

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 26th April, 2021.**

+ **W.P.(C) 2852/2021**

DINESH SINGH

..... Petitioner

Through: Mr. R.V. Sinha, Mr. A.S. Singh and
Mr. Amit Sinha, Advs.

Versus

DR. AJAY BHUSHAN PANDEY & ORS.

..... Respondents

Through: Mr. Ravi Prakash and Mohammad
Shahan Ulla, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE AMIT BANSAL

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

CM Nos.8594/2021, 8595/2021 (both for exemption) & 8596/2021 (for permission to file lengthy list of dates)

1. Allowed, subject to just exceptions and as per extant rules.
2. The applications are disposed of.

W.P.(C) No.2852/2021 & CM No.8597/2021 (for filing additional documents)

3. This petition, under Article 226 of the Constitution of India, impugns the order dated 25th January, 2021 of Central Administrative Tribunal (CAT), Principal Bench, New Delhi, of closing the contempt case being C.P.

No.422/2016 filed by the petitioner, averring non-compliance by the respondents of the order dated 12th May, 2016 in OA No.3604/2015 filed by the petitioner.

4. We have heard the counsel for the petitioner.

5. OA No.3604/2015 was filed by the petitioner, an Officer of the Indian Revenue Service (Income Tax), of 1994 Batch, then working as Additional Commissioner of Income Tax, seeking promotion to the grade of Commissioner of Income Tax, with effect from 16th September, 2015, being the date when his immediate junior was promoted.

6. CAT, in the order dated 12th May, 2016, found/observed/held (i) that the petitioner fulfilled all the eligibility conditions for promotion and the Annual Performance Appraisal Reports of the petitioner for relevant years also met the prescribed benchmark and that the petitioner was neither facing any criminal case/disciplinary proceedings nor was under suspension; (ii) that the petitioner had however not been promoted because the respondents had obtained the first stage advice of Central Vigilance Commission for initiation of major penalty proceedings against the petitioner and therefore the case of the petitioner for promotion had been put on hold; (iii) that only when the government servant was under suspension or had been issued a charge sheet and disciplinary proceedings were pending against him or was under prosecution for a criminal charge, was the finding of the Departmental Promotion Committee (DPC) required to be kept in sealed cover, to be opened after the culmination of the said proceedings and the promotion, even if the recommendation of the DPC was for promotion, had to be kept in abeyance till then; (iv) that the petitioner, at the time of holding of the DPC, did not fall in either of the said categories and the Principal, Director

General of Income Tax (Vigilance) had also not withheld the vigilance clearance of the petitioner, as his case did not fall in either of the said three categories; (v) that only when the recommendations of the DPC were submitted to the Appointment Committee of the Cabinet (ACC) for approval, did the ACC desire to know the latest status of the complaint pending against the petitioner and in response where to it was informed that the first stage advice for initiating major penalty proceeding against the petitioner had been sought; and, (vi) that in these circumstances, there was no ground for withholding promotion of the petitioner. Accordingly, the OA was allowed and the respondents directed to promote the petitioner from the date on which his immediate junior had been promoted.

7. The contention of the counsel for the petitioner before us is, that the aforesaid order of CAT attained finality with the dismissal on 28th May, 2018 of W.P.(C) No.10543/2017 preferred by the respondents thereagainst and CAT, in the impugned order dated 25th January, 2021, has erred in closing the contempt case and not directing implementation of its order dated 12th May, 2016 and in not punishing the respondents for contempt thereof.

