GAHC010015002023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/448/2023

HITEN KALITA

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMM. AND SPECIAL SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS DEPTT., DISPUR, GHY-6

2:THE COMM. AND SPECIAL SECRETARY
PUBLIC WORKS (BLDG. AND NH) DEPTT.
DISPUR
GHY-6

3:THE SECRETARY TO THE GOVT. OF ASSAM
DEPTT. OF HOUSING AND URBAN AFFAIRS
DISPUR
GHY-6

4:THE SECRETARY TO THE GOVT. OF ASSAM
PERSONNEL DEPTT.
DISPUR
GHY-6

5:THE DIRECTOR
TOWN AND COUNTRY PLANNING
DISPUR
GHY-

Advocate for the Petitioner : MR. W SHARMA

Advocate for the Respondent : GA, ASSAM

Linked Case : WP(C)/356/2023

HITEN KALITA

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMM. AND SPECIAL SECRETARY TO THE GOVT. OF ASSAM
PUBLIC WORKS DEPTT.
DISPUR
GHY-6

2:THE COMM. AND SPECIAL SECRETARY
PUBLIC WORKS (BUILDING. AND NH) DEPTT.
DISPUR
GHY-6
3:SECRETARY TO THE GOVT. OF ASSAM
PUBLIC WORKS DEPTT. (BUILDING AND NH) DISPUR
GHY-6
4:THE CHIEF ENGINEER
PUBLIC WORKS (ROAD) DEPTT. CHANDMARI
GHY-3
5:THE SECRETARY TO THE GOVT. OF ASSAM
DEPTT. OF HOUSING AND URBAN AFFAIRS
DISPUR
GHY-6
6:THE DIRECTOR
TOWN AND COUNTRY PLANNING
DISPUR
GHY-6

Advocate for : MR. A PHUKAN
Advocate for : SC
PWD appearing for THE STATE OF ASSAM AND 5 ORS

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM

Date of hearing : 25.05.2023.

Date of judgment : **25.05.2023**.

JUDGMENT & ORDER (Oral)

Heard Mr. A. Phukan learned counsel appearing for the writ petitioner in both these writ petitions. Also heard Mr. P. Nayak, learned Standing Counsel, PWD, Assam appearing for the respondent Nos.1, 2, 3 and 4. Mr. D. Borah, learned Government Advocate, Assam has appeared for the respondent Nos.5 and 6.

2. Both these writ petitions filed by the same petitioner arise out of more or less common factual background and are interconnected with each other. Therefore, I propose to dispose of these writ petitions by this common judgment and order.

3. The writ petitioner herein is serving as an Executive Engineer under the Public Works Department (PWD), Assam. Presently he is posted in the Nagaon Division of the PWD. Aggrieved by denial of promotion to the post of Superintending Engineer and also the "sealed cover" proceeding adopted by the Selection Committee, the petitioner has approached this Court by filing the instant writ petition. The petitioner's case, in a nutshell, is that while working as Executive Engineer, PWD, Nagoan, he was supervising the additional work of "Improvement of Nehrubali Ground including walking and Cycle Track and Development of Lakhi Prasad Goswami Open Stage at Nagaon". Although the Public Works Department was the nodal agency for

execution of the work, the project was under the Department of Housing and Urban Affairs. The City Level CIDF Implementation and Monitoring Committee (CCIMC) was monitoring the work. However, after execution of the work the Housing and Urban Affairs Department had come up with an allegation that the petitioner had prepared the estimate of the work without obtaining approval of the administrative department. Consequently, a preliminary enquiry was conducted by the department of Housing and Urban Affairs whereafter, the Additional Chief Secretary of the concerned department had made a recommendation that the petitioner should not be promoted to the post of Superintending Engineer. Taking note of the objection raised by the department of Housing and Urban Affairs the Special Commissioner and Secretary, Public Works (Roads) Department, Dispur had served a show cause notice dated 06.04.2022 calling upon the petitioner to submit his response with regard to the allegations leveled against him. The allegations leveled against the petitioner is apparent from the Statement of Allegations which is reproduced herein below for ready reference :-

"***STATEMENT OF ALLEGATIONS***

Sri Hiten Kalita, Executive Engineer (C), PWRD, Nagaon, Barhampur & Rupahihat Territorial Road Division while executing the CIDF project in Nagaon Town viz. "Improvement of Nehrubali ground including walking and cycle track & development of Lakhi Prasad Goswami open stage at Nagaon under CIDF", an enquiry was initiated in the Department of Housing & Urban Affairs was w.r.t. anomalies in implementation of the said scheme.

