

Niraj Kumar Vs. the Secretary Government of India, Department of Personnel and Training and Another

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Court : Central Administrative Tribunal CAT Delhi

Decided On : Mar-26-2012

Judge : The Honourable Mr. G. George Paracken, Member (J) & the Honourable Dr. a.K. Mishra, Member (a)

Appeal No. : OA.764 of 2011

Appellant : Niraj Kumar

Respondent : The Secretary Government of India, Department of Personnel and Training and Another

Advocate for Pet/Ap. : For the Applicant : M.K. Bhardwaj, Advocate. For the Respondents : T.C. Gupta, Advocate.

Judgement :

G. George Paracken:

The applicant is aggrieved by the Annexure A-1 letter No. 5/23/2007-CS.I (U) dated 31st May, 2010 of the Respondent No. 1, namely, Department of Personnel and Training ('DOPandT' for short) rejecting his representation dated 14.05.2010 for grant of ad hoc promotion to the post of Under Secretary on the grounds that (i) he was not clear from vigilance angle (ii) a criminal case is pending against him in the Special Court of CBI and (iii) the departmental proceedings under Rule 14 of

the CCS (CCA) Rules, 1965 are underway.² The relevant incidences and events in this case in the chronological order are delineated here. The applicant is a Section Officer in the cadre of Central Secretariat Service ('CSS' for short). He joined the service on 06.07.1998 and was posted in the Ministry of Statistics and Programme Implementation. While he was working there, he was placed under suspension w.e.f. 06.12.2000 under sub-rule (1) of Rule 10 of Rules, 1965 in contemplation of disciplinary proceedings against him for his alleged involvement in leakage of some classified information. The period of his suspension was extended from time to time and thereby he remained under suspension for over 4 = years continuously. The CBI has finally filed charge sheet against him in the Court of Chief Metropolitan Magistrate on 13.4.2005 for his prosecution under the Official Secret Act. However, in the case one Mr. Thomas Mathew, then Director in the Ministry of Home Affairs who was also placed under suspension w.e.f. 26.3.2001 for his alleged involvement in the same case, the suspension was revoked, vide order dated 28.09.2004. The applicant has, therefore, challenged his continued suspension before this Tribunal vide OA No. 1286/2005. The contentions of the applicant in the aforesaid O.A. were four fold: (i) there was violation of sub-rule (7) of Rule 10 of the CCS (CCA) Rules, 1965 inasmuch as the suspension has not been reviewed and extended within the time prescribed in the said Rule; (ii) it was a case of hostile discrimination and selective suspension since the suspension of Shri Thomas Mathew who was also alleged to be party to the conspiracy of leaking of classified information/document to Tehelka reporter has been revoked by the Government by order dated 29.09.2004 but his suspension was being continued; (iii) he was placed under suspension vide order dated 06.12.2000 in contemplation of the disciplinary proceedings and it has been continued on the pretext that the allegations against him were grave and serious but after a lapse of about 5 years, he has not been served with any charge sheet; (iv) Clause (b) of sub-rule (5) of Rule 10 does not give power to the respondents to extend his suspension. This Tribunal vide order dated 01.09.2005, disposed of the aforesaid OA revoking his suspension w.e.f 28.3.2005 and directing the respondents to reinstate him with all consequential benefits but with the liberty to place him again under suspension during the pendency of the criminal proceedings. The operative part of the said order reads as under:

“18. The result of the above discussion is that the suspension order stands revoked w.e.f. 28.3.2005. The consequences shall follow. The applicant shall be reinstated in service with all consequential benefits from 28.3.2005.

19. However, it is clarified that this will not debar the respondents from exercising power under sub-rule (1) of Rule 10 of the Rules 1965 for placing the applicant under suspension during the pendency of the criminal proceedings.

20. The OA stands disposed of with the above directions. Parties, however, are left to bear their own costs.”

3. Thereafter, the Ministry of Home Affairs revoked the suspension of the applicant, vide order dated 20.10.2005 again placed him under suspension on 21.10.2005 and served him the Memorandum dated 08.02.2006 proposing to hold an enquiry against him under Rule 14 of the CCS (CCA) Rules, 1965. He challenged the aforesaid order of suspension dated 21.10.2005 as well as the Memorandum of 08.02.2006 in OA 868/2006 before this Tribunal. He relied upon the judgment of the Apex Court in K. Sukhender Reddy Vs. State of .A.P. and Anr. (1999 (6) SCC 257) wherein issue of ‘selective suspension’ was considered and held that,

“an officer cannot be kept under suspension for an indefinite period, particularly in a situation where many more senior officers may ultimately be found involved, but the appellant alone has been placed under suspension. The Government cannot be permitted to resort to selective suspension.” This Tribunal, vide order dated 04.05.2007, partly allowed the O.A. and quashed and set aside the aforesaid order dated 21.10.2005 by which the applicant was placed under suspension and directed the respondents to reinstate him in service with all consequential benefits. Thereafter, the respondents reinstated him in service w.e.f. 17.07.2007.4. However, during the earlier spell of his suspension period from 06.12.2000 to 20.10.2005, the respondent had promoted a number of Section Officers, both seniors and juniors to the applicant, as Under Secretary on ad hoc basis w.e.f. 07.07.2005. Therefore, the applicant, after his reinstatement in service, requested the respondents to open the sealed cover and give him also ad hoc promotion as Under Secretary. In response to the said representation, Respondent No. 1

disclosed that the applicant was not considered for ad hoc promotion and no sealed cover procedure was followed in his case. According to the applicant, since he was under suspension and no disciplinary proceedings were initiated against him, his candidature should have been considered by the respondents themselves in terms of the DOPT O.M. No. 22011/4/91-Estt. (A) dated 14.09.1992 and O.M. No. 28036/2/98-Estt (D) dated 23.02.1999. According to the aforesaid O.M dated 14.09.1992, the details of Government servants coming in the zone of consideration for promotion but under suspension, etc.etc. should be brought to the notice of the Departmental Promotion Committee ('DPC' for short) and its assessment shall be kept in "sealed cover". The relevant parts of the said O.M. dated 14.09.1992 are extracted and they are as under:

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

Government servants under suspension;

Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and

Government servants in respect of whom prosecution for criminal charge is pending.

