

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6806 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

JANAK NATAVARBHAI SUTHAR

Versus

STATE OF GUJARAT THROUGH SECRETARY & 1 other(s)

Appearance:

MR NIRAV C THAKKAR(2206) for the Petitioner(s) No. 1

MR SHIVAM DIXIT, AGP for the Respondent(s) No. 1,2

CORAM:HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR

Date : 05/05/2023

ORAL JUDGMENT

1. By way of this petition, the petitioner has prayed for the following reliefs :

“(A) To admit this petition;

(B) To issue appropriate writ, order or direction directing

the respondents to consider and process the case of the petitioner for promotion to the post of Deputy Engineer pursuant to meetings of DPC dated 29.6.2009, 29.8.2009 and 25.3.2010 and thereafter to issue order of promoting the petitioner to the post of Deputy Engineer from the deemed date since the petitioner is superannuated from service on 30.11.2012;

(C) During pendency and final hearing of this petition, be pleased to direct the respondents to calculate and pay the pension and other retirement dues of the petitioner by considering the petitioner as having superannuated from the post of Deputy Engineer from the date the promotion to the said post fell due i.e. pursuant meetings of the DPC dated 29.6.2009, 29.8.2009 and 25.3.2010;

(D) To pass such other and further orders as may be deemed fit in the facts and circumstances of the present case.”

FACTUAL MATRIX :

2. The facts giving rise to the present petition may be summarised as under :

2.1. It is the case of the petitioner that he was working as an Assistant Executive Engineer with the respondent in the Panam Irrigation Project and was looking after various works regarding the construction of the check dams in the department. He was due for promotion to the post of Deputy Engineer.

2.2. It is the case of the petitioner that the first Departmental Promotion Committee had conveyed meetings on several occasions (i.e. on 29.6.2009, 29.8.2009 and 25.3.2010) for considering giving promotion to the posts of Deputy Engineer to the eligible employees from the cadre of Assistant Executive Engineers. The petitioner, on the strength of his work performance and blot-less career, was considered for being promoted to the higher post along with the other employees. The petitioner was one of the senior most Assistant Executive Engineers to be placed in the list of employees being considered for promotion and his name was also recommended for promotion even by the GPSC. It is further the case of the petitioner that he came to know that his name was cleared by the DPC as well as by the GPSC and, therefore, he ought to have been given promotion to the post of Deputy Engineer. However, to the prejudice of the petitioner he was not given the promotion, thereby violating his fundamental rights.

2.3. It is the case of the petitioner that on 6/8.10.2010, a charge-sheet came to be issued to the petitioner along with many other employees for the alleged irregularity in the construction work of various check dams in the Panchmahals district during the period from 2005 to 2006. It is the case of the petitioner that on the basis of the said charge-sheet, the petitioner was not given promotion to the post of Deputy Engineer and his juniors were given

promotion vide order dated 5.1.2011. In the departmental proceedings, the petitioner had filed his reply to the charge-sheet dated 6.10.2010, on 1.12.2010. Ultimately, the petitioner came to know that the Inquiry Officer found that the charges levelled against the petitioner were not proved or were partially proved. However, the higher officer found that the charges proved against the petitioner were administrative lapses only and there was no financial loss caused to the State Government.

2.4 The petitioner, on attaining the age of superannuation, retired from service on 30.11.2012.

3. In the backdrop of the aforesaid facts, the petitioner is here before this Court with the present petition claiming promotion to the post of Deputy Engineer pursuant to the first Departmental Promotion Committee meetings convened on 29.6.2009, 29.8.2009 and 25.3.2010, as subsequently his name was even cleared by the GPSC too.

