him, the delinquent employee can be promoted after taking the status position from the concerned Vigilance Division. He further submitted that the Coordinate Bench, while passing the order dated 8/4/2019, did not take into consideration that in the State of Assam there is an Office Memorandum holding the field and as such the said judgment passed by the Coordinate Bench is a per incuriam and as such not binding upon this Court.

12. During the course of dictating the judgment, this Court put an enquiry upon both the counsels for the parties as to what is the present stage of the criminal proceedings. It has been submitted at the bar that the said criminal proceedings against the petitioner is at the stage of evidence. It further appears from the records that the Government of Assam in its department of personnel had issued an office memorandum dated 9/5/2006 stipulating the guidelines for promotion of Government Servant against whom departmental/disciplinary/court proceedings are pending or whose conduct is under investigation and the procedure and guidelines to be followed in respect thereto. It further appears that the said guidelines as mentioned in the Office Memorandum dated 9/5/2006 was framed on the basis of the judgment of the Supreme Court in the case of K.V. Janakiraman(supra).

A further perusal of the said guidelines shows that in terms to Paragraph No. 2, the departmental promotion committee/the selection committee/the appointing authority has to be informed in the case, the Government servant, who comes within the zone of consideration for promotion, falls within the categories mentioned in the sub-paragraphs of paragraph 2 i.e. (i) Government servants under suspension; (ii) Government servants in respect to whom a charge-sheet

has been issued and the disciplinary proceedings are pending; and (iii) Government servants in respect to whom prosecution for criminal charges is pending.

Paragraph 3 of the said Office Memorandum deals with a situation to the effect that the departmental promotion committee/the selection committee/the appointing authority shall assess the suitability of the Government servant coming within the purview of the circumstances mentioned in Paragraph 2 along with other eligible candidates, without taking into consideration the disciplinary case/criminal prosecution pending against the delinquent employee. It was clearly mandated that only a bare statement has to be made to the departmental promotion committee/the selection committee/the appointing authority that the case of an employee in the zone of consideration/the extended zone of consideration is covered by any of the three situations mentioned in the Sub-Paragraphs of Paragraph No. 2 and the necessity of making the said statement is to enable the said authority to place its recommendations in the sealed cover. It has been clearly mentioned in Paragraph No. 3 that no other details about the pending enquiry or the nature of charges etc are to be furnished to the departmental promotion committee/the selection committee/the appointing authority and the reason being that these details may have a bearing with the said authority in making the recommendations which are to be placed in the sealed cover.

Paragraph 4 of the said Office Memorandum relates to furnishing of a vigilance enquiry and the integrity certificate to the departmental promotion committee/the selection committee/the appointing authority. It has been mentioned that if any of the three situations indicated in Paragraph No. 2 of the said Office Memorandum exists in the case of an employee, a bare statement of that fact needs to be placed before the authority concerned so that the recommendations can be placed in the sealed cover. However, when none of the situations arise, a simple vigilance clearance would be needed to be furnished. It was also clearly mentioned that the vigilance clearance/the status would have no other significance and would not be a factor in deciding the fitness of the officer/Government servant for promoting on merit.

Paragraph 5 is very relevant for the purpose of the instant case wherein it has been clarified that there is no requirement of furnishing a separate integrity certificate to the departmental promotion committee/the selection committee/the appointing authority. It has been mentioned that in terms with the judgment of the Supreme Court in the case of K.V. Janakiraman (*supra*), no 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 or issue of charge-sheet etc. However, in the matter of corruption/dereliction of duty etc there is a serious complaint and the matter is still under investigation of the CBI or otherwise the Government is within its right to suspend the officials and in that case the officers/the Government servant's case for promotion would

automatically be required to be placed in the sealed cover.