2.1 The Departmental Promotion Committee shall assess the suitability of the Government servants coming within the purview of the circumstances mentioned above along with other eligible candidates without taking into consideration the disciplinary case/criminal prosecution pending. The assessment of the DPC including 'Unfit for Promotion' and the grading awarded by it will be kept in a sealed cover. The cover will be superscribed 'Findings regarding suitability for promotion to the grade/post of .in respect of Shri..(name of the Government servant). Not to be opened till the termination of the disciplinary case/criminal prosecution against Shri.'. The proceeding of the DPC need only contain the note 'The findings are contained in the attached sealed cover'. The authority competent

to fill the vacancy should be separately advised to fill the vacancy in the higher grade only in an officiating capacity when the findings of the DPC in respect of the suitability of a Government servant for his promotion are kept in a sealed cover.

2.2 The same procedure outlined in para 2.1 above will be followed by the subsequent Departmental Promotion Committee convened till the disciplinary case/criminal prosecution against the Government servant concerned is concluded.

3, 3.1, 3.2, 4 x x x x x

5. In spite of the six monthly review referred to in para 4 above, there may be some cases, where the disciplinary case/criminal prosecution against the Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC, which kept its findings in respect of the Government servant in a sealed cover. In such a situation the appointing authority may review the case of the Government servant, provided he is not under suspension, to consider the desirability of giving him ad-hoc promotion keeping in view the following aspects:-

- a) Whether the promotion of the officer will be against the public interest;
- b) Whether the charges are grave enough to warrant continued denial of promotion;
- c) Whether there is any likelihood of the case coming to a conclusion in the near future;
- d) Whether the delay in the finalization of proceedings, departmental or in a court of law, is not directly or indirectly attributable to the Government servant concerned; and
- e) Whether there is any likelihood of misuse of official position which the Government servant may occupy after ad-hoc promotion, which may adversely affect the conduct of the departmental case/criminal prosecution.

The appointing authority should also consult the Central Bureau of Investigation and take their views into account where the departmental proceedings or criminal prosecution arose out of the investigations conducted by the Bureau.

5.1 In case the appointing authority comes to a conclusion that it would not be against the public interest to allow ad-hoc promotion to the Government servant, his case should be placed before the next DPC hold in the normal course after the expiry of the two year period to decide whether the officer is suitable for promotion on ad-hoc basis. Where the Government servant is considered for ad-hoc promotion, the Departmental Promotion Committee should make its assessment on the basis of the totality of the individual's record of service without taking into account the pending disciplinary case/criminal prosecution against him.

5.2 After a decision is taken to promote a Government servant on an ad-hoc basis, an order of promotion may be issued making it clear in the order itself that:-

the promotion is being made on purely ad-hoc basis and the ad-hoc promotion will not confer any right for regular promotion; and

the promotion shall be until further orders. It should also be indicated in the orders that the Government reserve the right to cancel the ad-hoc promotion and revert at any time the Government servant to the post from which he was promoted."

5. By the O.M. No. 28036/2/98-Estt (D) dated 23.02.1999, the sealed cover procedure' prescribed in the aforesaid O.M. dated 14.09.1992 has been extended in the case of ad hoc promotions also.

6. According to the applicant, the respondents have completely ignored the aforesaid sealed cover procedure' prescribed in the Office Memoranda dated 14.09.1992 and 23.02.1999. He has further submitted that had his case been kept in sealed cover, on revocation of his suspension in terms of the order of this Tribunal dated 04.05.2007 in OA 868/2006, the respondents ought to have considered him for ad hoc promotion as Under Secretary after he was reinstated in service on 17.07.2007 and if the assessment in his case was Fit for Promotion', he would have got his ad hoc promotion w.e.f. 07.07.2005. He has also submitted

that in terms of the aforesaid O.M. dated 23.02.1999, it was obligatory on the part of the DPC to follow the sealed cover procedure' in his case at the time it considered his juniors for ad hoc promotion as Under Secretary as he was under suspension and facing prosecution for the criminal charge pending against him. 7.

He has, therefore, again approached this Tribunal by filing Contempt Petition No. 256/2009 in OA 868/2006 (supra). While dismissing the said contempt petition, this Tribunal observed that since the applicant has already been reinstated in service, his only grievance then was that he has not been promoted to the post of Under Secretary on ad hoc basis which should have been done in view of the direction of this Tribunal to give him all consequential benefits. But his representation was rejected by the respondents, vide communication dated 31.03.2009, stating therein that a policy decision had been taken by the DOP and T not to grant any further ad hoc promotion in the grade of Under Secretary. Accordingly, noting the aforesaid submission of the respondents, CP was dismissed vide order dated 03.06.2009 and its relevant parts are as under:

"2. Pursuant to the above direction, the Applicant has been reinstated in service. The only grievance of the applicant now is that he has not been promoted to the post of Under Secretary on ad hoc basis, which should have been done in view of the direction of this Tribunal to give him all consequential benefits. The Applicant's representation was rejected by the Respondents by communication dated 31.03.2009 stating therein that a policy decision had been taken in the Department of Personnel and Training not to grant any further ad hoc promotion in the grade of Under Secretary. It is stated that in view of the policy decision, it would not be possible to consider the Applicant's case for ad hoc promotion to the grade of Under Secretary at this stage.

3. In the above circumstances, we are of the considered opinion that the Respondents have substantially complied with the directions of this Tribunal in the order dated 4.05.2007. We are not inclined to give any further direction to the Respondents in view of their communication dated 31.03.2009, adverted to above.

