

CWP-23501-2018 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

106+227

CWP-23501-2018 (O&M)
Date of Decision: 20.02.2024

Sandeep Vashishth

...Petitioner

Versus

Director General, ITBPF and others

...Respondents

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present:- Mr. Rajeev Anand, Advocate for the petitioner
Mr. Sunil Kumar Sharma, Senior Panel Counsel,
for Union of India-respondents

JAGMOHAN BANSAL, J. (Oral)

1. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking direction to the respondents to promote him w.e.f. 25.04.2017 instead of 16.03.2020.
2. The petitioner w.e.f. 05.05.2007 joined respondent-Indo Tibetan Border Police Force (for short 'ITBP') as Constable (General Duty). In September' 2011, he was selected and sent on deputation to National Security Guards (for short 'NSG'). The respondent found that petitioner during 2012-2016 has been made payment by them in addition to the payments made by NSG. On the asking of respondent-ITBP, the petitioner returned excess payment to the tune of ₹17,02,156/- on 12.06.2017. The petitioner remained

on deputation till 31.12.2016. The petitioner re-joined his parent department in 2017. The respondent-ITBP vide order dated 24.04.2017 (Annexure P-3), promoted him along with other employees. The promotion was granted subject to conditions contemplated in the aforesaid order. The respondent-ITBP formed an opinion that petitioner does not comply with Condition No.(d) of the promotion order dated 25.04.2017 (Annexure P-3), thus, he is not eligible to promotion. The petitioner was thereafter actually promoted w.e.f. 16.03.2020.

3. Mr. Rajeev Anand, Advocate submits that on 25.04.2017 no departmental or vigilance matter was pending against the petitioner, thus, he could not be denied fruit of the promotion. The case of the petitioner is squarely covered by judgment of Apex Court in ***Union of India and others v. K.V. Jankiraman and others, (1991) 4 SCC 109***. The Government of India has issued Office Memorandum dated 25.10.2004 (Annexure P-9) which is in consonance with judgment of Supreme Court in ***K.V. Jankiraman (supra)***. In the said memorandum, it has been categorically provided that promotion shall not 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 charge sheet.

4. *Per contra*, Mr. Sunil Kumar Sharma, Advocate submits that in the order dated 25.04.2017 (Annexure P-3), it was categorically mentioned that an employee would not be promoted if the departmental inquiry or vigilance matter is pending or contemplated against him or his integrity is doubtful. The petitioner was paid excess payment to the tune of ₹16.40

Lakhs during January' 2012 to February' 2017, thus, by order dated 24.03.2017, a committee was constituted to inquire into the matter. As the committee to inquire the excess payment has already been constituted before 25.04.2017, the petitioner was not promoted w.e.f. 24.03.2017.

5. I have heard the arguments of learned counsels for both sides and perused the record with their able assistance.

6. The conceded position emerging from the record is that the petitioner joined respondent-ITBP on 05.05.2007 and he remained posted with ITBP till 31.12.2011. He joined NSG on deputation w.e.f. 01.01.2012. He worked with NSG till 31.12.2016. He joined his parent department in 2017. While he was posted with NSG, the respondent-ITBP made him excess payment to the tune ₹16.40 Lakhs. The petitioner, in June' 2017, returned excess payment. The petitioner was promoted along with other officers vide order dated 25.04.2017 subject to conditions mentioned in the said order. The respondent-ITBP did not actually promote the petitioner w.e.f. 25.04.2017 because a committee had been constituted on 24.03.2017 with respect to excess payment made to him. The petitioner was actually promoted w.e.f. 16.03.2020.

7. From the conceded position and argument of both sides, the question which arises for the consideration of this Court is whether the petitioner could be denied promotion w.e.f. 25.04.2017 on the ground that a committee prior to said date was constituted to enquire excess payment made to him.

