

RESERVED**'A.F.R.'**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO. 3

Original Application No. 44 of 2013Tuesday the **1st** day of **October, 2013**

“Hon’ble Mr. Justice Virendra Kumar Dixit, Judicial Member

Hon’ble Lt. Gen. B.S. Sisodia, Administrative Member”

Col M J Kumar, SM, s/o Late Shri Janak Kumar

Presently posted as Additional Officer, HQ 4 RAPID (strike)

C/O 56 APO (Allahabad)

- **Applicant**By Legal Practitioner - Shri S.S. Pandey and Shri V.A. Singh,
Advocate**Versus**

1. Union of India through The Secretary, Ministry of Defence ,
South Block, DHQ PO New Delhi-110 011
2. The Chief of the Army Staff, through The Additional Directorate
General (Discipline & Vigilance), Integrated HQ of Ministry of
Defence (Army), DHQ, PO New Delhi-110 011
3. The Military Secretary, Military Secretary’s Branch
Integrated HQ of Ministry of Defence (Army)
DHQ PO, New Delhi-110 011

- **Respondents****Ld. Counsel appeared for the applicant** - Shri S.S. Pandey,
Advocate and
Shri V.A. Singh, Advocate**Ld. Counsel appeared for the
respondents**- Shri Alok Mathur,
Advocate,
Senior Standing Counsel

ORDER

1. This Original Application has been filed under section 14 of the Armed Forces Tribunal Act, 2007, whereby the petitioner has sought following reliefs:-

- (a) *Directing the Respondents especially Respondents No 2 & 3 to issue necessary orders to enable the Applicant to assume his rank of Brig w.e.f. the date on which the first vacancy arose or the date on which the officer junior to him in the list of empanelled officers has been promoted to the rank of Brig i.e. w.e.f. 27.08.2011 with all consequential benefits of back wages, seniority and continuity in service etc.*
- (b) *Direct the Respondents to reconsider the Applicant for the General Cadre afresh based on the overall profile of the Applicant without taking into consideration the pendency of the Court of Inquiry.*
- (c) *Issue such other order/direction as may be deemed appropriate in facts and circumstances of the case.*

2. In brief, the facts of the case are that the applicant was granted permanent commission in the Army on 08.06.1985 in the Corps of Engineers. He was promoted to various ranks from time to time and later to Colonel in February 2004. During 1985 to 2011, the applicant was posted to various important staff and instructional appointments like Brigade Major, Assistant Quarter Master General, Commanding Officer of a Engineer Regiment, Colonel General Staff of a Division, Instructor Class 'B', HQ IMTRAT Bhutan and Directing Staff (Instructor) in Defence Services Staff College, Wellington (Tamil Nadu). The services of the applicant were duly recognized and he was conferred with Chief of

the Army Staff Commendation Card in 1989, Sena Medal in 1999, General Officer Commanding-in-Chief Commendation Card in 2008 besides two foreign postings in 1993 and 2000. The applicant had also qualified in the Higher Air Command Course and was declared as 'Purple Man' out of 129 officers participated from all the three services who were doing Higher Command Course of Army, Navy and Air Force in 2010.

3. The applicant was considered for promotion to the rank of Brigadier by No. 2 Selection Board held in April 2011. The result of the board was declared on 01.06.2011 and the applicant was on top of the list of fresh empanelled officers based on his seniority in his entire batch.

4. After the result of the selection Board was de-classified on 01.06.2011, one course mate of the applicant namely Lt Col Anil Chawla made a complaint of serious in nature on 29.06.2011 to the Adjutant General, Army Headquarters. Based on his complaint, One Man Inquiry was ordered and the then Deputy General Officer Commanding 23 Infantry Division was detailed to carry out a preliminary inquiry about the veracity of the complaint. In order to reach at logical conclusion, a Court of Inquiry was ordered by HQ South Western Command vide Convening Order dated 19.12.2011. Based on evidence at the Court of Inquiry, the applicant was given a Show Cause Notice dated 06.03.2013. The Show Cause Notice has been replied by the applicant and is under consideration of the concerned army authorities.