4. The Contempt Petition is dismissed. Notices are discharged."

8. In the above circumstances, the DOPT considered the case of the applicant for ad hoc promotion and advised the Respondent No.2 to consider his case as 'deemed sealed cover' and the relevant notings of the Establishment Division of the DOPandT obtained by the applicant under the Right to Information Act, 2005 and annexed with this O.A. are reproduced as under:

“Shri Niraj Kumar, S.O, who had been suspended, was reinstated on the basis of CAT order but prosecution for criminal charge is still continuing. As his batch mates have been given ad-hoc promotion as US, he has represented for promotion. CS Division seeks advice on adopting the procedure for ad-hoc appointment as per DOPandT O.M dated 14.9.1992.

2. OM dated 14.9.92 is relating to adoption of sealed cover procedure by DPC for promotion in respect of Govt. servants under suspension or when a disciplinary proceeding/prosecution for a criminal charge is pending. These instructions apply to ad-hoc promotions also, as per clarifications issued by Estt. (D).

3. The review and subsequent ad-hoc appointment, subject to conditions, envisaged in paras 4 and 5 of the OM dated 14.9.92 are in respect of Govt. servants whose suitability for promotion has been assessed but findings are kept in sealed cover. (It is seen that all the appointments made were ad-hoc in nature).

4. CS Division has been resorting to such ad-hoc promotions for administrative reasons without any assessment procedure. CS Division has also not followed the OM dated 14.9.92 for sealed cover procedure. When there has been procedural lapse, the proper course would be to try to rectify the lapse.

5. So far as Shri Niraj Kumar is concerned, the officer's fitness may be assessed without reference to the disciplinary and prosecution proceedings pending against him and the same treated as deemed sealed cover to be followed by the review procedure and ad-hoc appointment subject to fulfillment of conditions mentioned in paras 4 and 5 of OM dated 14.9.92 to the satisfaction of the appointing authority.

Sd/- 13.6.2008-

Notes from page 9/N explain the case of Shri Niraj Kumar, who is presently serving as Section officer in the Ministry of Social Justice and Empowerment. His immediate junior has been promoted to the grade of Under Secretary about 3 years back. The departmental proceedings and criminal case against him may take a long time to come to a conclusion. Keeping in view the overall circumstances of the case vis-avis provisions of this Department's OM dated 14.9.1992, Shri Niraj Kumar may be considered for ad-hoc promotion to the grade of Under Secretary subject to the outcome of disciplinary proceeding and criminal case, from the date of taking over charge and until further orders. Before the ACRs of Shri Niraj Kumar are assessed by the Screening Committee to adjudge his suitability for holding the post of Under Secretary on ad-hoc basis, the decision for his promotion, in principle, has to be taken at the level of MoS (PP) submitted for direction.

Sd/-

11.8.2008

XXXXXXXX

“17. Since there is a direction of the CAT (PB), Shri Niraj Kumar has been continued submitting his representations to Secretary (P), JS(CS), DS(CS.I). The following observations/ directions of the Hon'ble CAT (PB) while passing judgment dated 04.05.2007 in OA. No. 868/2006 (filed by Shri Niraj Kumar vs. UOI) allowing consideration of the applicant for promotion from the date when applicant's juniors were promoted are reproduced below:

Para1 of the judgment

“The applicant has impugned order No. C-12020/110/2005-VC dated 8.2.2006, which is a memorandum informing him that it is proposed to hold an enquiry against him under Rule 14 of CCS (CCA) Rules 1965 and order No. C-12020/184/2000-VC dated 21.10.2005 by which the Applicant has been placed under suspension. He has sought the following relief:

“(i) Quash and set aside the impugned order/Memo dated 8.2.2006 and 21.10.2005 (Annexure-A1 colly).

(ii) Pay full pay and allowances alongwith increments for the period applicant was kept under suspension (20.12.2000 to 28.03.2005 and thereafter).

(iii) Consideration for promotion from the date when applicants juniors were promoted.”

Para16 of the judgment

“In so far as the plea of the applicant regarding late initiation of department enquiry is concerned, it cannot be accepted as a ground for quashing the charge. It has not come as a surprise to the applicant. During all these years since the incident, he has every reason to remember the details because he is being questioned about the case or he has appeared before the Metropolitan Magistrate for giving a confessional statement. It cannot, therefore, be said that his memory would have failed, which would make it difficult for him to defend his case.

Para17 of the judgment

“On above considerations, the OA is partly allowed and the order No. C-12020/184/2000-VC dated 21.10.2005 by which the applicant has been placed under suspension, is quashed. The respondents are directed to reinstate the Applicant in service with all consequential benefits from 21.10.2005. No. order as to costs.”

18. On careful reading it may be seen from the operating Para i.e. Para 17 of the said judgment that the Applicant has been placed under suspension, is quashed. The Respondents are directed to reinstate the Applicant in service with all consequential benefits from 21.10.2005. In other words, it is submitted that the applicant i.e. shri Niraj Kumar's case of promotion has to be considered in implementation of the said judgment because 'all consequential benefits from 21.10.2005' also includes his case of promotion, which is overdue, has to be taken up in the right earned to avoid any likelihood of contempt of the said judgment.

The Present Status:

19. Meanwhile MHA has sent an endorsement to this Department, which is addressed to JSand CVO, M/o Social Justice and Empowerment. In the said letter, Shri Niraj Kumar is not clear from vigilance angle as a criminal case RC1 (s)/2001/SIC-IV/ND is pending in the Special Court of CBI and the departmental proceedings against him have been initial vide memorandum dated 8.2.2006 of MHA. The Inquiry Officer * Presenting Officer in the case had also been appointed to proceed department proceedings. After preliminary hearing, the departmental proceedings were held up as original or certified copies of list of documents relied upon were required during the enquiry. One such document is the statement given by Shri Niraj Kumar before the magistrate under Section 164 Cr PC. CBI has been asked by MHA to obtain it from the court and provide the same. In response, CBI has intimated that an application for obtaining the document has been filed in the court of Special Judge, Tis Hazari Courts and the orders on the application are yet to be passed by the Court. In brief, Shri Niraj Kumar is not clear from vigilance angle in MHA. From perusal of the CAT judgments and records, it seems that the document on which the MHA has been relying against the said officers was never available with the MHA.