8. CAT, in the impugned order, has closed the contempt case, reasoning (i) that it is true that the petitioner did not face any disciplinary or criminal proceeding by the time the DPC met for promotion; taking note thereof, vide order dated 12th May, 2016, OA No.3604/2015 preferred by the petitioner was allowed and direction issued for promotion of the petitioner; (ii) that during the pendency of W.P.(C) No.10543/2017, no steps were taken for implementation of the order and in fact the contempt case closed; however on dismissal of the writ petition, the contempt case was revived; (iii)

however since then a charge memo dated 6th February, 2017 had been issued to the petitioner and the OA No.2772/2017 preferred by the petitioner impugning the same was dismissed on 22nd August, 2019 and W.P.(C) No.13259/2019 preferred by the petitioner thereagainst was pending; (iv) that the issue pertaining to status of an officer, whose case was recommended for promotion but who was issued a charge memo or who faced criminal case or who was placed under suspension, before the order of actual promotion could be issued, had been dealt with by the Courts as well as Department of Personnel and Training (DoPT) and the view taken in this behalf was, that the recommendations of the DPC shall be treated as those in the sealed cover and the concerned officer can be promoted only when he comes out clean in the proceedings that came to be initiated against him; (v) that the case of the petitioner fell in the said category; though his name was recommended by the DPC in the year 2015, two First Information Reports (FIRs) were registered and a charge memo was issued against the petitioner, before the actual order of promotion could be issued; and, (vi) that in these circumstances, it could not be said that there was any deliberate act of contempt on the part of the respondents, inasmuch as there existed a legal impediment to the implementation of the directions issued in OA No.3604/2015.

9. The only contention of the counsel for the petitioner is that since neither on the date when the DPC was held nor on the date when OA No.3604/2015 was allowed and the respondents directed to promote the petitioner, was the petitioner under suspension or under prosecution or any disciplinary proceeding had been initiated against him, the subsequent FIRs registered against the petitioner and the charge memo issued to the

petitioner, could not come in the way of the promotion of the petitioner. Reference, without citing, is made to *Union of India Vs. Anil Kumar Sarkar* (2013) 4 SCC 161, *Union of India Vs. Sangram Keshari Nayak* (2007) 6 SCC 704, *Rajesh Kumar Vs. Union of India* 146 (2008) DLT 588, *Harsh Kumar Sharma Vs. State of Punjab* (2017) 4 SCC 366 and to *T. Sudhakar Prasad Vs. Govt. of A.P.* (2001) 1 SCC 516.

10. We have drawn the attention of the counsel for the petitioner to our recent judgment dated 6th April, 2021 in W.P.(C) No.4152/2012 titled *Union of India Vs. Rajiv Ranjan* wherein, referring to the OM dated 14th September, 1992 issued pursuant to *Union of India Vs. K.V. Jankiraman* (1991) 4 SCC 109 and Clause 7 whereof is as under:

“7. A government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of the 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 the provisions contained in this OM will be applicable in his case also.”

and further referring to the General Principles forming part of the Guidelines for promotion of IPS Officers to various Grades, enclosed to the letter dated 15th January, 1999 of Ministry of Home Affairs, and Clauses 21 and 21.1 whereof are as under:

**“21. SEALED COVER
PROCEDURE
APPLICABLE TO
OFFICERS COMING
UNDER CLOUD
BEFORE PROMOTION**

21.1 In the case of an officer recommended for promotion by the Screening Committee where any of the circumstances mentioned in Para 11 above arise before actual promotion, sealed cover procedure would have to be followed. The subsequent Committee shall assess the suitability of such officers along with other eligible candidates and place their assessment in sealed cover. The sealed cover / covers will be opened on conclusion of the disciplinary case / criminal prosecution, in case the officer is completely exonerated, he would be promoted as per the procedure outlined in Para 18 above and the question of grant of arrears would also be decided accordingly. If any penalty is imposed upon him as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover shall not be acted upon, as outlined in Para 18.2. above.”