5. The applicant was planned to be promoted during August 2011, however, considering the nature of the allegations Discipline & Vigilance clearance for promotion of the applicant to the rank of Brigadier was

withheld on 12.07.2011 by the competent authority till completion of the investigation. Officers junior to the applicant, who were empanelled for promotion to the rank of Brigadier by No 2, Selection Board of applicant's batch, were promoted leaving behind the applicant.

6. The applicant under these circumstances made representations dated 18.07.2012 to Respondent No 3, dated 05.12.2012 to General Officer Commanding -in-Chief South Western Command ventilating his grievance and dated 05.12.2012 and Respondent No 3 for personal interview. The applicant was interviewed by the Additional Military Secretary on 07.01.2013 and was informed that Discipline and Vigilance Directorate has not issued Discipline & Vigilance clearance till date hence he cannot be promoted.

7. On completion of the Court of Inquiry proceedings and issuance of directions by the General Officer Commanding-in-Chief, Southern Command, the applicant was placed under Discipline and Vigilance Ban Type 'A' with effect from 13.02.2013. The Show Cause Notice served to the applicant has also been replied which is under consideration. Being aggrieved, the applicant has filed this Writ Petition.

8. Heard Shri S. S. Pandey and Shri Virat Anand Singh, learned counsel for the applicant and Shri Alok Mathur, Learned Senior Central Government Counsel and perused all the relevant records.

9. Learned counsel for the applicant has submitted that the applicant is aggrieved by the wrongful action of the respondents in denying the applicant's rightful claim for promotion to the rank of Brigadier for which he was already empanelled and was due for such promotion on or before

01.08.2011. The applicant had outstanding career profile as compared to Lt Col Anil Chawla, the complainant. Both being the course mates, the complainant could not even be promoted to the select rank of Colonel. Due to complainant ulterior motive only, he had made complaint on 29.06.2011.

10. Learned counsel further submitted that Lt Col Anil Chawla, had submitted a similar complaint during 2009 also to the then Colonel Commandant and Vice Chief of the Army Staff which was closed after a thorough investigation by Discipline & Vigilance Directorate. Since then the complainant did not raise any grievance. This fresh complaint was made clearly on afterthought of the complainant to prevent the applicant to pick up his next rank of Brigadier.

11. Learned counsel for the applicant has submitted the sequence of events, which are as under:-

- (a) **01.06.2011** - Applicant empanelled for promotion to the rank of Brigadier by No 2 Selection Board.
- (b) **29.06.2011** - Complainant, Lt Col Anil Chawla made complaint against the applicant.
- (c) **23.08.2011** - The applicant was called by the One Man Inquiry on and it was concluded in the **end of August**.
- (d) **26.08.2011** - Applicant was to be promoted to the rank of Brigadier. However officer junior to the applicant in the list of approved officers was promoted.
- (e) **14.10.2011** - Two officers of the batch of applicant who were junior to him were selected in General Cadre.
- (f) **21.12.2011** - Court of Inquiry was ordered which commenced its proceedings on 07/08.01.2012.
- (g) **07.05.2012** - Court of Inquiry concluded.
- (h) **09.05.2012** - Applicant made several representations for

- to**
06.02.2013
- issuance of his promotion order but the respondents did not take any action and in the mean time promoted all officers of his batch.
- (j) **05.02.2013** - Hon'ble Tribunal admitted the case and directed the Respondents not to fill one vacancy of Brigadier in the Corps of Engineers.
- (k) **13.02.2013** - The Respondents for the first time imposed Discipline & Vigilance Ban (Type A) on the applicant for adm action of minor nature for awarding censure one week after the matter was already admitted by the Hon'ble Tribunal.
- (l) **06.03.2013** - A show cause notice was served to the applicant for explaining why he should not be awarded censure. This was timely replied on 23.05.2013. Till date the applicant has not been communicated the final decision of the respondents.