SUBMISSIONS ON BEHALF OF THE PETITIONER :

4. Learned advocate for the petitioner Mr. Nirav C. Thakkar has vehemently submitted that the petitioner was working as an Assistant Executive Engineer in the Panam Irrigation Project of the State Government. He was due to be promoted to the post of Deputy Engineer. The first Departmental Promotion Committee had conveyed meetings on several occasions (i.e. on 29.6.2009, 29.8.2009 and 25.3.2010) for considering and giving promotion

to the eligible employees from the cadre of Assistant Executive Engineers. He submitted that on the strength of the work performance and blot-less career, the name of the petitioner was considered for being promoted to the higher post of Deputy Engineer along with other employees. He would submit that the name of the petitioner was cleared by the Departmental Promotion Committee and his name was recommended to the GPSC for promotion and the GPSC also cleared his name. Therefore, the petitioner ought to have been given promotion to the post of Deputy Engineer.

4.1. Learned advocate Mr.Thakkar would further submit that to the prejudice of the petitioner, under the guise of a charge-sheet issued on 6/8.10.2010 for the alleged irregularity in the construction work of various check dams in the Panchmahals district during the period from 2005 to 2006, the petitioner was not given promotion to the post of Deputy Engineer and his juniors were given promotion vide order dated 5.1.2011 even though his name was cleared by the Departmental Promotion Committee as well as by the GPSC.

4.2. Learned advocate Mr.Thakkar further submitted that after issuance of the charge-sheet in the year 2010, for the alleged irregularity of the year 2005-2006, what reason had occasioned for the department to once again reconsider the name of the petitioner and placed in the second Departmental Promotion Committee held in the year 2012. The said act itself, on the part of the respondent, smacks doubt and has caused prejudice to the petitioner. It is apparently clear from the record that though

the name of the petitioner was cleared by the Departmental Promotion Committee as well as by the GPSC, however, with a view to favour some juniors to the petitioner, in a *mala fide* and arbitrary manner, the petitioner was denied the promotion. The petitioner had filed his reply to the said charge-sheet on 1.12.2010 and the petitioner came to know that the Inquiry Officer could not prove or partially prove the charges levelled against the petitioner and the higher officer found that the charges levelled against the petitioner were in the nature of administrative lapses only and there was no financial loss caused to the State Government, even though the petitioner was visited with punishment of Rs.200=00 pension cut for three months. Even assuming for the moment that the said order of punishment was inflicted upon the petitioner, it would not come in the way to consider the case of the petitioner for promotion as it was inflicted subsequently. In this regard, Mr.Thakkar, learned advocate for the petitioner, has profitably relied upon a decision of the Apex Court in the case of ***Union of India vs. K.V.Jankiraman, reported in AIR 1991 SC 2010***. In the said case, the Apex Court took the view that promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings were pending against the employee. To deny the said benefit, it must be shown that at the relevant time the disciplinary/criminal proceedings were pending at the stage when charge-memo/ charge-sheet was issued to the employee.

4.3. Learned advocate Mr.Thakkar further submitted that in the present case, the question of following the sealed cover procedure and the Government Resolution to keep the name of the petitioner in abeyance would not arise as the petitioner has

already superannuated. Hence, the petitioner is entitled for the deemed promotion and the ancillary benefits.

4.4. Learned advocate Mr.Thakkar finally requested this Court to allow the petition by directing the respondents to consider and process the case of the petitioner for promotion to the post of Deputy Engineer pursuant to the recommendations of the Departmental Promotion Committee and further requested to direct the respondents to issue order promoting the petitioner to the post of Deputy Engineer from the deemed date, since the petitioner superannuated from service on 30.11.2012.

SUBMISSIONS ON BEHALF OF THE RESPONDENT - STATE:

5. Per contra, learned AGP Mr.Shivam Dixit appearing for the respondent – State has submitted that the petitioner would not be entitled for promotion merely because his name has been cleared by the Departmental Promotion Committee or the GPSC. He submitted that his name is not included in the select list. Moreover, inclusion of the name in the select list itself also would not give any right of promotion. He relied on a Government Resolution No.SLT-1079-UO-2337-G-2, dated 23.9.1981, wherein the procedure has been prescribed to be followed by the DPC in case of Government servants under suspension and Government servants against whom inquiries are pending or to be initiated. The case of the petitioner was considered by the second Departmental Promotion Committee held on 26.9.2012. However, at that time since a charge-sheet was issued against the petitioner on 6.10.2010 for the alleged

irregularity in the construction work of the check dams, therefore, his name was kept in a sealed cover and punishment of Rs.200=00 pension cut for three months was inflicted upon the petitioner vide order dated 11.7.2018. An employee cannot be rewarded by promotion as a matter of course if a penalty is inflicted against him. The denial of promotion to the petitioner is not illegal. The denial is just, proper and legal one as considering the past service of the petitioner.

