

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

...

WP(C) no.827/2023

Reserved on: 04.03.2024

Pronounced on: 03.05.2024

Naba Kumar Giri aged 54 years S/o Byomkesh Ch. Giri R/o Dakshin Daubi Tehsil Contai Purbo Medinipur, West Bengal Force no.901311437 presently posted at 132 Bn. Central Reserve Police Force, Sanat Nagar, Srinagar

.....Petitioner(s)

Through: Mr Waseem Ramzan Lone, Advocate

Versus

1. Union of India Commr/Secy, Home Deptt of Home Affairs, New Delhi
2. Director General, CRPF, New Delhi
3. Special DG, J&K Zone CRPF, Bantalab, Jammu (Union Territory of J&K)
4. Commandant, 5th Sig. Battalion CRPF, Hallomenara, Chandigarh (UT)
5. Commandant, 132 Bn. CRPF Sanat Nagar, Srinagar, J&JK
6. DCO (Comn) cum OC D/5, Signal Bn. CRPF Rambagh, Srinagar (J&K)

.....Respondent(s)

Through: Mr T.M.Shamsi, DSGI with
Ms Yasmeen Jan, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Petitioner prays for quashing of communication/order no.P.VII-1/2022-Est-1 dated 17th January 2023 and order no.P.VII-1/2022-Est-1 dated 12th April 2022 issued by respondents. He also prays to direct respondents to promote him to the rank of Sub Inspector with effect from the year it has become due to him, i.e., 2018, and grant him all service and financial benefits retrospectively which have been granted

to other identically placed Sub Inspectors with whom petitioner was to be promoted. He also seeks a direction upon respondents to grant him all the financial benefits under MACP Scheme to which he is entitled to retrospectively from the date it has become due to him, with a further direction to respondents to release all services, promotional and financial benefits in his favour, which have been withheld by respondents retrospectively from the date they have become due to him.

2. The case set up by petitioner is that he is working as Assistant Sub Inspector in Central Reserve Police Force (CRPF) and is presently posted in 132 Battalion CRPF Sanat Nagar, Srinagar. He was appointed as Constable on 1st April 1990. He was promoted as Major Havaldar. In the year 2005, he underwent training for the post of Sub Inspector. However, due to non-availability of vacancy, he was promoted as ASI in 2010. Petitioner also states that he was to be promoted as Sub Inspector in 2018 along with other eligible candidates but he was dropped from the list. He also claims that he was firstly granted first financial benefit in the year 2003 and second financial benefit was due in 2013 but same was withheld. A case is stated to registered against petitioner by CBI ACB Kolkata on 23rd August 2010 vide RC 0102010A0027 under Section 120-B, 420, 1/120, 7,8,10, 12(2) read with Section 13 (1)(d) & 14 of the Prevention of Corruption Act, which is pending adjudication before the court of CBI Special Court no.2, Alipur South, 24 Pergan at Kolkatta. Petitioner states that it is because of pendency of criminal case that promotional and financial benefits have been withheld. It is stated that respondents vide order dated 7th April 2014 issued an office order recommending financial upgradation

under MACP Scheme for grant of 1st, 2nd and 3rd financial upgradation but he has not been recommended.

3. In their Reply, respondents would state that petitioner was enlisted as Constable (GD) on 1st April 1990. He was re-mustered as Naik/Radio Operator on 27th April 1993. He was promoted to the rank of ASI/RO on 10th May 2010. A criminal case is pending against him. He was even in judicial custody for more than 48 years. He was given bail by the court of competent jurisdiction. He was placed under suspension on 17th February 2011. Suspension was revoked on 8th July 2011 with effect from 23rd May 2011. Sanction for prosecution under Section 19 (1)(c), PC Act, 1988, against petitioner was granted on 28th June 2012. Charge sheet against petitioner was filed on 30th June 2012. The case is still *sub judice*.

4. I have heard learned counsel for parties and considered the matter.

5. Petitioner seeks benefit under Modified Assured Career Progression Scheme as also promotion to the post of Sub Inspector.

6. Insofar as benefit under MACP Scheme is concerned, O.M. no.35034/3/2015-Estt. (D) dated 22nd October 2019 provides that there shall be three financial upgradations under MACPS counted from the direct entry grade on completion of 10, 20 and 30 years' services, respectively or 10 years of continuous service in the same level in Pay Matrix whichever is earlier. The MACPS envisages merely placement in the immediate next higher level in the hierarchy of the Pay Matrix. The Financial upgradations under the MACPS would be admissible up to level 15 in the Pay Matrix, corresponding to the Higher Administrative Grade (HAG). Benefit of pay fixation available at the time of regular

promotion shall also be allowed at the time of financial upgradation under the scheme. Para 17 of MACPS provides that for grant of financial upgradation under the MACPS, the prescribed benchmark shall be 'very good' for all levels. Para 18 provides that in the matter of disciplinary matters/penalty proceedings, grant of benefit under MACPS shall be subject to rules governing normal promotion and such cases are to be regulated under the provisions of CCS (CCA) Rules, 1965, and instructions issued thereunder.