12. Ld. Counsel for applicant has further submitted that a fresh complaint on the same ground was lodged by Lt Col Anil Chawla on 29.06.2011 when applicant's result was de-classified on 01.06.2011 and he was approved. It is pertinent to note that forwarding of the complaints twice, first time when the applicant was nominated for higher command course and second time, just after declaration of the result of the selection board. The respondents entertained the second complaint containing more or less same or similar allegations as contained in the complaint made earlier in Jun 2009 available with the Discipline & Vigilance Directorate, did not invite any attention for a formal investigation but on the same allegations made in 2011, the respondents took a decision to withhold Discipline & Vigilance clearance of the officer for his promotion to the elevated rank of Brigadier. That the Respondents have not placed any policy on record which empowers them to withhold Discipline & Vigilance clearance of the applicant for promotion merely because there was a complaint pending against him which is either yet to be formally

investigated or investigation is in progress. Knowing well, that the applicant was approved for promotion to the rank of Brigadier and there was a vacancy for his promotion during August 2011, complaint made against the applicant was not investigated expeditiously, rather, it was ordered for investigation during Aug/Sep 2011 by a 'One Man Inquiry' followed by a Court of Inquiry which was ordered on 19.12.2011. The Court of Inquiry ordered on 19.12.2011 was finalized on 13.02.2013 in which General Officer Commanding-in-Chief, South West Command has directed that administrative action be initiated against the applicant. He has also placed Discipline & Vigilance Ban (Type A) '**means administrative action of minor nature for awarding censure**', on the applicant on 13.02.2013. To this effect a show cause notice was served to the applicant on 06.03.2013 which has been replied and is under consideration since 23.05.2013. He has further submitted that **Drop in Performance** cannot be established because no disciplinary/administrative action has yet been taken against the applicant by the respondents. There was no established ground with the applicant to pursue his case through a **Statutory Complaint**. However, he had written several letters to the authorities ventilating his grievance and taken interview of Military Secretary asking for the reasons for his non promotion. It is also submitted that in Para 3 of the Military Secretary's Branch/MS (X), Integrated HQ of MOD (Army) dated 01 Jun 2011, it has been clearly mentioned that the officers approved for promotion to the rank of Brigadier will be promoted subject to availability of vacancies, continued satisfactory performance and medical fitness. Since there was a vacancy, his performance was satisfactory and he was medically fit, then

there was no reason to withhold his promotion to the rank of Brigadier.

Para 3 of the ibid letter is quoted below :-

“3. The officers mentioned in Appendix to this letter will be promoted in their turn subject to availability of vacancies, continued satisfactory performance and medical fitness”

13. Learned counsel for the applicant further submitted that HQ South Western Command had got no statutory sanction as per Army Act and Rules to order one man inquiry and also there are no formal instructions or written policy which authorized or empowered the Adjutant General to withhold Discipline & Vigilance clearance of the applicant. It is pertinent to mention here that the Hon'ble Supreme Court in catena of judgments have clearly laid down that the promotion of an officer when due cannot be denied merely because there was a complaint or some investigation was pending. It was thus apparent that the Respondents without any justification and contrary to their own policy instructions as well as the established principles of law had delayed the promotion of the applicant for more than two years. The Hon'ble Supreme Court in series of judgments have laid down the principles which are law of the land in terms of Article 141 of the Constitution of India starting from **K.V. Jankiraman's** case till the case of **Anil Kumar Sarkar**. To put forth his contention, learned counsel for the applicant has relied upon the following judgements :-

- (a) Hon'ble the Apex Court Judgement in **UOI Vs K.V. Jankiraman** reported in AIR 1991 SC 2010.
- (b) Hon'ble Apex Court Judgement in **UOI Vs Dr. (Smt) Sudha Salhan** reported in AIR 1998 SC 1094.
- (c) Hon'ble Apex Court Judgement in **Bank of India Vs Degala Suryanaryana** reported in AIR 1999 SC 2407.
- (d) Hon'ble Apex Court Judgement in **UOI Vs Anil Kumar Sarkar** reported in J.T. 2013 (4) Supreme Court 103.