5.1. Further, learned AGP Mr.Dixit submitted that after a full-fledged inquiry, the petitioner was found guilty and, therefore, a punishment of Rs.200=00 pension cut for three months was inflicted upon the petitioner. Moreover, the order passed by the authority inflicting punishment upon the petitioner is not challenged and, therefore, the said order of punishment has attained finality. Therefore, the petitioner is not entitled for promotion.

5.2. In such circumstances referred to above, learned AGP Mr.Dixit has relied upon the case of ***Hardev Singh vs. Union of India, reported in (2011) 10 SCC 121***, wherein the Hon'ble Apex Court has held that no employee has a right to get promotion, but only a right to be considered for promotion. Further, he relied upon the case of ***C.O.Arumugam vs. State of Tamil Nadu, reported in (1991) 2 SCC 199***, wherein the Hon'ble Apex Court has held that promotion of persons against whom disciplinary proceedings or charge-sheet has been filed in criminal case may be deferred till proceedings are concluded. Learned AGP has also relied upon the case of ***S.Ramaswamy***

vs. Union of India, reported in AIR 1976 SC 2394, wherein the Hon'ble Apex Court has held that mere name in the selection list or panel of promotion do not confer any fundamental right of promotion to the employee much less confers no right on any one to be promoted.

5.3. In such circumstances, learned AGP Mr.Dixit requested the Court that there being no merit in the petition, the same may be dismissed.

FINDINGS :

6. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is, whether the petitioner is entitled for promotion to the post of Deputy Engineer, and from which date, whether from the date of holding of the Departmental Promotion Committee or the date of issuance of the charge-sheet ?

6.1. Before advertng to the rival submissions canvassed on either side, we must first look into few dates relevant for the purpose of deciding the subject matter :

(1) It is an undisputed fact that the petitioner was working as an Assistant Executive Engineer with the Panam Irrigation Project and the meetings of the first Departmental Promotion Committee had convened on 29.6.2009, 29.8.2009 and 25.3.2010 respectively, wherein the name of the petitioner was considered for promotion.

(2) Subsequently, a charge-sheet came to be issued on 6.10.2010. There was an allegation against the petitioner that he committed irregularity in the work of construction of various check dams in the Panchmahals district during the period from 2005 to 2006.

(3) On 5.1.2011, promotion orders were issued by the department giving promotion to other employees except the petitioner.

(4) Thereafter, once again the name of the petitioner was placed before the meeting of the second Departmental Promotion Committee convened on 26.9.2012, i.e. subsequent to the issuance of the charge-sheet. The same was kept in a sealed cover. The departmental proceeding was pending on that date and due to pendency of the departmental proceedings, the name of the petitioner was not considered for promotion.

6.2. This Court has gone through affidavit dated 30.4.2019 filed by one Shri Vijay V.Sanathara, Under Secretary, Narmada Water Resources, Water Supply and Kalpsar Department and further affidavit-in-reply dated 29.3.2023 filed by one Shri V.S.Prajapati, Under Secretary, Narmada Water Resources, Water Supply and Kalpsar Department, wherein it has been specifically averred that the petitioner was working as an Additional Assistant Executive Engineer and he was due for promotion to the post of Deputy Executive Engineer. It was further averred in the said

affidavit that the meetings of the first Departmental Promotion Committee were convened on 29.6.2009, 29.8.2009 and 25.3.2010, wherein the name of the petitioner was considered for promotion.

