

A.F.R.
Judgement reserved on 11.2.2020
Judgement delivered on 26.5.2020

Case :- WRIT - A No. - 6322 of 2018
Petitioner :- Dilip Kumar Pandey
Respondent :- State of U.P. and Another
Counsel for Petitioner :- Ashok Kumar Pandey
Counsel for Respondent :- C.S.C.

Hon'ble Saral Srivastava,J.

1. Heard Sri Ashok Kumar Pandey, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.
2. The petitioner by means of the present writ petition has assailed the order dated 2.2.2018 passed by Principal Secretary (Finance), Government of U.P., Lucknow by which promotion accorded to the petitioner by order dated 30.6.2016 has been withdrawn.
3. The case of the petitioner in the writ petition is that he was initially appointed as Treasury/Accounts Officer pursuant to a selection held by Uttar Pradesh Public Service Commission in accounts cadre. The petitioner was promoted in the next higher grade i.e. Rs. 6600/- as Senior Treasury Officer/Senior Accounts Officer in September 2012. The petitioner was subsequently promoted in the grade of Rs. 7600/- as Chief Treasury Officer/Chief Accounts Officer by order dated 30.6.2016. The respondent illegally and arbitrarily by order dated 2.2.2018 withdrew the order dated 30.6.2016 according promotion to the petitioner and directed the recommendation of the selection committee to be kept in seal cover. The order dated 2.2.2018 was passed on account of pendency of criminal cases against the petitioner and also in compliance of the order dated 18.1.2018 passed by the Lucknow Bench of this Court in Writ Petition No. 772 (S/B) of 2018.
4. The petitioner has averred in the writ petition that in Case Crime No. 308, 309 of 2003, the allegation against the petitioner is that two

teachers namely Sri Mangla Prasad Singh and Sri Surendra Kumar Singh have been illegally paid salary for which Charge-sheet Nos. 15 of 2005 and 16 of 2005 have been filed in the aforesaid criminal cases. The petitioner has tried to justify his action of disbursement of salary to the aforesaid two teachers on the ground that the role of the Accounts Officer in the disbursement of the salary is very limited, and the salary was paid in compliance of the order of the District Inspector of Schools dated 6.5.2002 as he being a subordinate officer was bound to comply with the said order. In respect of Case Crime No. 307 of 2005, the petitioner has stated that he had joined at District-Ballia in November 2001 whereas the salary to Sri Ravi Shankar Pandey was released in the year 1999, and before his joining at District-Ballia, there were about three Accounts Officer who had ensured the payment of salary to Sri Ravi Shankar Pandey, therefore, it is a case of false implication.

5. The respondent filed counter affidavit contending inter-alia that the order dated 2.2.2018 has been passed in compliance of order dated 18.1.2018 of the Lucknow Bench in Writ Petition No. 772 (S.B.) of 2018 filed by one Umesh Kumar Upadhyaya claiming parity with the petitioner for promotion on the post of Chief Treasury Officer/Chief Accounts Officer on the ground that Dilip Kumar Pandey (petitioner herein) had been granted promotion despite the pendency of criminal case against him whereas he was denied promotion on account of pendency of criminal case; this court directed the State Government either to grant promotion pay scale to the petitioner(Umesh Kumar Upadhyaya) or withdraw the promotion accorded to Dilip Kumar Pandey (petitioner herein). In compliance of the order of Lucknow Bench of this Court dated 18.1.2018, the case of Umesh Kumar Upadhyaya was considered and it was decided that it was not possible to grant the promotion to Umesh Kumar Upadhyaya till the conclusion of criminal cases against him. Accordingly, the order dated 2.2.2018 was passed withdrawing the promotion accorded to the petitioner.

6. The respondents further placed reliance upon the office Order No. 13/21/89-Ka-1-1997 dated 28.5.1997 which provides the procedure of

sealed cover, and according to the paragraph No. 2 (Ga) of the said office Order, if the case of an employee against whom a criminal case is pending has been considered by the selection committee for promotion, the recommendation of the Selection Committee of such candidate shall be kept in sealed cover till the conclusion of the criminal trial. It is further averred that the order impugned is per law and does not call for interference by this Court.

