

S. No. 1

Supp Cause List

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No. 1065/2017

Reserved on: 18.07.2022

Pronounced on: 17.08.2022

Tanveer Ahmad Khan ...Petitioner(s)

Through: Mr Tasaduq H. Khawaja, Advocate.

Vs.

JK BOSE and Others ...Respondent(s)

Through: Mr M. I. Dar, Advocate.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

1. In the instant petition filed under Article 226 of the Constitution, petitioner implores for the following reliefs: -

- i) *An appropriate writ quashing the impugned order bearing Order No. 148-B of 2017 dated 6.3.2017, herein annexure C.*
- ii) *An appropriate writ quashing Order No.448-B of 2014 dated 21.07.2014 in so for it defers the promotion of petitioner and reserves one post of Junior Assistant for the petitioner subject to clearance from police.*
- (iii) *An appropriate writ commanding the respondents to promote petitioner to the post of Junior Assistant from 21.07.2014 on the basis of his entitlement to such promotion uninfluenced by pendency of enquiry initiated against petitioner after issuance of Order dated 21.07.2014 and admit petitioner to all consequential benefits.*
- (iv) *Any other appropriate writ, order or direction which this Hon'ble Court deems just and proper in the attending facts and circumstances of the case.*

2. The facts as averred in the petition under the shade and cover of which reliefs aforesaid are being claimed are that the petitioner is an employee of the respondent Board of School Education (for short 'the BOSE') holding the post of orderly. The services of the petitioner as that of the other employees of the BOSE are stated to be regulated and governed among others by Jammu and Kashmir Civil Service Regulations (CSR) and Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 (CCA Rules).
3. It is being stated in the petition that the petitioner was posted in the secrecy unit III KD in the year 2014 and during his posting, as such, in liaison room of the said section, it got revealed that one candidate namely Aadil Gojray had in connivance with some officials of the BOSE written answers on his already evaluated answer sheet. The petitioner states to have detected the fraud and brought into the notice of the higher authorities of BOSE.
4. An FIR is stated to have been got registered for the said fraud committed by the said candidate having been purportedly done in connivance with some BOSE officials.
5. It is being further stated that the petitioner got allegedly implicated therein the said fraud and as a consequence whereof the respondent vide order No. 751-B of 2015 dated 17.10.2015 constituted a committee to enquire into the matter.
6. The petitioner is stated to have filed SWP No. 823/2015 prior to the filing of the instant petition, after respondent Board issued an order No. 448-B of 2014 dated 21.07.2014 promoting two orderlies to the posts of Junior Assistants excluding the petitioner though being senior. In the said promotion order one post of Junior Assistant for the petitioner had been reserved subject to the clearance from the crime Branch. The said petition is stated to be pending.
7. It is being next stated by the petitioner that the respondents issued impugned order dated 06.03.2017 debarring the petitioner from future

promotions for six years retrospectively w.e.f. 21.07.2014, as the petitioner was due for promotion on 21.07.2014 and same was denied to him at that relevant point of time.

8. Be that as it may, the instant petition is being maintained *inter-alia*, on the grounds which in extenso are being extracted and reproduced here under: -

a) *Because the impugned order is illegal and has been passed in an arbitrary manner without application of mind to the relevant facts and without complying with the rules and the procedure. The order not only suffers from the vice of being based on no evidence without there being any material to support the conclusions arrived at by the disciplinary authority or enquiry committee. It is submitted that there is no material on the basis of which any reasonable man would arrive at such conclusions or draw such inferences as have been arrived at by the respondents while passing the impugned order. The impugned order is in fact outcome of surmises and conjectures.*

b) *Because the order suffers from the vice of violation of principles of natural justice. It is submitted that impugned order admittedly visits petitioner with civil consequences. Before passing the impugned order, the respondents were obliged not only to hear the petitioner but also provide the material relied upon by the respondents. The respondents though issued show cause notice to petitioner but did not provide the petitioner with the material relied upon while passing the impugned order. The petitioner has been greatly prejudiced by non-furnishing of enquiry report and supporting material in that petitioner could not make an effective representation against the propose punishment*

in absence of the material relied upon by the disciplinary authority. The so called notice to show cause was empty formality and did not answer requirement of law. The order impugned is liable to be set aside on this ground alone.