Paragraph 6 of the said Office Memorandum makes it clear that if the conditions indicated in Paragraph No. 2 above arise only after departmental promotion committee/the selection committee/the appointing authority had made its recommendation and therefore the recommendation could not be placed in the sealed cover, the recommendations of the departmental promotion committee/the selection committee/the appointing authority shall be deemed to have been placed in the sealed cover and he shall not be promoted until he is exonerated of all the charges. In such circumstances, after the recommendations of the departmental promotion committee/the selection committee/the appointing authority have been approved by the competent authority, it is necessary to again seek the status position from the concerned vigilance division before issuing the promotion order in respect to any officer included in the approved panel of names to ensure that there is no hindrance in issuing the promotion order in respect to the concerned officer/the Government servant.

13. From a perusal of the said Office Memorandum, it is therefore clear that the question of any ad hoc or officiating appointment has not been mentioned in the said Office Memorandum. No doubt from a perusal of the judgment of the Supreme Court in the case of K.V. Janakiraman(supra) there is a mention of an ad hoc or officiating promotion in view of the fact that the Supreme Court took into consideration the Office Memorandum No. 22011/1/79.Estt(A) dated 30/1/1982 of the Government of India. A perusal of Paragraph No. 3 of the said judgment of the Supreme Court would clearly show that the said Office Memorandum dated 30/1/1982 envisaged the scope of an ad hoc or an officiating appointment which is however not the case in terms to the Office Memorandum dated 9/5/2006. It is therefore, in those circumstances, the Supreme Court, while taking into consideration the scope and ambit of the Office Memorandum dated 30/1/1982, had decided on the question of ad hoc and/or officiating appointment.

14. At this stage, this Court while taking into consideration the submission made by the learned counsel for the petitioner as regards the parity in view of the order dated 8/4/2019 passed in W.P.(C) No. 6517/2018 by a Coordinate Bench would like to observe that the perusal of the said order passed by the Coordinate Bench with due respect to the learned Judge had not taken into consideration that for the State of Assam there is an Office Memorandum dated 9/5/2006 specifically dealing with the situation pertaining to promotion of Government servants against whom departmental/disciplinary/court proceedings are pending and whose conduct was under investigation and the procedures and the guidelines laid down thereon. It being a well established principle of law that when an order and/or a judgment is passed in ignorance of the relevant applicable laws, the said order or judgment would be per incuriam and any judgment which is held to be per incuriam is not binding upon a Coordinate Bench. Under such circumstances, this Court is of the opinion that the parity

which has been sought by the learned counsel for the petitioner on the basis of the order dated 8/4/2019 passed in W.P.(C) No. 6517/2018 cannot be made applicable to the facts of the instant case in as much as the order dated 8/4/2019 by the Coordinate Bench is per incuriam.

15. In the backdrop of the above, it is relevant also to take note of that Paragraph 6 of the Office Memorandum dated 9/5/2006 categorically mandates that a Government servant until he is exonerated of the charges cannot be granted promotion. In the instant case, as it is an admitted fact that a criminal proceedings are presently ongoing before the appropriate Court of law, the question of granting promotion to the petitioner would be contrary to the Office Memorandum dated 9/5/2006. Under such circumstances, the instant writ petition so filed by which the petitioner is seeking promotion to the post of ASI(UB) w.e.f the date when his juniors were promoted to the post of Assistant Sub-Inspector (UB) of police cannot be accorded and accordingly no writ can be passed directing the respondent authorities to consider the case of the petitioner for promotion to the post of Assistant Sub-Inspector (UB) of police w.e.f. the date when his juniors were promoted to the post of Assistant Sub-Inspector (UB) of Police cannot be issued in the present facts and circumstances of the case.

16. However, it is made clear that in the eventuality if the petitioner is exonerated of all his charges in a criminal proceedings which are pending against him, the petitioner would be entitled to be considered for promotion to the post of Assistant Sub-Inspector (UB) of Police with all notional benefits to which the petitioner would be entitled to as per law from the date the petitioner was entitled to be promoted if there was no criminal proceedings pending against him. It is also observed that the recommendation so made by the Selection Board in the case of the petitioner would be deemed to be kept in the sealed cover in terms to paragraph 6 of the Office Memorandum dated 9/5/2006.

17. With the above observations and directions, the petition stands disposed off.