We held as under:

"28. We are unable to agree. The purport and intent of Clause 7 of OM dated 14th September, 1992 and of Clauses 21 and 21.1

of the General Principles forming part of the Guidelines enclosed to the letter dated 15th January, 1999 is that the government servant against whom disciplinary proceedings have been initiated after he has been recommended for promotion but before he is actually promoted, should not be promoted. The same, in our view is also in consonance with public policy. It will send a wrong message to the members of the public and to the employees and officers of the government, if the employee / officer against whom disciplinary proceedings are pending is promoted during the pendency thereof, owing to the technicality of having been wrongfully denied promotion prior to commencement of proceedings. The respondent is a member of highly disciplined force like police and which is always in the public eye and to promote the respondent while disciplinary proceedings are pending against him, would be injurious to the discipline in the force and be perceived as morally wrong. Of course if the respondent is exonerated, his promotion will date back to the date when due.

We thus asked the counsel for the petitioner, whether not what CAT in the impugned order has held while closing the contempt case, is in consonance with our view aforesaid.

11. The counsel for the petitioner states that he has not perused **Rajiv Ranjan** supra but is relying upon the judgments aforesaid of the Supreme Court and of the Division Bench of this Court.

12. Before referring to the judgments cited by the counsel for the petitioner, we may refer to **Union of India Vs. R.S. Sharma** (2000) 4 SCC 394. The said appeal was preferred against the order of CAT, allowing the OA filed by the respondent therein and quashing the sealed cover procedure followed and directing the petitioner therein to give effect to the recommendation of the DPC. Supreme Court, finding that the respondent, by the time the matter came for consideration before the Supreme Court, had

not been promoted and that after the order of CAT, formal sanction had been accorded for prosecution of the respondent therein, held that Paragraph 7 of the OM dated 12th January, 1988, which is similar to Clause 7 of the OM dated 14th September, 1992, would apply and the recommendations made by DPC have to remain in the sealed cover until the respondent therein was completely exonerated of the charges against him. The contention on behalf of the respondent therein, that the situation envisaged in Paragraph 7 would not have arisen, if the sealed cover procedure followed by the DPC and which was quashed by CAT, had not been followed or if the respondent had been promoted immediately after the order of CAT and that the faults/delays of the petitioners could not be permitted to prejudice the respondent, was rejected and it was held that the petitioners had acted in terms of Paragraph 7 and no fault could be found with their action. Accordingly, the order of CAT was set aside.

13. In *Sangram Keshari Nayak* supra cited by the counsel for the petitioner, on the date when the DPC considered the respondent therein, neither was the respondent under suspension nor were any prosecution or disciplinary proceedings pending against him. Finding so, CAT and the High Court held that the DPC ought not to have followed the sealed cover procedure and directed the recommendation of the DPC to be given effect to. Though the Supreme Court, in the judgment notices that charge sheet had been issued against the respondent therein on 24th September, 1999 but proceeded to hold that there was no bar to the promotion of the respondent till the date his immediate junior was promoted on 27th August, 1999 and dismissed the appeal of Union of India. *R.S. Sharma* supra was distinguished, reasoning that in that case there were serious allegations of

financial misdemeanour against the employee and Paragraph 7 of the OM dated 12th January, 1988 was attracted. There is however no discussion in the judgment, why the said Clause 7 was not applicable in the subject case.

14. *Anil Kumar Sarkar* supra, also cited by the counsel for the petitioner, was also a case, where, on the date of consideration by the DPC, the employee was neither under suspension nor was any prosecution or disciplinary proceedings pending against him; still the sealed cover procedure was followed by the DPC and which was quashed. Union of India, as the employer, before the Supreme Court relied on Clause 7 of the OM dated 14th September, 1992, to contend that since after the order of CAT, charge sheet had been filed, the employee was not entitled to promotion; *R.S. Sharma* supra was relied upon. Supreme Court however upheld the order of the High Court, merely observing that *R.S. Sharma* supra was of no help to the Union of India.

15. In *Harsh Kumar Sharma* supra, also relied upon by the counsel for the petitioner, however, again it was held that Clause 7 of the OM dated 14th September, 1992 clarifies that even after recommendation of the DPC but before the appointment/promotion of the officer, if the officer is suspended or disciplinary proceedings or prosecution has commenced against him, his case, under Clause 7 of the OM dated 14th September, 1992, is to be deemed to be kept in sealed cover.