- c) *Because order suffers from vice of abuse of authority in that by passing the impugned order the respondents have tried to achieve something indirectly which they could not do directly. In essence it is not a case of debarring future promotion but a case of demotion achieved by first taking away accrued promotion and then stopping further promotion from retrospective date. It is submitted that such course cannot be adopted. In this regard, it is submitted that petitioner was due to be promoted in 2014. However, promotion was illegally deferred even though no enquiry was pending nor any charge sheet had been issued against the petitioner. The respondents have now issued the order and debarred the petitioner from future promotion for six years retrospectively from 21.7.2014. Firstly, it needs to be appreciated that there is no provision of debarring promotion from retrospective effect. Secondly, respondents have resorted to hovel procedure of first stopping promotion when it was due and after two years passed another order debarring future promotion from retrospective date. The respondents have apparently imposed only a minor punishment and thus obviated the necessity of holding proper enquiry for imposing major punishment but in substance and essence it is a major punishment and actually a fraudulent exercise of power. Since respondents could not have demoted petitioner without holding a formal enquiry, the respondents have*

chosen an indirect and yet a specious mode to avoid holding of an enquiry by first simply stopping promotion and then debarring promotion from retrospective date. If petitioner would have been promoted in 2014 to the post of Junior Assistant along with his juniors, then respondents could not have demoted petitioner to the post of Orderly without holding an enquiry. But That is what has been done and managed. It is in essence a demotion without following mandate of rule 33 and thus not only fraudulent but mala fide and colorable exercise of power in that respondents are doing indirectly what they could not do directly. The impugned order is, therefore, liable to be quashed.

d) Because the respondents have proceeded in mechanical manner and have passed the final order without considering the reply of the petitioner. The issuance of notice to show cause appears to have been a sham exercise and only an empty formality. The decision to impose particular penalty appears to have been approved by the Chairman even before the issuance of show cause notice. There is nothing to suggest that reply filed by petitioner has been considered and addressed. The impugned order is thus liable to be quashed.

e) Because the respondents have failed to take note of and advert to reply filed by petitioner and have consequently failed to appreciate that the student who could not take benefit of fraud must have an inherent grudge against the person who detected the fraud and prevented the student from taking benefit of fraud.

f) Because juniors of petitioner were promoted in 2014 while as case of petitioner was kept pending. At that point of time no disciplinary enquiry was pending

against the petitioner. The respondents had thus no reason to stop or defer the promotion of petitioner pending clearance by police. The action is illegal and without authority of law.

g) Because promotion of petitioner had been deferred till clearance of the case by police. The police is yet to frame any opinion in the matter and no challan is presented as yet. The veracity of the statement of the student by which petitioner is sought to be implicated and on the basis of which order has been passed is yet to be considered by the Hon'ble court. The respondents ought to have waited for result of investigation and trial and ought not have rushed to draw uncorroborated statement more so when the person who made the implicating statement had reason to speak against the petitioner.

9. **Per contra**, respondents have filed objections to the petition opposing the petition of the petitioner on the premise that none of the legal, fundamental, and statutory rights of the petitioner have been violated by the respondents and that the involvement of the petitioner in the fraud got established during the course of investigation and enquiry held and that the petitioner was not promoted against the post of Junior Assistant even though he was due for the same w.e.f. 21.07.2014 on account to his involvement in the fraud and that still a post of Junior Assistant was kept reserved in terms of order No. 448-B of 2014 dated 21.07.2014.

10. It is being further stated in the objections that petitioner had been found guilty facilitating the candidate namely Aadil Gojray in making insertions in his answer book after the declaration of the result and before applying for the Xerox copy. The allegation of denial of promotion to the petitioner without any authority of law is being denied.

11. It is being further denied in the objections that the petitioner detected the fraud and brought into the notice of the authorities, in that, petitioner had no business to detect such frauds and that petitioner in fact in connivance and league facilitated the said candidate to make insertions in his answer sheet.
12. It is being further stated in the objections by the respondents that upon surfacing of the fraud committed by the petitioner, a committee was constituted to enquire into the matter. A communication is also stated to have been received from Sr. Superintendent of Police, Crime Branch Kashmir through incharge Assistant Secretary Admn. Central State Board of School Education Kashmir bearing No. CBK/R-9590 dated 31.07.2015 addressed in response to letter No. F(Admn.-B)CU/15 dated 06.07.2015, regarding clarification in case of Tanveer Ahmad Khan in FIR No. 11/2014, wherein upon the statement of the accused candidate Aadil Gojray the insertions had been made in the answer sheet in connivance with BOSE official namely Tanveer Ahmad Khan who was working in liaison room on 14.03.2014.
13. It is being further stated that show cause notice served upon the petitioner incorporated all the details of proceedings of the enquiry, as such, there was no need to furnish copy of the enquiry report to the petitioner, so much so, the petitioner had no reason to express his inability to file detailed reply to show cause notice on said basis.
14. It is being next stated that respondents considered the response filed by the petitioner to the show cause notice and being unsatisfactory and misleading, the decision with regard to the imposition of proposed punishment was upheld. The impugned order is denied to have violated principal of natural justice or else being passed on either no evidence or was being without any material. Further, the petitioner is stated to have appeared before the enquiry committee which recorded his statement.

