

(2010) 12 DEL CK 0266

In the Delhi High Court

Case No : Writ Petition (C) 985 of 2010

Union of India (UOI) and Others

APPELLANT

Vs

Duli Chand

RESPONDENT

Date of Decision : 07-12-2010

Acts Referred:

Citation : (2010) 12 DEL CK 0266

Hon'ble Judges : Siddharth Mridul, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R.V. Sinha, R.N. Singh and A.S. Singh, for the Appellant; C. Harishankar and S. Sunil, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—Vide impugned judgment and order dated 25.3.2009, OA No. 580/2008 filed by the Respondent Duli Chand has been allowed with a direction that the sealed cover containing the recommendation pertaining to the Petitioner for promotion to the post of Additional Commissioner be opened and recommendation implemented. It has been held that the penalty order dated 2.5.2003 has to be given effect from said date.

2. Vide order dated 2.5.2003 the Disciplinary Authority inflicted upon the Respondent the punishment of stoppage of two annual increments with cumulative effect which was quashed by the Tribunal when Respondent filed OA No. 1573/2003. Tribunal's order was upheld by the High Court but was reversed by the Supreme Court when CA No. 2168/2006 was disposed of by the Supreme Court on 21.4.2006 and the penalty imposed by the Disciplinary Authority was restored. It may be noted that before the penalty could be implemented, the Respondent obtained a stay from the Tribunal and since the Tribunal quashed the penalty the same could not be implemented and the stage for implementation came only when the Supreme Court pronounced the verdict on 21.4.2006. Another relevant fact is that pending inquiry, since entitlement of the Respondent to be considered for further promotion enured, at the DPC held, the

recommendation pertaining to him was put in a sealed cover.

3. Before the Department could give effect to the penalty by withholding the first increment which fell due after the Supreme Court decided the issue of penalty on 21.4.2006 and thereafter could withhold the second increment the next year; penalty being to withhold two increments cumulatively, the Respondent deposited Rs. 45,148/- being the amount received by him in excess of what he would have received had the penalty been implemented in the year 2003 and 2004 and for which he calculated the amount with reference to the increment payable as per the scale in which he was drawing salary in the years 2003 and 2004. He claimed thereafter that the penalty lasted for two years and would have to be treated as effective from the date when the penalty was levied i.e. 2.5.2003 and would lapse after two years and therefore he had to be promoted and for which he prayed that the sealed cover containing recommendations pertaining to him should be opened.

4. Since the Department did not allow the claim and held that the suo motu deposit of Rs. 45,148/- by the Petitioner was meaningless, the Department sought to inflict the penalty with respect to the increment which became due to the Respondent after 21.4.2006 and additionally refused to open the sealed cover, the Respondent litigated for a second time by filing OA No. 580/2008, which as noted in para 1 above, has been allowed by the Tribunal.

5. Pertaining to the direction issued by the Tribunal that the sealed cover containing the recommendation pertaining to the Respondent be opened, suffice would it be to state that the Tribunal has ignored the fact that Respondent's name was kept in a sealed cover on account of a Disciplinary Proceeding pending against him and in which the Respondent has been held guilty and thus the question of giving effect to the recommendations of the DPC does not arise in view of the law declared by the Supreme Court in the decision reported as Union of India Vs. K.V. Jankiraman, etc. etc.,

6. But the question remains as to the giving effect to the penalty of withholding two annual increments on permanent basis.

7. As noted above, before the penalty could be levied, the Respondent had obtained a stay from the Tribunal and since OA No. 1573/2003 filed by him was ultimately allowed and the penalty quashed, the question of the Department implementing the same did not arise till the Department succeeded before the Supreme Court on 21.4.2006.

8. Now, as explained by the Bombay High Court in the decision reported as 2009 (3) Mah.L.J. 968 Britannia Industries v. M.G.K. Union, the effect of an interim stay by a Court with respect to a matter puts under eclipse the subject matter of the matter and the effect of the interim stay being vacated is to remove the eclipse. This was so held by the Supreme Court in the decision reported as AIR 1975 SC 1950 Smt. Indira Gandhi v. Raj Narayan when the Supreme Court observed that the reasonable effect of stay order is that there is plenary eclipse

of the High Court's judgment and order during the pendency of appeal.

9. Conventionally understood, the Doctrine of Eclipse pertains to the area of Constitutional Law where an existing law is held to be inconsistent with a fundamental right and this would be making the law inoperative from the date of commencement of the Constitution or a law enacted post independence but held to be unconstitutional and in both circumstances by and under a constitutional amendment, the blemish/infirmity is removed with reference to the existing law. The law in the moribund or eclipsed state, becomes operative on the principle as explained by the Supreme Court in the decision reported as *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, . that an existing law inconsistent with a fundamental right though becomes inoperative from the date of commencement of the Constitution is not dead altogether and the position is that it is eclipsed for the time being and the effect of the amendment to free it from blemish or infirmity removes the shadow and makes the impugned act free. In the decision reported as *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, it was held that when the Constitutional bar is removed by a Constitutional amendment, the law held to be unconstitutional will operate proprio vigour after the Constitutional amendment and there is no need for fresh legislation.

