

(2006) 11 DEL CK 0228
In the Delhi High Court
Case No : WP (C) 10541-43 of 2006

Union of India (UOI) and Others

APPELLANT

Vs

R.C. Sehgal

RESPONDENT

Date of Decision : 17-11-2006

Acts Referred:

Central Civil Services (Conduct) Rules, 1964 — Rule 3(1)

Citation : (2006) 11 DEL CK 0228

Hon'ble Judges : Manmohan Sarin, J;J.M. Malik, J

Bench : Division Bench

Advocate : A.K. Bhardwaj, for the Appellant; V.S.R. Krishna, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Sarin, J.—By this writ petition, the Union of India assails the judgment and order dated 9.6.2006, passed by the Central Administrative Tribunal, Principal Bench, Delhi (hereinafter referred to as CAT) whereby OA No.750/2006 of the respondent R.C. Sehgal was allowed, directing the petitioners to promote the respondent immediately in the available vacancy.

2. The facts giving rise to the present writ petition are as follows:

Respondent had joined the Military Engineering Services (MES) as an Assistant Engineer (Electrical and Mechanical) after selection through UPSC in 1967. He progressed in his career and eventually on 2nd February, 2001, he was appointed as Chief Engineer. On 31st October, 2003, he was posted as Joint Director General (Utilities).

3. On 31st March, 2005, respondent was empanelled along with three others for promotion to the coveted post of Additional Director General. Relevant extracts from the empanelment letter dated 31.3.2005 are quoted hereinbelow:

1. 04 (Four only) Chief Engineers listed at Appendix "A" to this letter, have been approved for promotion to the grade of Additional Director General of Works in

the Military Engineer Services of the Ministry of defense.

2. Actual appointment of officers included in this panel will be made in the order shown therein subject to the availability of vacancies and issue of orders for appointment.

3. Before placing in position on promotion it should be ensured that the officer is not involved in any disciplinary/ vigilance/CBI/SPE case.

Sd/-

SE

Dir(Pers)/EI(DPC-I)

For Engineer-in-Chief

xxxxxxxxxxxxxxxxxxxxxx

Appendix A

PANEL FOR PROMOTION FROM CHIEF ENGINEER TO THE GRADE OF ADDITIONAL DIRECTOR GENERAL AGAINST THE VACANCIES FOR THE YEAR 2005-06

S. No. MES No. Name of the officer Date of Birth 01 405264 Sh. D.K. Jain 24.03.1946 02 200111 Sh. T.K. Saha 08.07.1945 EXTENDED PANEL 03 110883 Sh. Narender Kumar 28.12.1943 04 169111 Sh. R.C. Sehgal 02.07.1946 (Four Officers Only) Note: Shri Narender Kumar (S.No.3) to be promoted on retirement of Sh. T. K. Saha (S. No. 2 above) and Shri R.C. Sehgal (S. No. 4) to be promoted on the retirement of Sh. Narender Kumar (S.No.3 above).

4. As noted above, in terms of the order empanelling the respondent he was to be promoted to the post of Additional Director General on the retirement of Mr. Narender Kumar on 31st December, 2005. Though respondent was not promoted, the letter mentioned that actual appointment of officers included in the panel would be made in the order shown therein subject to the availability of vacancies and issue of orders for appointment. The letter also stated that Sh. R.C. Sehgal to be promoted on retirement of Sh. Narender Kumar. As Mr. Narender Kumar was due to retire on 31.12.2005, the respondent claimed to be entitled to promotion with effect from 1.1.2006.

5. It is stated that based on an anonymous complaint made, CVC permitted investigation of the same in June, 2005. Investigation was completed by 1st October, 2005. On 14th October, 2005, the proposal for promotion-cum-posting order of the respondent was sent to the Ministry of defense.

6. Petitioners submit that a decision was taken to initiate disciplinary proceedings by the Engineer-in-Chief on 26th October, 2005 and pursuant thereto, show cause notice was issued to the respondent on 4th January, 2006. The show cause notice stated as follows:

XXXXXXXXXXXXXXXXXXXX

SHOW CAUSE NOTICE

During certain investigations, while serving as CE (AF) Ahmedabad from 02 Feb 2001 to 02 Oct 2003, you have been found blameworthy for the following lapses:

(a) Circumventing payment of Guest Room rental and electricity charges of accommodation at CE (AF) Ahmedabad.