6.3. On going through the record, *prima facie*, it appears that prior to the issuance of the charge-sheet on 6.10.2010, there was nothing adverse against the petitioner when the meetings of the first Departmental Promotion Committee were convened. Therefore, there was no question of following the sealed cover procedure of the circular issued by the General Administration Department, State of Gujarat, dated 23.9.1981, as already the name of the petitioner was cleared by the Departmental Promotion Committee and subsequently by the GPSC and no charge-sheet was issued prior to that. In this regard, it is profitable to refer and rely upon the case of **K.V.Jankiraman** (*supra*). The relevant paragraphs read as under :

“16. However, we find that the Tribunal has taken a mechanical view and applied the decision of the Full Bench and directed the promotions to be given to the employees on the basis of the recommendations, if any, of the DPC of July 1986. We are of the view that in the present case when the DPC met in July 1986, the Committee had before it the record of the refund of the amount by the respondent-employees and the consequent withdrawal of the prosecutions without prejudice to the authorities' right to institute departmental proceedings.

17. In view of the aforesaid peculiar facts of the present case, the DPC which met in July 1986 was justified in resorting to the sealed cover procedure, notwithstanding the fact that the charge-sheet in the departmental proceedings was issued in August/ December, 1987. The Tribunal was, therefore, not justified in mechanically applying the decision of the Full Bench to the facts of the present case and also in directing all benefits to be given to the employees including payment of arrears of salary. We are of the view that even if the results in the sealed cover entitle the employees to promotion from the date their immediate juniors were promoted and they are, therefore, so promoted and given notional benefits of seniority etc., the employees in no case should be given any arrears of salary. The denial of the benefit of salary will, of course, be in addition to the penalty, if any, imposed on the employees at the end of the disciplinary proceedings. We, therefore, allow these appeals as above with no order as to costs."

6.4. It is the not even the case of the respondents that charge-sheet was issued to the petitioner prior to 6.10.2010 or during the time when the name of the petitioner was considered in the meetings of the first Departmental Promotion Committee which convened on several occasions and subsequently it was cleared by the GPSC. Even the respondents have remained silent on the question why the name of the petitioner, which was considered and recommended for promotion by the first Departmental Promotion Committee, was deleted from the list and he was not considered for promotion and thereafter, his name was once

again reconsidered for promotion and placed before the second Departmental Promotion Committee on 26.9.2012. Even, the circular issued by the General Administration Department dated 5.1.1999, wherein the case of ***K.V.Jankiraman*** (*supra*) is considered and it is resolved that the promotion of an employee cannot be withheld merely because a criminal proceeding is pending against him. To deny the said benefit it must be shown that at the relevant time the criminal case is pending at the stage when charge-sheet has already been issued to the employee. So, the sealed cover procedure should be adopted only after the charge-sheet is issued to the employee and not before it. In such circumstances, the act on the part of the respondent to keep the name of the petitioner in a sealed cover is bad in law, illegal, unfair and lacking *bona fides*. Even, the Gujarat Civil Services (Pension) Rules, 2002, more particularly rule 24(5)(a), which also confirms the said fact and which provides that, departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government employee or pensioner.

6.5. Further, it is profitable to refer the case of ***Union of India vs. Anil Kumar Sarkar, reported in 2013 (4) SCC 161***. In the said case, the Hon'ble Apex Court has been pleased to held that, "*...on the relevant date when the respondent's batch-mates were promoted, admittedly the respondent was not under suspension, no charge sheet was served upon him nor he was facing any criminal prosecution - till the date on which batch mates were promoted, no question of applying sealed cover procedure is*

*required to be followed.” In the case of **Coal India Limited & Ors. vs. Saroj Kumar Mishra, reported in AIR 2007 SC 1706**, the Hon’ble Apex Court, in para 22, has held as that, “...a departmental proceeding is ordinarily said to be initiated only when a charge-sheet is issued. In the case of **Chairman-cum-Managing Director, Coal India Limited and others vs. Ananta Saha and others, reported in (2011) 5 SCC 142**, the Hon’ble Apex Court held as under :*

“27. There can be no quarrel with the settled legal proposition that the disciplinary proceedings commence only when a charge-sheet is issued to the delinquent employee. (Vide Union of India vs. K.V. Jankiraman, (1991) 4 SCC 109 and UCO Bank vs. Rajinder Lal Capoor, (2007) 6 SCC 694)”