10. We have referred to the afore-noted decisions to simply explain the jural concept of Doctrine of Eclipse which makes us understand that upon being stayed by a Court a penalty order would remain eclipsed and not dead and that the moment the stay is vacated, the same would operate proprio vigour i.e. on its own strength.

11. To put it differently the de facto component of a penalty order continues to exist since this is a matter of fact. Its de jure status comes under a cloud as a result of it being stayed and would die a temporary death if the order is ultimately set aside. But it gets resurrected, not reborn, when the order quashing the penalty is set aside by a superior Court.

12. Thus, it can safely be said that an order levying penalty which has come under an eclipse has to be given its effect from the date it was born and not from the date when the eclipse was removed, but this would be subject to an exception of a deemed reality. The deemed reality would be dependent upon the nature of the penalty order. Let us take an order of penalty of removal from service which gets stayed before it is served upon the employee i.e. before it takes effect. The stay is ultimately vacated. The penalty order must take effect from the retrospective date and not prospectively. This would be on the principle that the order resurrects and was always in existence; it came under an eclipse due to the stay and upon the eclipse being removed would operate proprio vigour. But let us take a penalty order as of the instant kind i.e. stoppage of two increments. This penalty order would have various implications, the first being the delinquent not earning promotions in the next two years. The second being disentitled to be considered for promotion during the currency of the penalty i.e.

for two years. The third would be the penalty to be considered by the Departmental Promotion Committee as a part of the ACR record if falling within the preceding five years" period; for the reason DPC"s consider the preceding five years" ACR records of eligible government servants and exceptionally, where the rules or guidelines contemplate, the entire service record to be considered. This penalty order would have various manifestations in its applicability and thus such penalty order being stayed and stay vacated, the effect thereof has to be considered very carefully.

13. The reason is that it would be an extremely unjust situation and may be held to be unreasonable if the effect of the penalty is disproportionate to the penalty. As in the instant case, the penalty remained eclipsed for three years and if given effect to after three years would mean that not only for the preceding three years after eclipse was over but even for the next two years the delinquent would be ineligible to be considered for promotion and further when he would become eligible to be considered for promotion, for the next five years the penalty would stand in his way. This may borderline on double jeopardy, though not strictly a case of double jeopardy.

14. Thus, the distinction between an order"s existence de jure and de facto has to be kept in mind. For and in relation to penalty order of the kind we are dealing we hold that for purposes of giving effect to the penalty a hiatus has to be drawn qua the factum of the increments to be stopped and the existence of the penalty order for purposes of other service related issues and in particular consideration of the ACR record of the Respondent at the DP Cs post 2.5.2003. For the purposes of DP Cs post 2.5.2003 i.e. the date of the penalty order, the same has to be treated as effective from 2.5.2003 which would be the date wherefrom two years would reckon as a bar to consider the candidature of the Respondent for further promotion; and beyond two years of 2.5.2003, such DP Cs which have to consider the preceding five year ACR record would take into account the penalty if the year 2003 is a part of the preceding five years" period. Thus, the de facto coupled with de jure implementation of the penalty order, in harmony with the Doctrine of Eclipse, would require the penalty to be given effect to after the eclipse was over and the penalty order resurrected and for which we hold that the two increments which the Respondent has to forfeit would be the ones which he had earned on the dates after 21.4.2006.

15. We would be failing if we do not note two decisions cited by learned Counsel for the Respondent, being Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., . and Delhi Cloth and General Mills Co. Ltd. Vs. Union of India (UOI) and Others, . which hold that upon vacation of an interim stay, the parties must be relegated to the same position in which they would have been, but for the stay. The said decisions operate in the realm of the jurisprudence of restitution inasmuch as the decisions contemplate the restitution of the party against whom an interim order was obtained; to be placed in the same position as it would have been but for the interim stay. Surely, the said decisions have no

applicability qua the person who has obtained the stay and upon losing the battle finds himself in a somewhat watery situation.

16. Accordingly, we dispose of the writ petition setting aside the impugned order dated 25.3.2009 and dispose of OA No. 580/2008 holding that the Respondent is not entitled to the opening of the sealed cover containing recommendations pertaining to him when the DPC met during currency of the departmental proceedings. The penalty levied upon the Respondent would be given effect to as per our observations in para 14 above. We clarify that if vacancies to the higher posts fell vacant and DP Cs met post 2006, the candidature of the Respondent would be considered by convening Review DPC for the year in question and the DPC would be entitled to take into account the penalty levied upon the Respondent by treating the same to be levied in the year 2003. We clarify that our reason for not requiring any DP Cs to be convened pre 2006 is the fact that for two years post 2003 the Respondent would not even be eligible to be considered for promotion. Needless to state, if as a result of any Review DPC, the Respondent is to be promoted he would not be entitled to any back-wages for the reason he has not shouldered the responsibilities of the higher post.

17. No costs.