(b) Illegal drawal of HRA while staying in Government accommodation.

(c) Illegal sanction of special repairs to Guest Room at CE (AF) Ahmedabad through AF funds by misappropriation.

(d) Illegal delegation of funds amounting to Rs. 45 lakhs to CWE (AF) Bhuj for road work.

2. You have Therefore failed in your duty as CE(AF) Ahmedabad and Therefore liable for disciplinary action.

XXXXXXXXXXXXXXXXXXXX

7. Respondent replied to the show cause notice vide letter dated 10.1.2006. He denied the stated lapses and further submitted that the lapses alleged were vague and pertain to the period of February, 2001 to October, 2003, it may not be possible to recollect all the facts and events of that period. Respondent filed OA No.750/2006 in March, 2006, against the action/inaction on the part of the petitioner, in not promoting the respondent to the grade of Additional Director General. He requested for early orders from the CAT in view of the fact that he was due to retire on 31.7.2006.

8. Petitioners, after considering the reply of the respondent dated 10th January, 2006, issued a charge memo on 26th May, 2006. This charge sheet was issued after filing of the O.A. by the respondent. The articles of charges enumerated the lapses as stated in the show cause notice. Relevant extracts are produced hereinbelow:

Statement of Articles of Charge framed against MES-169111-Sh.R.C.Sehgal ex-CE(AF) Ahmedabad.

ARTICLE - I

That MES 169111 Sh. R.C. Sehgal, while functioning as Chief Engineer, Air Force, Ahmedabad, during the period February, 2001 to October, 2003, committed gross irregularities in that he misused his official power and position as CE(AF) Ahmedabad and Chairman of the Officer's Mess for his personal benefit by indulging in the following lapses:

(i) That Shri RC Sehgal circumvented the payment of rental and electricity charges of Officers' Mess Guest Room No.3, which was under his occupation, as

the charges of the aforesaid guest room were not levied/paid fully for the period of occupation, but levied/paid intermittently w.e.f. February 2001 to July 2002, and though Room No.4 and 5 were also allotted to Sh. R. C. Sehgal, charges were levied/paid only for one room i.e. Room No.3 w.e.f. July 2002 to Dec, 2003.

(ii) That Sh. R.C. Sehgal illegally drew House Rent Allowance and kept Guest Rooms Nos. 3, 4 and 5 under his occupation, despite allotment of Government accommodation to him, immediately on his arrival and four times subsequently.

(iii) That Sh. R. C. Sehgal with his personal persuasion got special repairs work sanctioned illegally/wrongfully for Guest Room No.3 of Officers Mess from Hqr. SWAC i.e. Air Force Authorities although the subject building is a property under the maintenance charge of the Army Authorities; and during such repair work, Sh. R.C. Sehgal remained a mute spectator when Guest Rooms No.4 and 5 were modified and merged with Guest Room No.3 without any proper Authority, obviously because he was the beneficiary of such a merger/work in view of the fact that Room Nos. 3, 4 and 5 were allotted to the same occupant i.e. Sh R.C. Sehgal w.e.f. 26th June 2002 to December 2003.

(iv) That Sh. R.C. Sehgal, wrongly and injudiciously, delegated funds to the tune of around Rs. 45 lakhs from savings to Commander Works Engineer, Air Force, Bhuj, for road work, which was in violation of provision of para 10 of RMES, 1968 and was subsequently, also criticized by Audit Authorities.

By the aforesaid acts, Sh. R.C. Sehgal misused his official power and position as CE AF Ahmedabad and thus, failed to maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a Govt. Servant, thereby violating provisions of Rule 3(1)(i) (ii) and (iii) of CCS(Conduct) Rules, 1964.