20. The pendency of the case relating to Shri Niraj Kumar has been received from internet and the next date of hearing in the District Court has been fixed on 12.09.2008 (Page 145/corr.)

21. In view of the above discussions, now this Department has to take a view whether Shri Niraj Kumar may be given ad hoc promotion in view of the Para 5 of the DOPT's OM No. 2201/4/91-Estt. Dated 14.9.1992 (flag 'D'), a tabular analysis is submitted for consideration:

Para 5(a) Whether the promotion of the officer will be against public interest; Applicant has already been transferred from MHA by the DOPT vide order No.21/48/2006-CS-I dated 24 July, 2007 on the ground of public interest and is not handling sensitive papers relating to the MMA which had alleged misconduct on the part of the applicant. The main accused in the same matter pending prosecution, Shri Thomas Mathew, Director (DR-1973, CSL No. 696) has retired on

30th June, 2009 and given all retrial benefits. Therefore, it seems there is nothing as such, which is against public interest. The Hon'ble Tribunal in Para 16 of the order dated 18.09.2005 in OA No. 1286/2005 has observed .. To our view it is not a good reason for dealing with the applicant's case differently. The applicant is working in a different department now' By the order dated 18.9.2005 in OA No. 1286/2005, the first suspension of applicant was revoked with all consequential benefits from 28.3.2005.

Further it is added that order dated 04.05.2007 in OA No. 868/2006 Hon'ble Tribunal has observed- Any person would be completely robbed of his dignity by such an act. Conceded that the charges against the Applicant are serious in nature, yet the Govt. have started the proceedings against him six years after placing him under suspension. It has been conceded in the counter affidavit by the Respondents that it would take very long for the criminal proceedings to come to a conclusion. This would remain in limbo for an indefinite period of time."

By the order dated 04.05.2007 in OA No. 868/2006 of Hon'ble Tribunal, the second suspension was revoked with all consequential benefits. In the said order Hon'ble Tribunal has allowed all prayers except the prayer to quash the charge-memo dated 08.02.2006. The prayer include consideration of promotion of applicant from the date when applicant's juniors were promoted. (Para 16and17 of the said CAT Order).

In view of the above directions of Hon'ble Tribunal, and the fact that my performance after reinstatement has been exemplary and always outstanding and highly appreciated by the senior officers, the promotion on ad hoc basis is not against public interest. Para5(b) Whether the charges are grave enough to warrant continued denial of promotion; The CBI has sought Grant of Pardon to the applicant u/s 306 Cr PC in CBI case No. RC1(S) /2001 SIC-IV/New Delhi. This is done only when an impartial prosecuting agency like the CBI finds charges against the applicant are not grave enough. Moreover, the CBI was asked to furnish its objection, if any against the ad-hoc promotion of the applicant. The CBI has not objected to the promotion of the applicant and stated that the same is an administrative matter. Para5(c) Whether there is no likelihood of the case coming

to a conclusion in the near future; No, because the proceedings on framing of charges has yet not commenced and it may take longer period to conclude. The FIR was filed on 31st March, 2001 and the charge sheet was filed on 12th April 2005. The cognizance was taken by the learned Judge on 15th June, 2005 and till date the hearing on framing of charges has not commenced. Next date of hearing is 11 October, 2010. Para 5(d) Whether the delay in the finalization of proceedings, departmental or in a Court of Law, is not directly or indirectly attributable to the Government servant concerned; and No, delay is not directly or indirectly attributable to me. The applicant has appeared before Hon'ble Court on each and every date and is on bail. The applicant has never filed or raised any objection in the criminal proceedings. The charge memo in the departmental enquiry was issued on 8.2.2006 which is actually barred by res-judicata, since the applicant was kept on suspension for nearly 5 years on contemplation of disciplinary proceedings on same ground; and when the Hon'ble CAT revoked the suspension order with all consequential benefits from 28.3.2005; the charge-memo on same ground should not have been issued. Moreover, for more than four and a half years, the proceedings has not progressed inspite of Hon'ble CAT giving a time-frame of 4 month to give a quietus to the issue vide its order dated in the OA No. /2009. The applicant has attended each and every proceeding and yet even the listed documents have not been furnished since the same was not made available to the Presenting Officer by the Disciplinary authorities. The applicant sought certified copies of the listed document under the RTI Act, 2005; but the request was rejected by the Appellate authority and the Disciplinary authority. In such circumstance, it is evident that the disciplinary proceedings which is selective, discriminatory and against all canons of rules and laws is meant to keep the career of the applicant in limbo for an indefinite period of time. Para5(e) Whether there is any likelihood of misuse of official position which the Government Servant may occupy after ad-hoc promotion, which may adversely alter the conduct of the departmental case/ criminal prosecution. Since the applicant has already been transferred from the alleging Department viz. MHA and even on promotion the applicant requests not to be posted to the alleging department viz. MHA, it is unlikely that applicant's promotion will adversely alter the conduct of the departmental case/criminal prosecution. 5.1 The appointing authority should also

consult the CBI and take their views into account where the departmental proceedings or criminal prosecution arose out of the investigations conducted by the Bureau. Since there has been long injustice, the DOPT, the Appointing Authority in this case consulted the CBI vide OM dated 18.11.2008 and letter dated 17 December, 2008 to take their views into account since the departmental proceedings and criminal prosecution arose out of the investigations conducted by the Bureau. The CBI did not object to the promotion of the applicant and communicated vide ID No.5151/3/1(S) 2001 SIC-IVND dated 26.12.2008 following opinion: The matter of promotion of Shri Niaj Kumar is an administrative matter and may be decided by the Deptt. As per relevant rules."(para-2) 5.2 In case the appointing authority comes to a conclusion that it would not be against the public interest to allow ad-hoc promotion to the Government Servant, his case should be placed before the next DPC held in the normal course after the expiry of two years period to decide whether the officer is suitable for promotion on ad-hoc basis. Where the Government servant is considered for ad-hoc promotion, the DPC should make its assessment on the basis of the totality of the individual's record of service without taking into account the pending disciplinary case/ criminal prosecution against him. In the instant case for ad-hoc promotion to Grade-I of CSS, the views of CBI was available, along with ACRs as well as APAR. The same was never placed before the DPC in contravention of DOPT OM No. dated 14.9.1992, 23.2.1999 and 2004. The communication dated 31.3.2009 and 31.5.2010 are contradictory and against the rule position since the DPC has to make assessment without taking into account the pending disciplinary and criminal proceedings. Final submissions for taking a decision in the matter:

22. For promotion from SO to Grade of CSS following records are required:

(i) Requisite number of ACRs, (ii) Vigilance Clearance and (iii) Eligibility as per CSS Rules.

23. The ACRs of Shri Niraj Kumar are available. However for vigilance clearance we may rely upon his present Ministry i.e. M/o Social Justice and Empowerment though MHA has stated in their communications that Shri Niraj Kumar is not clear from vigilance angle. He is already eligible for consideration of promotion as per

CSS Rules, 1962. However, the order dated 04.05.2007 in OA. No. 868/2006 allowing consideration of the applicant for promotion from the date when applicants juniors were promoted, which is yet to be implemented. The other records i.e. Grant of Pardon sought from CBI in favour of Shri Niraj Kumar (through not exonerated) but can be relied upon for considering his case of ad hoc promotion. Following the procedure at Para 5.1. of the OM No. 2201/4/91-Estt dated 14.09.1992 of the DOPT, CBI was consulted (page 63-64/Corr.) stating that Shri Niraj Kumar has represented for his promotion and they have not forwarded any objection to his representation to promotion (vide page 77-79/corr).

24. Apart from that, Section 7 Grant of immunity/pardon of the Chapter IV (Facilities and Cooperation to CBI) of Vigilance Manual issued by Central Vigilance Commission (fifth edition) may be referred in the instant case, which is placed at flag 'C'.

25. The following observations/directions of the Hon'ble CAT(PB) while passing judgment dated 4.5.2007 in OA No. 868/2006 (filed by Shri Niraj Kumar vs UOI) allowing consideration of the applicant for promotion from the date when applicants juniors were promoted are reproduced below:-

Para1 of the judgment

“The applicant has impugned order No. C-12020/110/2005-VC dated 8.2.2006, which is a memorandum informing him that it is proposed to hold an enquiry against him under Rule 14 of CCS(CCA) Rules 1965 and order No. C-12020/184/2000-VC dated 21.10.2005 by which the Applicant has been placed under suspension. He has sought the following relief:

(i) Quash and set aside the impugned Order/Memo dated 8.2.2006 and 21.10.2005 (Annexure-A1 colly).

(ii) Pay full pay and allowances alongwith increments for the period applicant was kept under suspension (20.12.2000 to 28.03.2005 and thereafter).

(iii) Consideration for promotion from the date when applicants juniors were promoted.”

Para16 of the judgment

"In so far as the plea of the applicant regarding late initiation of departmental enquiry is concerned, it cannot be accepted as a ground for quashing the charge. It has not come as a surprise to the applicant. During all these years since the incident, he has every reason to remember the details because he is being questioned about the case or he has appeared before the Metropolitan Magistrate for giving a confessional statement. It cannot, therefore, be said that his memory would have failed, which would make it difficult for him to defend his case.

Para17 of the judgment

"On above considerations, the OA is partly allowed and the order No. C-12020/184/2000-VC dated 21.10.2005 by which the applicant has been placed under suspension, is quashed. The respondents are directed to reinstate the Applicant in service with all consequential benefits from 21.10.2005. No order as to costs."

26. It is reiterated that on careful reading it is clear from the operating Para i.e. Para 17 of the said judgment that the Applicant has been placed under suspension, is quashed. The respondents are directed to reinstate the Applicant in service with all consequential benefits from 21.10.2005." In other words, it is submitted that the applicant i.e. Shri Niraj Kumar's case of promotion has to be considered in implementation of the said judgment because 'all consequential benefits from 21.10.2005' also includes his case of promotion, which is overdue, has to be taken up in the right earnest to avoid any likelihood of contempt of the said judgment.

27. Recently on direction of DS)(CS.I), we sought the comments of CBI (page 146/corr) to furnish their specific comments with reference to representation of Shri Niraj Kumar for his promotion to the grade of US on ad hoc basis, in the light of this Department's OM. No. 22011/4/91-Estt(A) dated 14.11.1992 to consider the request of Shri Kumar. The CBI have stated that the matter of promotion of Shri Niraj Kumar is an administrative matter and may be decided by the DOPT as per relevant rules. In the comments of CBI, it seems they are not negative so far as

promotion of Shri Kumar is concerned because they have already filed grant of pardon in favour of Shri Niraj Kumar (for details para 12 at page 23/N/ante of the instant note may be referred).

28. In view of the above submissions, his case of promotion on ad hoc basis may be considered by the Screening Committee. The statement of his ACRs is submitted below.

“Table”

Vigilance status: Not available

29. In view of the above discussions, his case of promotion on ad hoc basis may be considered.

Submitted for consideration please.

US(CSI/ UandC)

Notes from pre-pages refer.

2. Shri Niraj Kumar is a DR Section Officer of 1997 batch. Previously, he was serving as Section Officer in the Ministry of Home Affairs. Now, he is serving as Section Officer in the Ministry of Social Justice and Empowerment (National Commission on Scheduled Castes). His batchmates and immediate junior were promoted to the grade of Under Secretary on ad-hoc basis in 2005 when they completed 8 years regular service in the grade of Section Officer. He could not be promoted to the grade of Under Secretary since he was under suspension and criminal /departmental proceedings have been pending against him.