- (e) Hon'ble Apex Court Judgement in **Coal India Ltd Vs Saroj Kumar Mishra** reported in AIR 2007 SC 1706.
- (f) AFT, Principal Bench, New Delhi Judgement in MA No 545 of 2012 in OA No 88 of 2012 (**Brig. R.S. Rathore Vs UOI & Ors**) decided on 06.11.2012
- (g) AFT Chandigarh Regional Bench at Chandimandir Judgement in OA No 1037 of 2012 (**Sandeep Kumar Tiwari Vs UOI & Ors**) decided on 06.09.2012.
- (h) Hon'ble Punjab & Haryana High Court Judgement in **G.R Vinayak (Lt Col) Vs UOI reported in 1996 (1) S.C.T. 427.**

16. Learned Counsel for the applicant has also submitted that directions be issued to the respondents to promote the applicant with retrospective effect from 26.08.2011 when the officer junior to the applicant was promoted with all consequential benefits of seniority, continuity in service and back wages. Directions are also issued to the respondents for consideration of the applicant afresh for the general cadre.

17. On the other hand, learned standing counsel for the respondents Shri Alok Mathur has submitted that the applicant and the complainant, Lieutenant Colonel Anil Chawla had attended Young Officer's Course and Commando Course together during 1986 and 1987 respectively. The applicant attended EODE Course from May 1989 to Dec 1992 and complainant attended EODE Course from Nov 1989 to Oct 1992 at College of Military Engineering Pune only. The complaint was specific and verifiable. That in accordance with the policy dated 03.11.2000 on 'Discipline of Officers related to Matrimonial Affairs', "if any officer complains adultery with his wife and requests action under the Army Act, the matter is required to be investigated and disciplinary action taken against the officer". According to this policy only, the complaint was first inquired into by 'One Man Investigation' followed by a Court of

Inquiry. The applicant was given full opportunity to prove his innocence as per Para 180 of the Army Rule.

18. Learned Counsel for the respondents has contended that the complaint dated 29.07.2011 contained serious and verifiable allegations. The matter was examined and considering all aspects, decision was taken to withhold Discipline and Vigilance clearance for promotion of the applicant to the rank of Brigadier. The contention of the learned counsel for the applicant that Headquarters South Western Command and Adjutant General had no power to order for one man inquiry and withholding Discipline & Vigilance clearance is incorrect. The approval of the Chief of the Army Staff was accorded on 03 Aug 2011 for investigation of the matter by 'One Man Inquiry' followed by a Court of Inquiry. Both the inquiries have found sufficient evidence to establish culpability of the applicant. The decision to withhold Discipline and Vigilance clearance is taken after due deliberation at Army Headquarters. Adjutant General and Army Commanders are the competent authority to withhold Discipline & Vigilance clearance. Based on Court of Inquiry's findings only General Officer Commanding-in-Chief, Southern Command had placed the applicant under Discipline and Vigilance Ban Type 'A' with effect from 13.02.2013. A Show Cause Notice dated 06.03.2013 was served on the applicant, which has been duly replied and is under consideration. If the applicant is exonerated, he will be eligible for promotion with the same seniority at that of his batch mates. In case the applicant is found blameworthy and awarded censure, he will be considered by No 2 Selection Board afresh as Special Review (Drop in Performance) case as per policy dated 17.09.2010 on Selection Boards :