9. Advancing arguments in support of his OA before the CAT, respondent submitted that the fact of his being the President of Indian defense Service of Engineers" Association (IDSEA) and his efforts in such capacity for issues relating to discriminatory treatment to and victimisation of Civilian Engineers at the hands of combatant officers, had caused the issuance of the show cause notice, as otherwise he had enjoyed about 37 years of unblemished service record. But petitioners denied such allegations of mala fides.

10. The CAT allowed the O.A. of the respondent relying on the fact that on the due date for filling up the vacancy by promotion, the respondent was neither under suspension nor facing any departmental enquiry. It held that the ratio of the judgments, orders and DoPT instructions cited by Counsel for the respondent clearly established that only when a charge memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued to the employee, it can be said that disciplinary proceedings/criminal prosecution has been initiated against the employee. It was held by CAT that since no such proceedings were pending at the relevant time, the respondent should not have been denied his promotion. CAT directed the petitioners to promote the respondent immediately in the available vacancy.

11. Mr. Bhardwaj for the petitioners, relies on OM dated 14.9.1992 and the dicta of the Supreme Court in Union of India and Another Vs. R.S. Sharma, for advancing his case that since the respondent was not "actually promoted" prior to issuance of a charge memo against him, his falling within the zone of consideration for promotion and fixation of the date of his promotion will be of no avail. Relevant extracts of OM dated 14.9.1992 are reproduced below:

XXXXXXXXXXXXXXXXXXXX

2. At the time of consideration of cases of Govt. servants for promotion, details of Govt. servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:

(i) Govt. servants under suspension;

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

(iii) Govt. servants in respect of whom prosecution for criminal charges is pending.

?.

7. A Govt. servant who is recommended for promotion by DPC but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until he is completely exonerated of the charges against him and provisions contained in this OM will be applicable in his case also.

Perusal of para 7 of the OM quoted above is indicative of a legal fiction being created as regards the case being treated as one under sealed cover without the said procedure having been actually followed in case the circumstances specified in para 2 arise, after recommendation but before actual promotion.

12. Reference may also usefully be made to the following passages from Union of India and Ors. v. R.S. Sharma (supra), on which reliance is placed by the petitioners:

13. Two factual aspects are admitted. One is that respondent was not actually promoted even now. The other is that formal sanction has been accorded to prosecute him in the meanwhile. If that be so paragraph 7 of the sealed cover procedure would entirely apply and the recommendations made by the DPC in respect of the respondent have to remain in the sealed cover ?until he is completely exonerated of the charges against him.

14. ?

15. We are not impressed by the said arguments for two reasons. One is that, what the Department did not do is not the yardstick indicated in paragraph 7 of the Sealed Cover Procedure, what is mentioned therein is that it cannot apply to

the Govt. servant who is not ?actually promoted? by that time. Second is that, the stand taken up by the Department is that inspire of deletion of Clause (iv) of the second paragraph, the recommendations of the DPC must remain in sealed cover on account of the conditions specified in Clause (iii) of the said paragraph by virtue of the operation of paragraph 7 thereof. We cannot say that the said stand was incorrect and, Therefore, we are unable to blame the Department for not opening the sealed cover immediately after 31.7.1991.

13. Counsel for the respondent sought to distinguish his case from R. S. Sharma's case (supra) on the ground that Shri Sharma's promotion was kept in a sealed cover on account of registration of FIR by the CBI and the consequent continuation and completion of investigations, the CBI had applied to the Government for according sanction to prosecute Shri Sharma. No such criminal action was pending against the respondent and also the facts of Sharma's case indicate that his promotion has been in a sealed cover and Therefore there was no date of actual promotion.

14. Petitioner, relying upon the decision of the Supreme Court in Delhi Development Authority Vs. H.C. Khurana, urged that the decision to initiate disciplinary proceeding, precedes the issue of charge sheet. As such the promotion of a government servant can be withheld if the decision to initiate disciplinary proceedings has been taken without actually issuing the charge sheet. It was urged that CAT in passing the impugned order has acted contrary to the dicta of these decisions.