In such circumstances, the benefits sought by petitioner in the instant writ petition can be given only after there is a clearance from vigilance as also criminal/ disciplinary proceedings culminate in acquittal / exoneration of petitioner.

7. Insofar as functional promotion to the post of Sub Inspector is concerned, a reference has been made to O.M. bearing F.no.22034/4/2012-Estt.(D) dated 2nd November 2012, in which comprehensive review of instructions pertaining to vigilance clearance for promotion has been given. It mentions that instructions issued in terms of various O.Ms. on the basis of procedure laid down by the Supreme Court in *Union of India v. K. V. Jana Kiraman, (1991) 4 SCC 109*, makes it clear that vigilance clearance for promotion may be denied in the event government servant is under suspension; government servant in respect of whom charge sheet has been issued and the disciplinary proceedings are pending; and government servants in respect of whom prosecution for a criminal charge is pending. It would be appropriate to reproduce hereunder:

“Instructions issued vide O.M. No. 22012/1/99-Estt. (D) dated 25.10.2004 based on the O.M. No. 22011/4/1991-Estt. (A) dated 14.09.1992 (issued on the basis of procedure laid down by Supreme Court in K.V. Jankiraman case AIR 1991 SC 2010) makes it clear that vigilance clearance for promotion may be denied only in the following three circumstances:-

- (i) Government servants under suspension;
- (ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and
- (iii) Government servants in respect of whom prosecution for a criminal charge is pending.

Withholding of vigilance clearance to a Government servant who is not under suspension or who has not been issued a charge sheet and the disciplinary proceedings are pending or against whom prosecution for criminal charge is not pending may not be legally tenable in view of the procedure laid down in the aforesaid O.Ms.

2. Existing instructions provide for processing the cases of disciplinary proceedings in a time bound manner. A number of cases have however, come to notice where initiation of disciplinary proceedings/issue of chargesheet/ processing of the case is considerably delayed by the administrative Ministries/ Departments. Such delays allow an officer whose conduct is under cloud, to be considered for promotion. It becomes essential in respect of officer(s) in whose case disciplinary proceedings are contemplated or pending and are included in consideration zone for promotion, necessary action be taken for placing the proposal before the DPC so that vigilance clearance is not allowed as per conditions mentioned in para 1 above.

3. The Hon'ble Supreme Court in its judgment dated 27.08.1991 in Union of India Vs. K.V. Jankiraman etc.(AIR 1991 SC 2010) has held

“5. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is therefore, no discrimination when in the matter of promotion, he is treated differently”.

4. The issue of promotion of an officer who may be technically cleared from vigilance angle but in whose case it

may not be appropriate to promote him/her in view of doubtful integrity or where a charge-sheet is under consideration etc has been under examination in this Department.

5. The O.M. No. 22012/1/99-Estt. (D) dated 25th October, 2004 further provides that a DPC shall assess the suitability of the Government servant coming within the purview of the circumstances mentioned in para 2 of the Office Memorandum No.22011/4/91-Estt. (A) dated 14.09.1992, along with other eligible candidates, without taking into consideration the disciplinary case/criminal prosecution pending. No promotion can be withheld merely on the basis of suspicion or doubt or where the matter is under preliminary investigation and has not reached the stage of issue of charge sheet etc. If in the matter of corruption/ dereliction of duty etc., there is a serious complaint and the matter is still under investigation, the Government is within its right to suspend the official. In that case, the officer's case for promotion would automatically be required to be placed in the sealed cover.

6. When a Government servant comes under a cloud, he may pass through three stages, namely, investigation, issue of charge sheet in Departmental Proceedings and/or prosecution for a criminal charge followed by either penal-671 conviction or exoneration/ acquittal. During the stage of in prior to issue of charge sheet in disciplinary proceedings or prosecution, if the Government is of the view that the charges are serious and the officer should not be promoted, it is open to the Government to suspend the officer which will lead to the DPC recommendation to be kept in sealed cover. The sealed cover procedure is to be resorted to only after the charge memo/charge sheet is issued or the officer is placed under suspension. The pendency of preliminary investigations prior to that stage is not sufficient to adopt the sealed cover procedure.