7. The petitioner filed rejoinder affidavit denying the averment of the counter affidavit.

8. Challenging the aforesaid order, learned counsel for the petitioner has made two submissions; Rule 17 of The Uttar Pradesh Finance and Accounts Service Rules, 1992 (hereinafter referred to as 'Rules 1992') does not postulate that a person against whom a criminal case is pending can be denied promotion on the ground of pendency of the criminal case. He submits that Rule 17 provides that the criteria to grant promotion is seniority subject to rejection of unfit. Thus, his submission is that the seniority subject to rejection of unfit is the sole criteria for grant of promotion, and Office Order dated 28.5.1997 cannot override Rule 17 of Rules, 1992 and cannot be invoked to deny the promotion to the petitioner. In support of the above submission, he has placed reliance upon the judgement of Apex Court in the case of **Dr Rajendra Singh Vs. State of Punjab and others, AIR 2001 SC 1769** and judgment of this Court in **Anjani Mishra and others Vs. State of U.P. and others, 2007 (1) UPLBEC 260**.

9. The second submission of counsel for the petitioner is that the impugned order has been passed in violation of principles of natural justice inasmuch as once the petitioner had been accorded promotion, it was incumbent upon the authorities to give due and proper opportunity of hearing to the petitioner before withdrawing the order of promotion. Thus, the submission is that the impugned order is illegal and not sustainable in law. In support of the contention of violation of principles of natural justice, he has placed reliance upon the judgement

of Apex Court in the case of **State of Punjab Vs. K.R. Erry and Sobhag Rai Mehta, AIR 1973 SC 834.**

10. Per contra, learned Standing Counsel contends that the impugned order has been passed in compliance of the order dated 18.1.2018 passed by Lucknow Bench of this Court in Writ Petition No. 772 (S.B.) of 2018 and so as long as the said order stands, the respondents are bound to obey it. He further contends that the Office Memorandum dated 28.5.1997 is not contrary to Rule 17 of the Rules 1992 as it only provides the procedure to keep the recommendation of the Selection Committee in sealed cover in certain contingency. He submits that though the seniority is the prime consideration for promotion, that does not imply that an unfit person can be accorded promotion.

11. He further contends that in the case in hand, it is not in dispute that the chargesheet in criminal cases have been filed against the petitioner before the promotion of petitioner and he could not have been promoted. Therefore, he submits that the observance of principles of natural justice is not required and would be an empty formality.

12. I have heard the rival submissions of learned counsel for the parties and perused the record.

13. To appreciate the first submission of counsel for the petitioner that the office Order dated 28.5.1997 cannot override Rule 17 of Rules 1992, It would be pertinent to extract Rule 17 of Rules 1992 which reads as under:-

“17. Senior Scale Grade-II.-Selection to the Senior Scale, Grade II shall be made on the recommendation of a Selection Committee, on the basis of seniority subject to rejection of unfit from amongst such substantively appointed officers of the Ordinary Grade who have completed eight years service, as such on the first day of July of the calendar year in which the selection is made. The Selection Committee shall be constituted as under:-

(i)	the Principal Secretary or the Secretary, as the case may be to the Government in Finance Department.	Chairman
(ii)	Secretary to the Government in Personnel Department or his nominee not below the rank of Joint Secretary.	Member

(iii)	Director Treasuries, Uttar Pradesh	Member
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Provided that the Government may, in special circumstances relax the limit of service fixed for selection to the Senior, Grade-II.”

14. Rule 17 postulates that the criteria for promotion is seniority subject to rejection of unfit. Reading of Rule 17 of the Rules 1992 does not suggest that the promotion is automatic and seniority alone is the sole criteria. The word used in Rule 17 is "seniority subject to rejection of unfit", which means that seniority alone is not the sole criteria. The suitability of a candidate is also the relevant criteria for consideration for promotion. Thus, if a candidate is not found fit by the Selection Committee, he cannot be promoted solely on the ground of seniority. The pendency of a criminal case against an employee would be a valid and proper circumstance to be taken into account while considering the suitability of a candidate for promotion under Rule 17 of Rules 1992.