15. It was also urged that the DOPT's OM No.22012/1/99-Estt.(D) dated 25.10.2004, prescribes that after the recommendation of the DPC are approved by the Competent Authority, it is again necessary to seek status position from the concerned vigilance department before issuing the promotion order in respect of the officer included in the approved panel of names to ensure that there is no hindrance in issuing promotion order in respect of concerned officer.

16. Counsel for the petitioner additionally placed reliance upon the minutes of the Appointments Committee of the Cabinet dated 29.3.2005 approving the proposal for the promotion to the grades of Additional Director General. The said approval is in the following terms:

Appointments Committee of the Cabinet has approved proposal for the empanelment of the following officers for promotion to the grade of Additional Director General in the MES in the scale of pay of Rs. ?. from dates of assumption of charge of the posts and until further orders.

It is urged that it was a case of approval for empanelment but promotion was to be from the actual date of assumption of charge.

17. Mr.Krishna submits that respondent's date of promotion was pre-determined i.e. the date following the date of retirement of Mr. Narender Kumar on 31.12.2005. Respondent was denied promotion on the basis of a contemplated

inquiry by delaying the clearance of vigilance. This, he submitted, is not the intent and purpose of the OM of 1992. He urged that the respondent should be considered to be actually promoted on 1.1.2006, which was the date on which his promotion was due. It was submitted that the issuance of charge memo for alleged lapses in the period 2001 to 2003 belatedly after the respondent has become due for promotion is apparently vitiated with mala fides. The fact of petitioner being the President of Indian defense Service of Engineers' Association (IDSEA) and his efforts in such capacity for issues relating to discriminatory treatment to and victimisation of Civilian Engineers at the hands of combatant officers had worked to his prejudice. He drew the attention of the Court to para 17.11 of the Chapter on Promotions in Swamy's Complete Manual on Establishment and Seniority which reads as under:

Appointments to posts falling within the purview of ACC can, however, be treated as regular only from the date of approval of ACC or actual promotion, whichever is later, except in particular cases where the ACC approves appointments from some other date.

He submitted that in the instant case the ACC's order of empanelment shows that promotion is to take place on the retirement of predecessor of the petitioner. Accordingly, in this case date of promotion had been fixed by the ACC as 1.1.2006. Countering this argument, Mr. Bharadwaj submitted that the empanelment order itself shows that promotion is subject to vacancy and issuance of appointment order and assumption of charge.

18. Reliance was also placed on the decision of the Supreme Court in Bank of India and Anr. v. Degala Suryanarayana 1999 SCC (L&S) 1036, wherein the Court held that sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 be withheld for the DE proceedings initiated in the year 1991. It was urged that in the respondent's case also, petitioners were not justified in not issuing the order of promotion due on 1.1.2006 on the ground that a charge sheet stands issued vide memo dated 25.5.2006.

19. The charges imputed against the respondent are not under challenge in this writ petition. We refrain from expressing any opinion on merits of the charges and allegations except for noticing that the charges prima facie do not appear to be of a very grave or serious nature. The Explanation sought to be rendered and the plea of prejudice deserves to be examined by the petitioners.

20. The question which emerges for our consideration, in deciding the writ petition, is the interpretation of the OM dated 14.9.1992 in so far as it provides in para 7, for a legal fiction of a deemed sealed cover procedure. The language employed is 'A Govt. servant who is recommended for promotion by DPC but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC.' It is apparent that the respondent has not been actually promoted, though he was

due to be promoted on 1.1.2006. Thus in the absence of his actually being promoted to the post of Additional Director General, the deemed legal fiction as mentioned above will come into operation. His case will be deemed to have been placed in a sealed cover and Therefore he cannot be promoted. The respondent has retired on 31.7.2006 awaiting his promotion.

21. In view of the foregoing discussion, the decision of the CAT in so far as it directs "promotion of the applicant immediately in the available vacancy", is set aside. However, it is essential in the interest of justice, to direct that the enquiry initiated against the respondent be completed within 3 months from today and in case the respondent is exonerated of the charges, he be given all consequential benefits of promotion with effect from 1.1.2006 and his retiral benefits may be accordingly revised.

Writ Petition is allowed in the above terms.