He has executed the scheme based on working estimate deviating from the actual tendered items and submitted a running bill amounting to

Rs.1,25,33,779/- without obtaining Administrative Approval of the concerned Administrative Department on the working estimate based on which the work has been implemented.

In the Enquiry conducted by the Department of Housing & Urban Affairs cum administrative department of the aforesaid scheme, it appears that both material change and variation of items have been incorporated in the working estimate as supplementary items wherein an amount of Rs.63,93,863.96 has been considered as non-BOQ.

It appears that Sri Kalita has prepared the working estimate amounting to Rs.1,99,89,464/- against the Administrative Approval of Rs.2,00,00,000/- restricted in the tender to Rs.1,94,91,767/- without the knowledge of the administrative department. The said working estimate found to be approved by the Addl. Chief Engineer, PWRD, Tezpur Zore based on which the execution of the work has been carried out.

He has also failed to highlight the procedural requirements for execution of works as per revised estimate/working estimate in the CCIMC meeting held in connection with the aforesaid scheme and submitted a running bill, without obtaining requisite administrative approval and thereby violated existing norms and procedures of the Govt."

4. On receipt of the show cause notice the petitioner had submitted his reply. After taking note of the reply submitted by the petitioner the Special Commissioner to the Government of Assam, Public Works (Roads) Department had issued Notification dated 01.07.2022 closing the departmental proceeding drawn against the petitioner by imposing the minor penalty of 'censure'.

5. It appears that prior to that i.e. on 28.09.2021 the Departmental Selection Board had met and considered the candidature of a number of departmental

candidates for promotion to the rank of Superintending Engineer. In the said DPC meeting, names of as many as 8 (eight) Executive Engineers were recommended for being promoted to the newly created posts of Superintending Engineer. In the list of the eight officers so recommended for promotion, the name of the writ petitioner finds place at Serial No.6. The Selection Board has, however, observed that the case of the writ petitioner be kept in a "sealed cover" until such time, the adverse remark received from the Additional Chief Secretary to the Government of Assam, Department of Housing and Urban Affairs vide letter dated 22.09.2021 is resolved by the Public Works Department. Consequently, although the persons junior to the writ petitioner were promoted to the rank of Superintending Engineer on 22.11.2021, his case has been kept in "sealed cover" in the manner indicated above. Aggrieved by the aforesaid decision of the DPC to keep his case in 'sealed cover' the writ petitioner has filed WP(C) No.356/2023.

6. During the pendency of WP(C) No.356/2023, the order dated 01.07.2022 imposing the penalty of "censure" was issued by the authorities. Therefore, the subsequent writ petition being WP(C) No.448/2023 was instituted by the petitioner.

7. By referring to the materials available on record, Mr. Phukan submits that since the show cause notice/memorandum of charge served upon the petitioner on 06.04.2022 envisaged imposition of major penalty, hence, it was not open for the respondents to subsequently impose a minor penalty of 'censure' upon the petitioner. It is also the submission of Mr. Phukan that on the date of consideration of the candidature of the eligible departmental candidates for promotion to the rank of

Superintending Engineer including the writ petitioner i.e. on 28.09.2021, there was neither any departmental proceeding pending against the petitioner nor was he involved in any pending criminal proceeding. Therefore, in view of the law laid down by the Hon'ble Supreme Court in the case of **Union of India and others vs. K. V. Jankiraman and others** reported in **(1991) 4 SCC 109** as well as the subsequent decision rendered in the case of **Union of India and others vs. Anil Kumar Sarkar** reported in **(2013) 4 SCC 161** the respondents could neither have kept the case of the petitioner for promotion in a "sealed cover" nor could he be denied promotion to the rank of Superintending Engineer along with his juniors.