6.6. Learned AGP has relied upon the case of **Hardev Singh (supra)**, but the said authority is distinguishable on facts. In the said case, in the year 2008, the officers of 1973 batch were not considered but they were considered in the year 2009 and subsequently the policy was changed and due to framing of the new policy, the name of the appellant was not considered. Subsequently, it was implemented only for the officers of 1974 batch and due to this reason, the appellant had not been promoted. In the said judgment, in para-18, the Hon’ble Apex Court has been pleased to observe that, *“it cannot be disputed that no employee has a right to get promotion.....but he had a right to be considered for promotion to the rank of Lieutenant General and if as per the prevailing policy, he was eligible to be*

promoted to the said rank, he ought to have been considered.” In this case, there was no dispute to the fact that the appellant’s case was duly considered for promotion. Even, in the present case, the case of the petitioner was considered. In that case, the main grievance was with regard to the change of promotion policy and the case of the appellant was to the effect that after starting the selection process, the respondents could not have changed the policy. Here, in the present case, the respondents have not changed any promotion policy and the said fact is not in controversy before this Court. The only question is that the name of the petitioner was considered and subsequently, for the second time, his name was placed before the DPC and for placing the name of the petitioner for the second time, no reason is assigned and the respondents remained silent. Subsequently, they have stated that due to departmental proceedings his name was not considered.

6.7. It is pertinent to note that while for the first time when the name of the petitioner was considered, at that time, for the alleged departmental proceedings in question, a show-cause notice came to be issued upon the petitioner on 3.12.2007. On 27.1.2008, the petitioner filed his reply but was not considered. However, no departmental proceedings came to be initiated till 6/8.10.2010. Though the explanation offered by the petitioner was not accepted by the respondent, even then his case was placed before the DPC and the DPC has considered his name on 29.6.2009, 29.8.2009 and 25.3.2010 for promotion. Here in the present case, the main grievance of the petitioner is that though

his name was considered by the DPC, however, subsequently with a *malafide* intention, charge-sheet came to be issued. The petitioner has challenged the said action on the part of the respondents. The petitioner has not challenged any policy decision. As discussed in the earlier part of the order, the respondent authorities have remained silent as to why for the second time the name of the petitioner was placed before the DPC once his name was earlier cleared by the DPC.

6.8. In view of the above, the decision rendered in the case of ***Hardev Singh*** (supra) shall not be applicable or of any assistance to the respondent. Herein, the case of the petitioner is that even though he was found suitable and the DPC has cleared or recommended his name, however, subsequently issued charge-sheet and he was denied promotion. The Hon'ble Supreme Court, in the case of ***Ajitsingh vss State of Punjab, reported in (1999) 7 SCC 207***, laying emphasis on Articles 14 and 16(1) of the Constitution of India held that, if a person who satisfies the eligibility and the criteria for the promotion but still is not considered for the promotion, then it would be clear violation of his fundamental right to be considered for promotion. The said proposition is also reiterated by the Hon'ble Supreme Court in the case of ***Union of India vs. Hemrajsingh, reported in 2010(4) ASCC page 290 and Ajaykumar Shukla vs. Arvind Raj, reported in (2022) 6 SCC 105***. The right of eligible employee is to be considered for promotion is virtually part of their fundamental rights guaranteed under Article 16 of the Constitution of India. The guarantee of fair consideration in

matter of promotion virtually flows from the guarantee of equality under Article 14 of the Constitution. In the case on hand, as on the date of the DPC meeting and the date of consideration of the name of the petitioner for promotion, no departmental proceedings came to be initiated against the petitioner. Therefore, the question to follow any proceedings qua pending the name of the petitioner for consideration of giving promotion or to keep his name in a sealed cover does not arise. Hence, the decision rendered in the case of ***C.O.Arumugam (supra)*** also would be of no avail to the respondent.