3. He filed OA twice in the Central Administrative Tribunal against his suspension and on both occasions the Tribunal directed to revoke suspension with all consequential benefits.

4. In pursuance of the aforesaid decision of the CAT and keeping in view instructions of this Department issued in OM No. 2201/4/91 Estt(A)dated 14th September, 1992 (FlagD), Shri Niraj Kumar has been making representations for

his ad hoc promotion to the grade of Under Secretary citing cause that the criminal /departmental proceedings are pending for more than 2 years not for the fault on his part and that those proceedings may take a very long time.

5. The criminal case has been investigated and filed by the CBI in the court of law against Shri Niraj Kumar. Specific comments of the CBI were asked for on the representation of Shri Kumar, as provided in this Department's OM dated 14.9.1992; it has been reported by them that the matter of promotion of Shri Kumar is an administrative one and may be decided by the Department as per relevant rules vide their communication at page 176/corr.

6. From the CR dossier of Shri Niraj Kumar, it is seen that his ACRs for slightly less than 5 years are available and for the rest period he remained under suspension. Out of these ACRs, ACR for the year 1998-99 is average and No Report Certificate has been recorded. The excerpts for his ACRs are brought on page 28/N.

Submitted for consideration /order.

Sd/-

12/1/2009

Deputy Secy. (CS-I)

Ref: JS (CS)s minutes at 21/28/notes:

In the light of the preceding notes from p 21/ante, and the directions of the Hon'ble CAT, we may process his case for Ad-hoc promotion as an Under Secy, by following the Screening Committee' procedure, as a special case.

Submitted for kind consideration and approval of Secy (P).

Sd/-

12/1

JS (CS)

Shri Niraj Kumar has submitted representation for his promotion to US Grade as per FR.

2. A draft reply, as desired, please.

Sd/-

20.3.09

US (CS.1/UandC)

We may reply to Shri Niraj Kumar since he has been submitting representations again and again.

Sd/-

24/3/09

D.S. (CS1)

As amended.

Pl discuss before issue.

Sd/-

27/3

US (CS)/U"

9. The applicant has also submitted that the Department of Personnel and Training vide their letter dated 17.12.2008 sought specific comments from the Central Bureau of Investigation ('CBI' for short) regarding ad-hoc promotion of the applicant as Under Secretary and they in their letter dated 26.12.2008 informed them that it was an administrative matter and the Department could decide the matter as per prevalent rules.

10. However, ignoring the case of the applicant, the respondents continued to make ad hoc promotions. On 26.05.2010, they have promoted 268 Section

Officers as Under Secretaries on ad hoc basis. Again, vide order dated 03.09.2010, they have further promoted 115 Section Officers as Under Secretaries on ad hoc basis. The applicant has, therefore, made a number of representations to the respondents on 30.07.2007, 13.06.2008, 10.07.2008, 11.11.2008, 13.03.2009, 12.04.2010, 04.05.2010, 14.06.2010, 02.11.2010 and 10.11.2010, etc. to consider him also for promotion as Under Secretary on ad hoc basis in terms of Para 5 of the aforesaid DOPT O.M. dated 14.09.1992 and reiterated vide its subsequent O.M. dated 23.02.1999. However, the respondents, vide their impugned letter dated 31.05.2010, informed the applicant that he was not clear from vigilance angle as the criminal case is pending in the Special Court of CBI and departmental proceedings under Rule 14 of the CCS (CCA) Rules, 1965 are under way against him.

11. The respondents have filed their reply narrating the entire background of the case. According to them, the ad hoc promotions have been resorted to as a stop gap arrangement to manage the various cadres of the CSS as the select list for promotion from Section Officers' grade to Under Secretary grade was not available. They have also submitted that the ad hoc promotion to the grade of Under Secretary is made in the order of seniority of the Section Officers who have completed 8 years of approved service in the grade as per the CSS Rules as applicable from time to time after assessing ACRs/APARs and vigilance clearance. They have further submitted that unlike regular promotion for which the DPC is convened by the UPSC, for consideration of officers for ad hoc promotion only an internal Screening Committee of officers is formed from time to time and on their recommendations vis-à-vis requirement to fill up the vacancies, the Section Officers are promoted to the Under Secretary grade on ad hoc basis in terms of the DOPT O.M. dated 23.02.1999 extracted above. Therefore, the applicant was not given ad hoc promotion. However, the direct recruit Section Officers of 1996 to which the applicant belongs were included in the Under Secretary Select List of 2005 for regular promotion as recommended by the DPC conducted by the UPSC. The recommendation of the DPC in case of the applicant has been kept in 'Sealed Cover' in terms of the DOPT O.M. dated 14.09.1992. They have further submitted that the DOPT, vide its letter dated 29.06.2010, had forwarded a representation of the applicant dated 14.06.2010 to the Respondent No.2 where he is presently

posted and requested them to reconsider his case for grant of vigilance clearance in view of the CBI's proposal to grant pardon to him. They were also asked to consider his case for vigilance clearance in terms of the aforesaid O.M. dated 14.09.1992 keeping the specific stress on paragraphs 4 to 5.2 thereof as well as O.M dated 25.10.2004. However, Respondent No. 2 has not given him the clearance in view of the pendency of the criminal case as well as departmental proceedings under Rule 14 of the CCS (CCA) Rules, 1965. Accordingly, Respondent No.2, vide its O.M dated 29.10.2010 intimated the DOPT that the applicant is not clear from vigilance angle.