15. In the instant case, it is not in dispute that chargesheet has been issued against the petitioner in three criminal cases i.e. Case Nos. 1254 of 2005, 1252 of 2005 and 1253 of 2005 arising out of Case Crime Nos. 307, 308, 309 of 2003. The record reflects that further proceeding in the aforesaid criminal cases has been stayed by this Court in Application under Section 482 Cr.P.C. No. 10770 of 2005 (Annexure No. 10 to the writ petition) but it does not mean that the petitioner has been exonerated from all the charges. The stay of further proceedings in the criminal case does not mean that the charges which have been levelled against the petitioner in criminal cases are false and have been quashed. In the opinion of the court, as the chargesheet in the criminal cases have been filed against the petitioner before the meeting of D.P.C., therefore, the recommendation of the selection committee should have been kept in the sealed cover in view of office Order dated 28.5.1997. Hence, the petitioner could not have been recommended by the selection committee nor could he be promoted. Thus, the promotion of the petitioner was illegal.

16. The Division Bench of this Court in the case of **Dharam Narain Upadhyaya Vs. State of U.P. and others, 2016 (1) AWC 454 (LB)**, has upheld the rejection of promotion in a case where the competent authority took a decision and sanctioned the prosecution before the decision of Departmental Promotion Committee. The paragraph Nos. 13 to 15 of the said judgment is extracted hereinbelow:-

“13. Under the terms of office memorandum dated 28 May 1997 the term 'pendency of prosecution' has been clarified with the words that 'the charge-sheet has been submitted in the competent Trial Court'.

14. In the case of Union of India Vs. Kewal Kumar (supra) the Supreme Court considered its judgment rendered in the case of Union of India Vs. K.V. Jankiraman (Supra) and held that in K.V. Jankiraman itself it has been pointed out that the sealed cover procedure is to be followed where a Government Servant is recommended for promotion by the Departmental Promotion Committee but before he is actually promoted, if he is either placed under suspension or disciplinary proceedings are taken against him or decision has been taken to initiate the proceedings or criminal prosecution is launched or sanction for such prosecution has been issued or decision to accord such sanction is taken. The object of following the sealed cover procedure has been indicated by the Supreme Court in the case of Delhi Development Authority Vs. H.C. Khurana (1993) 3 SCC 196 the relevant paragraphs No.13 and 14 are reproduced as under:

"13. It will be seen that in Jankiraman also, emphasis is on the stage when 'a decision has been taken to initiate the disciplinary proceedings' and it was further said that 'to deny the said benefit (of promotion), they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee'. The word 'issued' used in this context in Jankiraman it is urged by learned counsel for the respondent, means service on the employee. We are unable to read Jankiraman in 'this manner. The context in which the word 'issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch of the chargesheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision. Obviously, the contrary view cannot be taken.

14. 'Issue' of the charge-sheet in the context of a decision taken to initiate the disciplinary proceedings must mean, as it does, the framing of the charge-sheet and taking of the necessary action to despatch the charge-sheet to the employee to inform him of the charges framed against him requiring his explanation; and not also the further fact of service of the charge-sheet on the employee. It is so, because knowledge to the employee of the charges framed against him, on the basis of the decision taken to initiate disciplinary proceedings, does not form a part of the decision making process of the authorities to initiate the disciplinary proceedings, even if framing the charges forms a part of that process in certain situations. The conclusions of the Tribunal quoted at the end of para 16 of the decision in Jankiraman which have been accepted thereafter in para 17 in the manner indicated above, do

use the word 'served' in conclusion No.(4), but the fact of 'issue' of the charge-sheet to the employee is emphasised in para 17 of the decision. Conclusion No.(4) of the Tribunal has to be deemed to be accepted in Jankiraman only in this manner."