16. The other judgments cited by the counsel for the petitioner do not concern the aforesaid aspect and were cited, in response to our query, whether not the scope of interference with an order of CAT closing the contempt case, should be in an extremely narrow compass, considering that even under the Contempt of Courts Act, 1971, the remedy against refusal by

the High Court to entertain a contempt case, is by way of a petition under Article 136 of the Constitution of India only and not by way of appeal. However in the facts of the present case, it is not deemed appropriate by us to consider this aspect further and accordingly, the need to refer to the other judgments cited, also is not felt.

17. What thus emerges is that though Supreme Court in ***R.S. Sharma*** supra and in ***Harsh Kumar Sharma*** supra unequivocally held that even if the DPC wrongfully follows the sealed cover procedure and which is quashed and direction issued for giving effect to the recommendation of the DPC, but still, if before the actual promotion, the circumstances in which sealed cover procedure is prescribed to be followed, come into existence, promotion is not be granted and is to await the outcome of the disciplinary proceedings or the prosecution, but still, in ***Sangram Keshari Nayak*** supra and ***Anil Kumar Sarkar*** supra, notwithstanding existence of facts making Clause 7 of the OM dated 14th September, 1992 applicable, the order of CAT and/or the High Court directing promotion to be granted, was not interfered with. However, while doing so, neither in ***Sangram Keshari Nayak*** supra nor in ***Anil Kumar Sarkar*** supra was Clause 7 of OM dated 14th September, 1992 held to be bad or was it laid down, in what circumstances, it would apply. To that extent, one can say that there is dichotomy in the view of the Supreme Court in ***R.S. Sharma*** supra and ***Harsh Kumar Sharma*** supra on the one hand and in ***Sangram Keshari Nayak*** and ***Anil Kumar Sarkar*** supra on the other hand. All that we may say in this context is, that while ***R.S. Sharma*** supra is a judgment by three Hon'ble Judges, all the other three judgments are of Benches of two Hon'ble Judges and that while ***R.S. Sharma*** and ***Harsh Kumar Sharma*** supra can be

considered as precedent, the same cannot be said of *Sangram Keshari Nayak* and *Anil Kumar Sarkar* supra, to the extent of applicability of Clause 7 of the OM dated 14th September, 1992.

18. We may in this context also notice that even before the Division Bench of this Court, in the writ petition preferred by the respondents against the order dated 12th May, 2016 of CAT, it was the contention of the respondents that since after the order dated 12th May, 2016 of CAT, charge memo had been issued against the petitioner and disciplinary proceedings commenced, the petitioner, in accordance with Clause 7 of OM dated 14th September, 1992, was not entitled to be promoted. The Division Bench of this Court, in judgment dated 28th May, 2018, though noted the said contention of the respondents herein but again did not pronounce or deal with the same and refused to interfere with the order of CAT.

19. It was in the aforesaid state of law that we, in *Rajiv Ranjan* supra held that though the relief ultimately granted in a lis relates back to the date of initiation of the lis and on which basis, this Court, exercising power of judicial review could not find any error in the order of CAT in that case, but Courts, in certain situations, have also taken subsequent events since the institution of the lis, into consideration and moulded the relief sought. It was further held that if notwithstanding disciplinary proceedings or prosecution having been initiated against a public servant, the public servant is still granted promotion owing to the technicality of having been wrongly denied the same earlier, it will not augur well for the morale of the employees who are public servants and will send a message to the public including public servants, that an employee of doubtful integrity is being rewarded. A reference in this regard may be also made to *State of Madhya*