12. We have heard Shri M.K. Bhardwaj, the learned counsel for the applicant and Shri T.C. Gupta, the learned counsel for the respondents. We have also perused the entire documents on record and considered the submissions of the learned counsel for the parties. It is an undisputed fact that the applicant's case for promotion as Under Secretary on ad hoc basis w.e.f. 07.07.2005 was to be considered in terms of the provisions contained in DOPandT O.Ms dated 14.09.1992 and 23.02.1999 but the same was not done. The DOPandT has clarified in clear terms that the sealed cover procedure' prescribed in its earlier O.M dated 14.09.1992 was to be followed at the time of consideration for ad hoc appointment also in the cases of Government servants (1) who are under suspension; (2) in respect of whom charge sheet has been issued and disciplinary proceedings are pending; and (3) in respect of whom criminal prosecution is pending.

13. As regards the suspension of the applicant is concerned, it was revoked retrospectively w.e.f. 28.03.2005 vide order in O.A 1286/2005 (supra) dated 01.09.2005. The respondents themselves have, pursuant to the aforesaid order, revoked his suspension w.e.f. 28.03.2005, vide their order dated 20.10.2005. By the said order, the applicant was also granted all consequential benefits including full pay and allowances for the period from 28.03.2005. In other words, on 07.07.2005, no suspension in effect was operating against the applicant. Again, admittedly, no departmental proceedings were also initiated against him as on 07.07.2005 admittedly the charge sheet under Rule 14 of the CCS (CCA) Rules, 1965 was issued against him only on 08.02.2006. However, since the criminal

prosecution had already been initiated against him on 13.04.2005 and it was still pending, the respondents were quite justified in not promoting him along with his juniors vide their order dated 07.07.2005. But the crux of the issue is that in such situation the respondents were required to follow the sealed cover procedure' prescribed in O.Ms dated 14.09.1992 and 23.02.1999 but they admittedly failed to do so.

14. Further, according to the aforesaid O.M dated 14.09.1992, in order to ensure that the disciplinary case/criminal prosecution instituted against the Government servant is not unduly prolonged, all efforts to finalize the proceedings expeditiously should be taken so that the need for keeping the case of the Government servant in the sealed cover is limited to the barest minimum time. Therefore, the appointing authority was expected to review comprehensively the cases of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of six months from the date of convening the first DPC which had adjudged his suitability and kept its findings in the sealed cover, in terms of the aforesaid provisions in the said O.M. Had the applicant's case been kept in the 'sealed cover', the respondents would have got it reviewed after six months of convening the DPC in July, 2005. Such six monthly reviews were to be undertaken periodically. Wherever the disciplinary case/criminal case against the Government servant was not concluded even after expiry of the two years from the date of meeting of the first DPC which kept its findings in respect of a Government servant in a sealed cover, in such situation, the appointing authority may review the case of the Government servant provided he is not under suspension to consider the desirability of giving him ad hoc promotion. If the said provisions in the O.M were complied with in the case of the applicant, the appointing authority would have reviewed the case of the applicant comprehensively in July, 2008. Since the applicant's case was not kept in the sealed cover, he was denied such an opportunity to have his case comprehensively reviewed in July, 2008.

15. The O.M dated 14.09.1992 also envisages the desirability of giving ad hoc promotion to such Government servants provided he was not under suspension. Again, there is no doubt that the applicant was not under suspension in July, 2008

or even later. While considering the desirability for grant of ad hoc promotion, the appointing authority was to consider the following five aspects:

- a) Whether the promotion of the officer will be against the public interest;
- b) Whether the charges are grave enough to warrant continued denial of promotion;
- c) Whether there is any likelihood of the case coming to a conclusion in the near future;
- d) Whether the delay in the finalization of proceedings, departmental or in a court of law, is not directly or indirectly attributable to the Government servant concerned; and
- e) Whether there is any likelihood of misuse of official position which the Government servant may occupy after ad-hoc promotion, which may adversely affect the conduct of the departmental case/criminal prosecution.

Further, the appointing authority was also required to consult the Central Bureau of Investigation and take their views into account where the departmental proceedings or criminal prosecution arose out of the investigations conducted by the Bureau. It is on record that the DOPandT has actually examined the case of the applicant on the above aspects in the middle of the year 2008 itself. Since the respondents have failed to follow the 'sealed cover' procedure as envisaged in O.Ms dated 14.09.1992 and 23.02.1999, they themselves have admitted that there was a procedural lapse on their part in his case and, therefore, his case could be treated as a case of deemed sealed procedure' as the CS Division of the DOPandT themselves has been resorting to such ad hoc promotions for administrative reasons without assessment procedure. They have also assessed all those aspects in the case of the applicant as revealed from the records of this case. As regards the question whether the promotion of the officer will be against public interest', the DOPandT has opined that since the applicant has already been transferred from MHA on 24.07.2007 and since then he has not been handling sensitive papers, and since the main accused in the case Shri Thomas Mathew

has already retired from service on 30.06.2009 and given all retrial benefits, if the applicant was promoted it was not considered against any public interest. As regards the question whether the charges are grave enough to warrant continued denial of promotion', the finding was that the CBI has sought grant of pardon to the applicant u/s 306 Cr.P.C. As regards the question whether there is no likelihood of the case coming to a conclusion in the near future', the analysis of the case reveal in the negative. Same was the answer to the question whether the delay in the finalization of proceedings, departmental or in a Court of Law, is not directly or indirectly attributable to the Government servant concerned'. On the last aspect, whether there is any likelihood of misuse of official position which the Government servant may occupy after ad hoc promotion, which may adversely alter the conduct of the departmental case/criminal prosecution', the analysis by the Department shows that he has already been transferred from the Ministry of Home Affairs, it was unlikely that applicant's promotion will adversely alter the conduct of the departmental case/criminal prosecution. Further, the CBI did not object to his promotion. Rather, their opinion was:

"the matter of promotion of Shri Niraj Kumar is an administrative matter and may be decided by the DOPT as per relevant rules."

Lastly, on the aspect, in case the appointing authority comes to a conclusion that it was not against the public interest to allow ad hoc promotion to the applicant, his case should be placed before the next DPC after the expiry of two years period to decide whether the officer was suitable for promotion on ad hoc basis', it was observed in the case of the applicant that even though the views of CBI were available along with ACRs as well as APAR, the same was never placed before the DPC in contravention of DOPT O.Ms dated 14.09.1992 and 23.02.1999 particularly when, as per the rules, the DPC had to make assessment without taking into account the pending disciplinary and criminal proceedings.