8. Responding to the above, Mr. P. Nayak, learned Standing Counsel, PWD submits that although the departmental proceeding was initiated against the petitioner subsequent to the holding of the DPC on 28.09.2021, yet, prior to that, the Department of Housing and Urban Affairs had conducted an enquiry and there were instructions from the Additional Chief Secretary of the Housing and Urban Affairs Department not to promote the petitioner to the rank of Superintending Engineer. It was on such ground that the case of the petitioner was kept in a "sealed cover". Mr. Nayak has further submitted that even thereafter, another departmental proceeding has been initiated against the petitioner vide memorandum of charge dated 12.04.2023 pertaining to an incident of bridge collapse at Nagaon and therefore, it cannot be said that the petitioner has been completely exonerated from the allegations of misconduct. It is on such ground Mr. Nayak has resisted the prayer made in the writ petition.

9. Mr. D. Borah, learned Government Advocate, Assam has adopted the arguments advanced by the learned Standing Counsel, PWD.

10. I have considered the submissions made at the bar and have gone through the materials available on record.

11. The first point urged by the petitioner's counsel in this case is to the effect that the authorities could not have imposed the penalty of 'Censure' upon his client in view of the allegations brought in the show-cause notice dated 06.04.2022. It may be noted herein that Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 lays down the procedure to be followed for imposing penalties upon a public servant under the employment of Government of Assam. Sub-rule (12)(a) of Rule 9, however, makes an exception in case, the penalty sought to be imposed is "censure" which provides that the procedure laid down in the Rules 9(1) to (11) would not be required to be followed when the penalty sought to be imposed is "censure". Sub-rule (12)(a) of Rule 9 is reproduced herein below for ready reference :-

> "*12)(a) Notwithstanding anything contained in this rule, it shall not be necessary to follow the procedure laid down in the preceding sub-rules in cases where it appears to the authority competent to impose the penalty at the initial stage of the proceedings that the penalty of censure would be adequate, but if at any later stage it is proposed to impose any other penalty specified in Rule 7, the procedure laid down in the said rules shall be followed.*
>
> *(b) No order imposing the penalty of censure shall however be passed, except after –*
>
> > *(i) the Government servant is informed in writing of the proposal to take action against him and of the allegations on which it is proposed to*

be taken and given an opportunity to make any representation he may wish to make; and

(ii) such representation, if any, is taken into consideration by the Disciplinary Authority."

12. In the present case, there is no doubt or dispute about the fact that the order of penalty of "censure" was imposed upon the petitioner after informing him about the decision to take action against him on the aforementioned allegations and also after giving him an opportunity of making a representation. A reading of the order imposing penalty of "censure" dated 01.07.2022 also goes to show that the penalty of "censure" has been imposed at the initial stage. The petitioner's counsel has not urged any other ground to interfere with the minor penalty of "censure" imposed upon the petitioner. On a careful examination of the materials available on record, I also do not find any justifiable ground to interfere with the order of penalty dated 01.07.2022.

13. In so far as the other grievance of the petitioner pertaining to keeping his candidature in "sealed cover" is concerned, what is to be noted herein that on 28.09.2021 i.e. the date on which the Selection Committee had met and made the recommendations for promotion of several departmental candidates including the petitioner to the rank of Superintending Engineer there was no departmental proceeding pending against the writ petitioner. It is no doubt correct that materials on record indicates that some preliminary enquiry was going on in the Department of Housing and Urban Affairs but what is significant to note herein that the only enquiry contemplated under the law against a Government servant is as per the procedure

prescribed under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964. There is no dispute about the fact that the enquiry allegedly conducted by the Housing and Urban Affairs Department was not an enquiry coming within the ambit of Rule 9 of the Rules of 1964. As a matter of fact, the proceedings initiated against the petitioner under Rule 9 of the Rules of 1964 was by serving the show-cause notice dated 06.04.2022 which culminated in the order dated 01.07.2022 imposing the penalty of 'censure'. Therefore, there can be no doubt about the fact that on the date of holding the DPC/Selection Committee meeting i.e. 28.09.2021 there was no departmental proceeding pending against the petitioner.