15. In view of the aforesaid proposition of law laid down by the Hon'ble Supreme court, we are of the view that the pendency of prosecution is not based upon the submission of charge-sheet in the competent Trial Court. Once the competent authority took a decision to initiate a criminal proceeding and sanctioned the prosecution, it is an appropriate stage to withhold the recommendations of the Departmental Promotion Committee from giving effect to. ”

17. Now coming to the argument of counsel for the petitioner that the Office Order dated 28.5.1997 cannot override Rule 17 of the Rules 1992 which does not prohibit the promotion on the ground of pendency of criminal proceedings. To appreciate the aforesaid submission, it would be apposite to extract one passage from the Division Bench judgment of this Court in the case of **Raj Karan Yadav Vs. High Court of Judicature at Allahabad, 2018 (10) ADJ 61 (DB)** wherein this Court has delineated the object of adopting sealed cover procedure. Paragraph No. 30 of the said judgment is extracted hereinbelow:-

“30. We have given our anxious consideration to the rival submissions. Before we proceed to address the issue as to whether adoption of sealed cover procedure was justified in the facts of the case, if not, its consequences, it would be useful to first notice as to what purpose adoption of sealed cover procedure serves in matters relating to departmental promotion. The object of adopting a sealed cover procedure is to ensure that a person against whom a decision is taken to proceed departmentally or judicially on a charge constituting misconduct is not left out of consideration for promotion merely because an enquiry is pending against him, therefore to balance the interest of the Establishment, which is that an unworthy person is not promoted, and that of the incumbent, so that upon exoneration in enquiry he is not deprived of the fruits of promotion from the date his fellow colleagues would enjoy, the candidature of the incumbent for promotion is considered but recommendation is kept in a sealed cover to be opened and implemented upon exoneration in the inquiry.”

18. There is no quarrel to the proposition of law that Office Memorandum or government order cannot override a statutory provision, but if the rules are silent on any particular point, the government can fill the gap and supplement the rules and issue instructions not inconsistent with the rules. Thus, keeping in view the

object for adopting sealed cover procedure as explained by this Court in the case of **Raj Karan Yadav (supra)**, the Office Memorandum dated 28.5.1997 cannot be said to be inconsistent or overrides Rule 17 of the Rules,1992.

19. Counsel for the petitioner could not demonstrate as to how the Office Memorandum dated 28.5.1997 is inconsistent with the aforesaid Rule 17. Accordingly, the court is of the opinion that the judgments of **Dr Rajendra Singh (supra) and Anjani Mishra (supra)** relied upon by counsel for the petitioner are of no help to the petitioner. In view of the aforesaid discussion, this Court does not find any substance in the first submission of counsel for the petitioner.

20. As regards the second submission of the counsel for the petitioner that the opportunity of hearing ought to have been afforded to the petitioner by the respondents before passing the impugned order, it is worth to mention that it is settled law that where the facts are admitted and only one conclusion is possible, the observance of principles of natural justice is empty formality and observance of it is not necessary since it does not cause any prejudice to the person concerned. The Apex Court in the case of **S. L. Kapoor vs Jagmohan & Ors, 1980 (4) SCC 379**. Paragraph No. 17 of the said judgment is extracted hereinbelow:-

“17. Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non observance of natural justice but because Courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.”

21. In the present case, it is admitted on record that three criminal cases are pending against the petitioner in which chargesheet has been filed. The petitioner could not have been promoted due to pendency of the criminal cases against him and sealed cover procedure should have been adopted by the authorities as provided in Office Order dated

28.5.1997, but the petitioner was illegally promoted. Thus, non-observance of the principle of natural justice in the instant case had not caused any prejudice to the petitioner as he could not have been promoted due to pendency of the criminal case. For the aforesaid reason, the judgment of the Apex Court in the case of **State of Punjab (supra)** is not applicable in the present case. Accordingly, the court is of the opinion that the second submission of the petitioner is also devoid of merit.

22. Further, it is pertinent to mention that there is nothing on record to indicate that the order of this court dated 18.01.2018 in Writ Petition No. 772 (S.B.) of 2018 has either been vacated or set aside in appeal and as long as the order of this court dated 18.01.2018 stands, the authorities are bound to obey it.

23. Given the reason above, the impugned order cannot be said to be arbitrary or illegal. The writ petition lacks merit and is, accordingly, **dismissed** with no order as to cost.

Order Date :- 26.5.2020
Jaswant