Special Review. He has further submitted that the judgment of Hon'ble The Supreme Court in the case of K.V. Jankiraman was given in respect of DOPT memorandums, governing civil servants, which are not applicable to Armed Forces/Defence Services Personnel. The Judgements cannot be applied mechanically; each case has to be seen in its own facts. The Respondents relied upon the judgments of Hon'ble Supreme Court in the case of **Union of India Vs Maj Bahadur Singh, reported in (2006) 1 SCC 368**. Further Hon'ble Supreme Court in the case of **Union of India vs K.V. Janakiraman reported in AIR 1991 SC 2010** had observed that when allegations are serious, authorities are keen in investigating them; they are not without a remedy. Hon'ble Supreme Court has observed that an employee can be suspended. In Army, provision for suspension of an officer is rarely resorted to. The fact that the applicant was not suspended, does not take away the seriousness of the issue, which was the basic reason for withholding Discipline & Vigilance clearance and based on which suspension also could have been ordered. Hon'ble Supreme Court in the case of Lt Col K D Gupta Vs UOI, 1989 Supp (1) SCC 416 has held in para 8 of the judgement that :-

“ the Defence Services have their own peculiarities and special requirements. The considerations which apply to others government servants in the matter of promotion cannot as a matter of course be applied to Defence Personnel of the petitioner's category and rank”.

20. Learned Counsel for the respondents also submitted that Army is a command oriented organization. Soldiers act on a word of command of their superiors. During war, at one command, soldiers face bullets and lay down their lives. During war or peace, soldiers live in a close knit atmosphere. Discipline and moral values are bedrock of Armed Forces. The allegations levelled against the applicant were of serious in nature,

therefore, strict action was taken to withhold his promotion till the time investigation is completed. Now the Court of Inquiry has been finalized, show cause notice has been served to the applicant and its reply is under examination of the authorities. If the applicant is found exonerated, he will be promoted to the rank of Brigadier without any hitch.

21. We have heard arguments of both sides and perused relevant documents. The applicant was considered for promotion to the rank of Brigadier by No. 2 Selection Board held in April 2011. The result of No. 2 Selection Board was declared on 01.06.2011 and the applicant was approved for promotion to the rank of Brigadier. His name was on top of the list of fresh empanelled officers based on his seniority in his entire batch. As per respondents, the applicant was planned to be promoted during Aug 2011 to the rank of Brigadier. In the mean time, Lt Col Anil Chawla, a course mate of the applicant, made a complaint of very serious nature dated 29.06.2011 to Adjutant General, Army Headquarters. The Army Headquarters ordered immediately to enquire the matter. The entire matter was examined and it emerged that there was a ring of truth in the complaint. The matter was placed before the Chief of the Army Staff and it was decided to initially investigate the matter by 'One Man Inquiry' and if evidence was found then the same would be investigated by a constituted Court of Inquiry. The applicant participated in the 'One Man Inquiry' and the inquiry did not rule out the culpability of the applicant. The Court of Inquiry was ordered by HQ South Western Command vide Convening Order dated 19.12.2011 and on 07.05.2012 the inquiry was concluded. The applicant was given full opportunity of rights provided in Para 180 of the Army Rule. Based on evidence at the Court of Inquiry,

adopted for consideration of officer for promotion in each case where DISCIPLINE & VIGILANCE ban has been imposed. If the officer is exonerated, the sealed cover would be opened and the withheld result will be declassified. If an officer is punished, the sealed cover would not be opened and he will be considered afresh with the punishment awarded forming part of the record of service. Similar philosophy will apply to cases of time scale and substantive promotion. It is for this reason that ban info has been extended upto unit and fmn cdrs.

Procedure for Imposition

12. The imposition of DISCIPLINE & VIGILANCE Ban is done on the authority of the COAS. The authority to direct the imposition of DISCIPLINE & VIGILANCE Ban on officers of all ranks has been delegated to Adjutant General.