6.9. Further, the Honb'le Apex Court, in the case of ***Jagdish Prasad vs. State of Rajasthan, reported in (2011) 7 SCC 789***, has been pleased to held that the governmental action must be fair. Rule of fairness in governmental action is an essential feature. Here in the name of the petitioner was considered in the meetings of the first Departmental Promotion Committee which convened on several occasions and subsequently it was cleared by the GPSC. Even the respondents have remained silent on the question why the name of the petitioner, which was considered and recommended for promotion by the first Departmental Promotion Committee, was deleted from the list and he was not considered for promotion and thereafter, charge-sheet came to be issued on 6.10.2010 in connection with a show-cause notice issued in the year 2007 and his name was once again placed before the DPC same was reconsidered for on 26.9.2012. In the case of ***Udaykumar V. Shah vs. State Of Gujarat, reported in 2016 (0) AIJEL-HC***

236819, this Court has taken a view that when the DPC has cleared the name of petitioner for promotion and a proposal was also approved by the respondent, then the action of the respondents in continuing different departmental inquiries right from the year 2003 till the year 2008 and to deny promotion to the petitioner held arbitrary and with ulterior motive where in, respondents were directed to give effect of deemed promotion to the petitioner to the post of Executive Engineer (Electrical) with all consequential benefits. The charge-sheet, which is issued practically immediately after the recommendation, goes to show that it is issued with an ulterior motive. It is also relevant to refer to the resolution dated 4.8.2007 by the respondents themselves, which is again regarding procedure to be followed by DPC in the case of Government employee/officer under suspension and/or against whom departmental inquiry/ prosecution is pending/ contemplated.

6.10. I have given my thoughtful consideration qua the submission made by the learned AGP that as the punishment is imposed on the petitioner and as he has not challenged the order of punishment which has attained finality, therefore, the question does not arise to promote the petitioner. Here, in the present case, while considering the name of promotion of petitioner at first time at that time there was no charge-sheet issued, hence question does not arise to keep name of petitioner in sealed cover. As discussed above, the relevant date for the purpose of deciding the case on hand is the date on which the first Departmental Promotion Committee meeting convened, i.e.

29.6.2009, 29.8.2009 and 25.3.2010. Supposed, the name of the petitioner was considered and cleared for promotion and he was promoted accordingly, then if subsequently, charge-sheet is issued and petitioner is held guilty and he does not challenge the said punishment the same analogy would apply in case of non challenge order of punishment by the petitioner. The order of punishment, which is in the nature of administrative lapses only, i.e. a minor punishment, and that too, of Rs.200=00 pension cut for three months only. It is needless to say that by allowing the present petition, the order of punishment is not being wiped out. The order of punishment remains as it is. The punishment of Rs.200=00 pension cut for three months is inflicted to the petitioner only for his administrative lapses. There is no any financial loss caused to the State Government.

CONCLUSION :

7. In view of the above, it is crystal clear that neither any departmental inquiry was pending nor any departmental proceedings were initiated against the petitioner when his name was placed for consideration before the Departmental Promotion Committee and cleared by the Departmental Promotion Committee as well as by the GPSC, i.e. prior to 6.10.2010. then the charge-sheet, which is issued practically immediately after the DPC has considered the name of petitioner, which goes to show that it is with an ulterior motive. Therefore, this Court is of the considered opinion that the petition deserves to be allowed. Since the petitioner has been superannuated, he can be granted

only the notional benefit of promotion to the post of Deputy Engineer with effect from 5.1.2011, the date on which his juniors were promoted or his actual date of promotion to the post of Deputy Engineer, on the basis of the recommendations made by the Departmental Promotion Committee dated 29.6.2009, 29.8.2009 and 25.3.2010. The respondents are directed to calculate and pay the pensionary and other retiral benefits to the petitioner accordingly, within three weeks from the date of receipt of copy of writ of this order. However, it is clarified that this order will not wipe out the order of punishment of Rs.200=00 pension cut for three months. It is needless to mention that the respondents shall have to take into consideration the said fact while calculating the amount and making the payment.

8. Rule made absolute to the aforesaid extent.

(HASMUKH D. SUTHAR, J.)

/MOINUDDIN