Pradesh Vs. Syed Naseem Zahir 1993 Supp (2) SCC 225, where events subsequent to the meeting of the DPC were taken into account while determining whether it was in the interest of justice to promote the respondent therein. In said case, though on the date of DPC, there was no requirement for DPC to follow the sealed cover procedure but the DPC had nevertheless followed the same. However finding that the government servant had come under a cloud after the DPC met but before formal order of promotion could be issued, it was held that in such a situation it would be permissible not to give effect to the recommendation of the DPC pending inquiry. Mention may also be made of a dicta of a coordinate bench of this Bench in *C.P. Gupta Vs. Union of India* MANU/DE/9131/2006, where also, relying on Clause 7 of the OM dated 14th September, 1992, promotion was kept in abeyance till the conclusion of the disciplinary proceedings initiated after the DPC but before the actual order of promotion. We would be failing in our duty if do not record that *Syed Naseem Zahir* and *C.P. Gupta* supra were cited before the Division Bench of this Court during the hearing of W.P.(C) No.10543/2017 preferred against the order dated 12th May, 2016 of CAT allowing OA No.3604/2015 of the petitioner but were distinguished in the judgment dated 28th May, 2018, reasoning that in both the said cases there were grave allegations of financial irregularity against the public servant. We may respectfully state that applicability of Clause 7 of the OM dated 14th September, 1992 does not depend upon the nature of the disciplinary proceedings and is applicable whenever disciplinary proceedings have been initiated, though after the date of the DPC recommending promotion but before the actual order of promotion. We may also add that the judgment dated 28th May, 2018 was only concerned

with the correctness of the order dated 12th May, 2016 of CAT allowing OA No.3604/2015 and in which order, no error could be found. On the contrary, now we are concerned with the implementation of the order dated 12th May, 2016 and at which stage the said Clause 7 of the OM dated 14th September, 1992 is of relevance. Thus, the question of the issue being *res judicata*, does not arise. Even otherwise, the issue involved, is a pure question of law, to which principles of *res judicata* do not apply. There can be no estoppel against law.

20. Mention may also be made of *J. C. Thind Vs. Union of India* MANU/DE/0270/2015, where a Coordinate Bench of this Court followed *Syed Naseem Zahir* supra and held *Anil Kumar Sarkar* supra to be turning on its own fact and not applicable as a precedent. With reference to *K.V. Jankiraman* supra it was held that Courts are not to act mechanically and cannot ignore glaring facts and that if a government servant comes under a cloud after the DPC had met but before formal order of promotion could be issued it would be permissible not to give effect to the recommendation of the DPC, pending inquiry.

21. We thus see no reason to take a view different from that taken in *Rajiv Ranjan* supra.

22. Of course, if the petitioner in the present case had been promoted when his promotion according to CAT was due or even immediately after the order dated 12th May, 2016 of CAT, Clause 7 of OM dated 14th September, 1992 would not have come in his way. However the fact of the matter is that for whatsoever may have been the reasons, he was not so promoted and owing whereto Clause 7 of OM dated 14th September, 1992 has now come into play. We, as a Court, would loathe to direct promotion

of a public servant against whom prosecution and disciplinary proceedings are pending.

23. It cannot also be lost sight of, that the respondents, against whom contempt case was initiated and was being pursued, are bound by Clause 7 of OM dated 14th September, 1992 and could not have acted in violation thereof, by, in compliance of order dated 12th May, 2016 of CAT granting promotion to the petitioner, when since the order of CAT, much water had flown and to which eyes could not have been shut.

24. The view taken by CAT in the impugned order, is thus a reasonable and lawful view, which does not qualify as perverse, for this Court to interfere therewith in exercise of power of judicial review.

25. Though during the hearing, no mention thereof was made but we may mention that application respondents for review of judgment dated 28th May, 2018 of dismissal of W.P.(C) No.10543/2017, being Review Petition No.34/2019, is also pending consideration.

26. Dismissed.

RAJIV SAHAI ENDLAW, J.

AMIT BANSAL, J.

APRIL 26, 2021

'bs'