15. It is being denied that punishment imposed upon the petitioner amounts to major punishment. It is also being denied that the respondents proceeded in the matter in a mechanical manner or else passed the impugned order without considering the reply of the petitioner.

Heard learned counsel for the parties and perused the record.

16. Mr. Tasaduq H. Khawaja, appearing counsel for the petitioner and Mr. M. I. Dar, appearing counsel for the respondents while making their respective submissions reiterated the contentions raised in their respective pleadings.

17. Having regard to the facts and circumstances of the case following questions arise for consideration of this court:-

- (a) Whether respondents could have deferred promotion of the petitioner when it was due on 21.07.2014 and kept it subject to the clearance by the Crime Branch; and
- (b) Whether the respondents could debar the petitioner from future promotions from retrospective date, (when promotion of the petitioner was already deferred) on the basis of enquiry that was initiated after the promotion of the petitioner was deferred on 21.07.2014.

18. In so far as the question (a) is concerned, perusal of the record tends to show that on 21.07.2014, when the promotion of the petitioner was deferred and kept subject to the clearance from the Crime Branch, on the said date no disciplinary enquiry had been initiated or was pending against the petitioner so much so no charge sheet was framed against him. The petitioner was not on the said date implicated in the FIR registered in Crime Branch qua the alleged fraud of writing of the answers in the answer sheet of the candidate.

19. Perusal of the record would further reveal that even though a committee was constituted by the Respondent-BOSE vide order No. 200-B of 2014 dated 17.04.201 relating to the insertions of additional text in the answer script of the candidate, the said enquiry had been

ordered in order to fix the responsibility upon the person(s) involved in the act. The said committee in its report had opined that the matter being serious in nature had to be referred to some investigating agency as the erring candidate is sheltering someone who had helped him in committing the fraud and as a consequence thereof, the matter had been referred to the Joint Secretary Legal K-D for filing of an FIR who in turn referred the same to the Sr. Superintendent of Police Crime Branch resulting into registration of an FIR No. 11/2014 under Sections 420, 468 and 120-B RPC.

20. Perusal of the record demonstrates that during the course of investigation in the said FIR, admittedly the involvement of the petitioner came to be reported for the first time vide letter of Sr. Superintendent of Police, Crime Branch addressed to the respondent BOSE dated 31.07.2015 in response to a letter of the BOSE dated 06.07.2015. Thus, the involvement of the petitioner in the said FIR came to the knowledge and notice of the respondents BOSE in terms of letter dated 31.07.2015 i.e. much after the process for promotion undertaken and consequent order of promotion dated 21.07.2014.

21. In so far as the holding of the disciplinary proceedings is concerned, record tends to show that the said enquiry was set into motion by respondent BOSE as noticed above, upon constitution of a committee in terms of order dated 17.10.2015, where after the said enquiry committee resulted into issuance of notice of proposed penalty dated 19.01.2017.

The aforesaid facts and circumstances would manifestly demonstrate that on the date of holding of departmental promotion committee meeting and making promotion of two juniors of the petitioner that deferred the promotion of the petitioner subject to the clearance from Crime Branch, the petitioner was neither implicated as an accused in the FIR in question nor was a charge sheet filed against him in any court of law for the commission of the offences covered by the said FIR in question, and also there was no disciplinary enquiry

pending against the petitioner on the date of issuance of promotion order dated 21.07.2014 supra, as holding of the disciplinary enquiry was ordered upon constitution of a committee vide order dated 17.10.2015 much after the issuance of process of an order dated 21.07.2014.