16. Further, the respondents' submission before this Tribunal in CP 256 of 2009 in OA 868/2006 was that the applicant's representation for ad hoc promotion has been rejected by them vide their letter dated 31.3.2009 on the ground that the DOPandT has taken a policy decision not to grant any further ad hoc promotion in

the grade of Under Secretary. The respondents have, however, not clarified as to the date from which the said policy decision was taken by Government. In any case the message that has been conveyed indirectly by the respondents through their aforesaid submission was that when the policy of granting ad hoc promotions in the grade of Under Secretary is re-introduced, the applicant would be considered for promotion on ad hoc basis. However, it is seen that the respondents have again resumed ad hoc promotion in the grade of Under Secretary and promoted Section Officers on ad hoc basis vide order dated 26.05.2010 but the applicant was not considered. The only reason given for his non-inclusion of his name is that the Respondent No. 2 has not given the vigilance clearance in his favour on account of the pendency of the departmental proceedings as well as the criminal prosecution which is absolutely irrelevant in view of the provisions contained in O.Ms dated 14.09.1992 and 26.02.1999. Therefore, in our considered opinion, the applicant has been arbitrarily discriminated in the matter of considering him for promotion as Under Secretary on ad hoc basis along with the officers who have been promoted vide order dated 26.05.2010.

17. As it is admittedly a mistake on the part of the respondents in not following the procedure as prescribed in the aforesaid O.Ms dated 14.09.1992 and 26.02.1999, the applicant shall not be made to suffer. As held by the Apex Court in *Nirmal Chandra Bhattacharjee and Ors Vs. Union of India and Ors.* (1992 Supp. (2) SCC 363), the beneficial rule or order should not be construed as to result in hardship to an employee when he is not at fault and the mistake or delay on the part of the department should not be permitted to recoil on him. The relevant part of the said judgment is as under:-

“5. One of the principles of service is that any rule does not work to prejudice of an employee who was in service prior to that date. Admittedly the vacancies against which appellants were promoted had occurred prior to restructuring of these posts. It is further not disputed that various other posts to which class ‘IV’ employees could be promoted were filled prior to 1/08/1983. The selection process in respect of Ticket Collectors had also started prior to 1/08/1983. If the department would have proceeded with the selection well within time and would have completed it

before 1/08/1983 then the appellants would have become Ticket Collectors without any difficulty. The mistake or delay on the part of the department, therefore, should not be permitted to recoil on the appellants. Paragraph '31' of the restructuring order itself provides that vacancies in various grades of posts covered in different categories existing on 31/07/1983 would be filled in accordance with the procedure which was in vogue before 1/08/1983."

18. It is also well settled by the decision of the Apex Court in the case of Delhi Jal Board Vs. Mohinder Singh (JT 2000 (10) SC 158) that right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India. The relevant part of the said judgment reads as under:

"5. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Art. 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."

19. As regards back wages are concerned, the applicant has been making representation after representation to grant him promotion as in the case of his

juniors. He has also approached this Tribunal both in the Original Application as well as in Contempt Petition. The contention of the respondents before this Tribunal was that the applicant was denied promotion in view of the policy of the Government to stop the practice of ad-hoc promotions. In such a situation, the Respondents ought to have granted him promotion when they have revived policy and re-introduced the practice of ad hoc promotions. However, when the respondents again promoted another batch of the applicant's juniors w.e.f. 26.05.2010, they simply ignored his case. As held by the Apex Court in Union of India Vs. K.V. Janakiraman (1991 (4) SCC 109), the normal rule of "no work no pay" is not applicable to cases such as the present one where although the applicant was willing to work, he was kept away from work by the authorities for no fault of his.

20. We also do not find the impugned action of the respondents satisfying the test of fair play and reasonableness as the basic touchstone of any administrative action, as upheld by the Hon'ble Apex Court in Man Singh V. State of Haryana and Ors. 2008(12) SCC 331 wherein the Apex Court observed as under:-

“20. We may reiterate the settled position of law for the benefit of the administrative authorities that any act of the repository of power whether legislative or administrative or quasi-judicial is open to challenge if it is so arbitrary or unreasonable that no fair minded authority could ever have made it.”

21. From the facts of the case and from perusal of Office Memorandum dated 14.09.1992, it is clear that the appointing authority has to decide first whether employees who are not cleared from vigilance angle or against whom criminal/disciplinary proceedings are pending for a long time are to be considered at all for ad hoc promotion. No doubt, these instructions have been given in respect of candidates who are considered for regular promotion and against whom sealed cover proceedings have been resorted to. In the present case, the applicant was considered for regular promotion and the D.P.C. has kept him under sealed cover vide averment made in Para-viii of the preliminary submissions made in counter reply.

22. From the impugned order, it is seen that the respondent authorities have simply not considered the case of the applicant on the ground that he was not free from vigilance angle in view of pendency of criminal and disciplinary case against him. They have not passed a speaking order taking into consideration the factors, which have been enumerated in the Office Memorandum dated 14.09.1992 and extracted in paragraph 4 (a to e) above.

23. In view of above, the order dated 31.05.2010 is set aside and the Respondent No.1 is directed to pass a speaking order keeping in view the aforesaid aspects whether the applicant should not have been considered for ad hoc promotion on 26.05.2010 when others including his juniors were considered. If, it is decided, on consideration of all the facts and circumstances of the case that the applicant was also eligible for ad hoc promotion, his case should be placed before a review departmental Screening Committee within a period of six weeks from the date of receipt of a copy of this order. Needless to say that the respondent authorities will pass appropriate orders on the recommendations of the Screening Committee within two weeks from the date of receipt of the recommendations. The OA is disposed of accordingly. No costs.

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