14. In the case of **K. V. Jankiraman and others** (supra) the Supreme Court has categorically held that it is only when a charge memo in a departmental proceeding or a charge-sheet in a criminal prosecution is issued to an employee then it can be said that the departmental proceedings/criminal prosecution has been initiated against the employee. The "sealed cover" procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of any preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the "sealed cover" procedure.

15. By relying on the decision in **K. V. Jankiraman and others** (supra) the Supreme Court has categorically held in the subsequent decision rendered in the case of **Anil Kumar Sarkar** (supra) as follows :-

> " *14. As per paragraph 2 of the said memorandum, at the time of consideration of the Government servants for promotion, the following details of Government servants in the consideration zone for promotion*

falling in the categories mentioned should be specifically brought to the notice of the DPC, viz., (i) Government servant is under suspension; (ii) Government servant has been served with a charge sheet and the disciplinary proceedings are pending; and (iii) Government servant is facing prosecution for a criminal charge and the said proceedings are pending. As rightly observed by the High Court, if the above conditions are available, even one of them, then the DPC has to apply the 'sealed cover process'. In the case on hand, it is not in dispute that the relevant date is 21.04.2003, when the respondent's batch mates were promoted, admittedly on that date the respondent was not under suspension, no charge sheet was served upon him nor he was facing any criminal prosecution. In such circumstances, in terms of paragraph 2 referred to above, the recommendation of the DPC has to be honored and there is no question of applying 'sealed cover process'."

16. From a careful analysis of the ratio laid down in the aforementioned two decisions, it is apparent that merely because there were some inter-departmental/preliminary/in-house enquiry going on against the petitioner, the same could not have been a ground for the authorities to adopt a "sealed cover" procedure, more so, when in the decision of the Committee dated 28.09.2021 the DPC had already disclosed the fact that the petitioner has been recommended for promotion to the post of Superintending Engineer. Therefore, there was hardly any scope of having a "sealed cover" proceeding in this case as has been projected in the minutes dated 28.09.2021. Be that as it may, for the reasons stated and discussions made herein above, this Court is of the unhesitant opinion that there was no justifiable ground for the respondents to withhold the promotion of the petitioner by adopting a "sealed cover" procedure. The mere fact that a minor penalty of

'censure' had been imposed upon the petitioner in a proceeding initiated at a stage subsequent to holding of the DPC cannot in any way denude the right of the writ petitioner to be promoted on the basis of recommendations made by the Selection Committee prior to initiation of the departmental proceeding.

17. For the reasons stated herein above, WP(C) No.356/2023 succeeds and is hereby allowed. The respondents are directed to forthwith give effect to the recommendation of the Selection Committee dated 28.09.2021 by promoting the petitioner to the rank of Superintending Engineer in the Public Works Department by giving him seniority with effect from the date on which his juniors were promoted as Superintending Engineer. Appropriate notification on that behalf shall be issued, as expeditiously as possible, but not later than two weeks from the date of receipt of a certified copy of this order.

18. In so far as the submission made by Mr. Nayak, learned Standing Counsel, PWD pertaining to the pendency of other departmental proceeding initiated against the petitioner in the year 2023 is concerned, it is made clear that the authorities would be at liberty to proceed with the matter in accordance with law, if so advised. However, the departmental proceeding initiated against the petitioner by charge-memo dated 12.04.2023 shall not have any bearing on the question of implementation of the recommendation the Selection Committee dated 28.09.2021 and therefore, would not come in the way of issuance of notification of the order of promotion of the petitioner to the rank of Superintending Engineer.

In the light of the observations made herein above, WP(C) No.448/2023 stands

disposed of.

Parties to bear their own cost.

JUDGE

T U Choudhury/Sr.P.S.

Comparing Assistant