7. The law on sealed cover based on the judgment of the Apex Court in Union of India vs. K.V. Janakiraman etc. (AIR 1991 SC 2010), is by now well settled. The O.M. dated 14.9.92 confined the circumstances for adopting sealed cover to the three situations mentioned in para 2 of the said O.M. Even after recommendation of the DPC, but before appointment of the officer if any of the three situations arise, the case is deemed to have been kept in sealed cover by virtue of para 7 of the O.M. dated 14.9.92.

8. As regards the stage when prosecution for a criminal charge can be stated to be pending, the said O.M. dated 14.9.92 does not specify the same and hence the definition of pendency of

judicial proceedings in criminal cases given in Rule 9 (6)(b)(i) of CCS (Pension) Rules, 1972 is adopted for the purpose. The Rule 9 (6)(b)(i) of CCS (Pension) Rules, 1972 provides as under:-

“(b) judicial proceedings shall be deemed to be instituted –
(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made”.

9. For the purpose of vigilance clearance for review DPC, instructions exist in O.M. No. 22011/2 /99-Estt.(A) dated 21.11.2002 that review DPC will take into consideration the circumstances obtaining at the time of original DPC and any subsequent situation arising thereafter will not stand in the way of vigilance clearance for review DPC. However, before the officer is actually promoted it needs to be ensured that he / she is clear from vigilance angle and the provision of para 7 of O.M. No. 22011 / 4 / 91-Estt. (A) dated 14.09.1992 are not attracted.

10. Opening of sealed cover on conclusion of proceedings, is covered in the instructions in para 3 of the O.M. dated 14.9.92. In cases where by the time the Departmental Proceedings are concluded and the officer is fully exonerated but another charge sheet has been issued, the second charge sheet will not come in the way of opening of sealed cover and granting promotion notionally from the date of promotion of the junior and para 7 of O.M. dated 14.9.92 will not apply as clarified in the O.M. No. 22011/2 / 2002-Estt.(A) dated 24.2.2003. After the disciplinary proceedings are concluded and penalty is imposed, vigilance clearance will not be denied. The details of the penalty imposed are to be conveyed to the DPC.

11. This Department has issued separate instructions for accordance of vigilance clearance to a member of Central Civil Services/holder of Central Civil post with respect to (a) empanelment (b) deputation (c) appointments to sensitive posts and assignments to training programmes (except mandatory training) vide O.M. No. 11012/ 11/ 2007-(Estt. A) dated 14.12.2007. It has been further clarified in the O.M. No.11012/6/ 2008-Estt. (A) dated 07.07.2008 that these instructions do not apply to promotions. While consideration for promotion is a right of an employee but empanelment, deputation, posting and assignment for training (except mandatory training) is not a right of an employee and is decided keeping in view the suitability of the officer and administrative exigencies.

12. It may thus be noted that vigilance clearance cannot be denied on the grounds of pending disciplinary/criminal/court

case against a Government servant, if the three conditions mentioned in Para 2 of this Department's O.M. dated 14.09.1992 are not satisfied. The legally tenable and objective procedure in such cases would be to strengthen the administrative vigilance in each Department and to provide for processing the disciplinary cases in a time bound manner. If the charges against a Government servant are grave enough and whom Government does not wish to promote, it is open to the Government to suspend such an officer and expedite the disciplinary proceedings.

13. All Ministries/Departments are, therefore, requested to keep in view the above guidelines while dealing with cases of vigilance clearance for promotion of the Government servants.”

8. It is mentioned in aforesaid OM that withholding of vigilance clearance to a Government servant who is not under suspension or who has not been issued a charge sheet and disciplinary proceedings are pending or against whom prosecution for criminal charge is not pending may not be legally tenable.
9. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is therefore, no discrimination when in the matter of promotion, he is treated differently.
10. The law has been enunciated by the Supreme Court in K.V. Janakiraman (supra) and State of Punjab v. Chamanlal Goel (1005) 2 SCC 570, that there is no right in a government servant to be considered

for promotion during pendency of either departmental proceedings or criminal proceedings or both against such government servant. Thus, at this stage, petitioner cannot demand grant of promotion to the next higher rank/post inasmuch as such consideration for promotion can/may become available to him on his acquittal from criminal proceedings.

11. It is worthwhile to mention that as and when the criminal proceedings conclude in favour of a government servant by way of an acquittal and such government servant stands also exonerated from departmental proceedings, then notwithstanding superannuation of such government servant, notional benefits attached to the promotion(s) which are due to government servant would be calculated and the pension fixed accordingly.

12. For the foregoing reasons, instant writ petition is without any merit and is accordingly **dismissed**.

(Vinod Chatterji Koul)
Judge

Srinagar

03.05.2024

Ajaz Ahmad, Secy.

Whether approved for reporting? Yes/No.