8. From the perusal of order dated 25.04.2017 (Annexure P-3), it comes out that a number of officers were promoted subject to conditions enumerated in the aforesaid order. The relevant extracts of order dated 25.04.2017 are reproduced as under:-

“Dated 25.04.2017

Order

The following Constable/GD who were brought in the approved list-2016 as per the order no.9613-50 dated 25.04.2017 of the Directorate for promotion to the post of HC/GD are approved for promotion to the post of Head Constable/GD in pay Band 1 i.e. Rs.5200-20200/- plus Grade Pay Rs.2400 (now level-4 as per the recommendation of seventh pay commission) with immediate effect. The concerned officers will pass the formal orders of their promotion provided they comply with the following conditions as mentioned in Para No.1(a)(i) of Standing Order 03/2013.

- a) Present Medical Category is SHAPE-1*
- b) No adverse remark in the ACRs of last 05 years*
- c) No major punishment in past 05 years and no minor punishment in last one year*
- d) No DE/Vigilance matter is pending or contemplated against them and their integrity should be beyond doubt*
- e) should have passed 10th class from recognized Board/University or its equivalent*
- f) Pre promotional courses should be qualified.”*

9. The petitioner was made excess payment to the tune of ₹16.40 Lakhs during 01.12.2012 to February’ 2017 i.e. the period during which he was posted with NSG on deputation. The respondent vide order dated 24.03.2017 constituted a committee to inquire factum of excess payment

made to the petitioner. The committee was constituted on 24.03.2017 i.e. before 25.04.2017 (date of promotion). The petitioner was not served with the charge sheet prior to 25.04.2017. Leaving aside the charge sheet, the preliminary inquiry had not concluded before the said date. The respondent is bound by Office Memorandum dated 25.12.2004 (Annexure P-9) issued by Ministry of Personnel, Public grievances and Pensions, Department of Personnel & Training. Paragraph 3 of the said memorandum provides that promotion shall not 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 charge sheet. Paragraph 3 of the aforesaid Memorandum is reproduced as under:-

“3. It is also clarified that there is no requirement of furnishing a separate integrity certificate to the DPC. In terms of the judgment of the Hon’ble Supreme Court in the case of Union of India vs K.V. Janakiraman etc. (AIR 1991 SC 2010), 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/derelection of duty etc., there is a serious complaint and the matter is still under investigation of CBI or otherwise, 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.”

10. A Three Judge Bench of Apex Court in ***K.V. Jankiraman (supra)*** has held that pendency of preliminary investigation will not be sufficient to enable the authorities to adopt sealed cover procedure. The Court

noticed that preliminary investigation takes an inordinate long time and particularly when it is initiated at the instance of interested persons who deliberately keep the matter pending. Many times, preliminary investigation does not result in issuance of charge sheet, thus, an employee cannot be denied promotion on the ground of preliminary investigation. The relevant extracts of the aforesaid judgment read as:

“16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is 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 preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise

the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p. 196, para 39)

“(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

*(2) ****

*(3) ****

(4) the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed before the criminal court and not before;”

17. There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.”

11. In the case in hand, the question of promotion of the petitioner was considered and adjudicated on 25.04.2017. He was found eligible for promotion, however, was not promoted on account of constitution of a committee to inquire excess payment made to him. Neither was charge sheet

issued prior to 25.04.2017 nor the preliminary inquiry concluded, thus, case of the petitioner is squarely covered by Office Memorandum dated 25.10.2004 issued by Government of India as well judgment of Apex Court in *K.V. Jankiraman (supra)*.

12. In the wake of above discussion and findings, this Court is of the considered opinion that present petition deserves to be allowed and accordingly allowed. The respondents are directed to grant benefit of promotion to the petitioner w.e.f. 25.04.2017 and release all consequential benefits.

13. Pending application(s), if any, shall also stand disposed of.

(JAGMOHAN BANSAL)
JUDGE

20.02.2024
Mohit Kumar

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No