22. Having regard to the facts and circumstances of the case, a reference to the “Sealed Cover Procedure” in the matter of promotion becomes imperative as provided under Regulation 110-A of the CSR. In terms of the said Regulation Sealed Cover Procedure in the matter of promotion has to be followed by a departmental promotion committee under three circumstances: (i) when a Government employee is under suspension; (ii) when charge has been framed and disciplinary proceedings are pending against the Government employee and (iii) when charge sheet for criminal offences had been laid before competent authority or any court of law or sanction for prosecution is issued.
23. In view of the aforesaid rule/position none of the circumstances as noticed above existed in the case of the petitioner which would have entitled the respondents to defer the promotion of the petitioner on 21.07.2014. Deferring of promotion of the petitioner on 21.07.2014 thus, safely can be said to be misconceived and without any authority or sanction of law. A reference hereunder to the judgement of the Apex court passed in case titled as “**Union of India V. Anil Kumar Sarkar**”, reported in 2013 (4) SCC 161, becomes imperative being relevant and germane, wherein at para 17 following has been noticed: -

In para 17, of K.V.Jankiraman case reported in 1991 (4) SCC 109, held as under:

.....“17.Conclusion 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.”

And in “**Union of India and Others V. Sangram Keshari Nayak, reported in 2007 (6) SCC 704**, wherein at para 11 and 15, being relevant and germane, following has been noticed: -

11. Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within its purview an effective, purposeful and meaningful consideration. Suitability or otherwise of the candidate concerned, however, must be left at the hands of the DPC, but the same has to be determined in terms of the rules applicable therefor.....”

15..... “Cases where ‘Sealed Cover Procedure’ applicable.- At the time of consideration of the cases of government servants for promotion, details under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:

- (i) government servants under suspension;*
- (ii) government servants in respect of whom disciplinary proceedings are pending or a decision has been taken to initiate disciplinary proceedings;*
- (iii) government servants in respect of whom prosecution for a criminal charge is pending or a sanction for prosecution has been issued or a decision has been taken to accord sanction for prosecution;*
- (iv) government servants against whom an investigation on serious allegations of corruption, bribery or similar grave misconduct is in progress either by CBI or any agency, departmental or otherwise.”*

24. Adverting to the question (b) supra as to whether after wrongly deferring the promotion of the petitioner when it became due to him, could respondents subsequently debarred the petitioner from future promotion retrospectively from the date the promotion was deferred and thereby achieve something indirectly which the respondents could not achieve directly, it seemingly appears that the respondents while imposing minor punishment upon the petitioner under the impression that only future promotion of the petitioner has been deferred, have in essence debarred the petitioner retrospectively for promotion. The respondents by adopting the said procedure have nonetheless ensured same consequences without formally demoting the petitioner, in that, the respondents firstly wrongly deferred the promotion of the petitioner in 2014 and subsequently debarred him for future promotion from retrospective date. Respondents in the process thus, have achieved same objective inasmuch as the petitioner continues to be on the same post on which the petitioner would have if, petitioner would have been promoted in the year 2014 and then demoted after such promotion. The said exercise undertaken by the respondents manifestly is abuse of process and colorable exercise of power.
25. The impugned order dated 21.07.2014 in terms whereof the promotion of the petitioner was deferred and dated 06.03.2016 in terms whereof the penalty was imposed upon the petitioner even though issued after interval of three years indisputably are part of same process read with conjointly having a cumulative effect on the services of the petitioner i.e. after deferring promotion of the petitioner that was due as the respondents have debarred the petitioner for future promotion with **retrospective effect**. The respondents admittedly have demoted the petitioner and done the same indirectly that they could not do directly, but without following the mandate of Rule 33 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 which provides for an enquiry and procedure thereof, in cases of dismissal, removal or reduction in rank of a civil servant.

26. Indisputably, the defence setup by the respondents against the case setup by the petitioner in the instant petition cannot by any sense of imagination said to be potent enough to dislodge the case setup by the petitioner.
27. Viewed thus, what observed, considered and analyzed hereinabove, the petition merits to be allowed. Accordingly the petition is allowed by issuance of writ of certiorari, impugned order No.448-B of 2014 dated 21.07.2014 and impugned order No. 148-B of 2017 dated 06.03.2017 are quashed and by issuance of writ of mandamus, the respondents are commanded to promote the petitioner to the post of Junior Assistant w.e.f. 21.07.2014 with all consequential benefits to which he has become entitled thereto.
28. The respondents, however, shall be free to proceed further in the matter against the petitioner in accordance with law and rules occupying the field.
29. Registry to return the record to Mr M. I. Dar, counsel for the respondents.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR

17.08.2022

"Ishaq"

Whether the judgment is reportable: Yes