13. On receipt of directions of the competent authority the offr will be placed on appropriate type of provisional DISCIPLINE & VIGILANCE Ban by Corps HQ/Comd HQ. This is to ensure that there is minimum time delay between issue of dirms/taking cognizance of the offence and imposition of provisional DISCIPLINE & VIGILANCE Ban. Subsequent to it on receipt of info at DISCIPLINE & VIGILANCE Dte the info will be put up for info/approval of AG by DISCIPLINE & VIGILANCE Dte. The effective date of the DISCIPLINE & VIGILANCE Ban, however, reckons from the date on which the directions of the competent authority are issued after application of mind.

14. to 23. x x x x x x x x x x x x x x x x x x x x x x

24. DISCIPLINE & VIGILANCE Ban is a management tool which primarily aims to protect organization interests and ensure administrative facilitation for the expeditious completion of disciplinary/administrative proceedings. It is by no means a punishment in itself and should not be viewed or considered as such.

25. x x x x x x x x x x x x x x x x x x x x x x x

**Sd/-
(R S Pradhan)
Maj Gen
Addl**

DISCIPLINE & VIGILANCE D&V

25. The respondents have relied upon the policy letter dated 03.11.2000 issued by Discipline and Vigilance Directorate, Adjutant General's Branch, Army Headquarters, which deals with the disciplinary aspect of matrimonial affairs of officers (male and female) are as under :-

Discipline Officers : Matrimonial Affairs

1. Reference this HQs letter No 79333/AG/DISCIPLINE & VIGILANCE-1 dated 15.06.1984.

2. *The existing policy contained in letter *ibid*, dealing with disciplinary aspect of matrimonial affairs of officers (male and female) has been re-examined. The following contingencies may arise in a case involving matrimonial disharmony :-*

(a) x x x x x x x x x x x x x x x x x x

(b) x x x x x x x x x x x x x x x x x x

(c) *Where a male officer is accused of committing adultery with the wife of another officer or for attempting to steal or to have stolen the affections of the wife of such an officer.*

(d) x x x x x x x x x x x x x x x x x x

(e) x x x x x x x x x x x x x x x x x x

3. *The Chief of the Army Staff directs that such cases will be dealt with in the manner prescribed in the succeeding paragraphs.*

Alleged Misbehavior Amounting to Adultery

4. *If an officer complains to a superior military authority that another officer has committed adultery with his wife and requests for action under the Army Act, the matter will be investigated and disciplinary action taken against the accused officer under the Army Act. If, however, after due investigation of the complaint, a prima facie case of adultery is made out but for some reasons trial by court martial is considered impracticable or inexpedient, steps will be taken to terminate the officer's service administratively under Army Act Section 19 read with Army Rule 14. In case the aggrieved officer lodges a complaint with the civil authority and the said authority decides to take cognizance of the offence, the competent military authority may, with the prior permission of this Headquarters, claim the case under Army Act Section 125 for trial by a court martial.*

5. to 13. x x x x x x x x x x x x x x x x x x x x x x

14. *This letter will be brought to the notice of all officers. Commanding Officers will ensure that all newly commissioned officers are shown this letter on first joining.*

15. *This Headquarters letter No 79333/AG/DISCIPLINE & VIGILANCE-1 dated 15.06.1984, is hereby cancelled.*

*Sd/-
(SS Grewal)
Lt Gen
Adjutant General*

26. The contention of the respondents is that since a disciplinary case is pending against the applicant, he cannot be promoted to the rank of Brigadier. The learned counsel for the applicant, on the other hand argued, that policy letters quoted above nowhere prevent the applicant for promotion to the rank of Brigadier. He has also submitted that the respondents have not placed any policy on record, which empowers them to withhold Discipline & Vigilance clearance for promotion of the applicant merely because there was a complaint pending against the

applicant and is under investigation or investigated but the outcome has not yet been declared.

27. In view of the pleadings of both sides, facts and circumstances of the case, we have to consider a short question before us for adjudication is that whether promotion can be withheld merely because disciplinary proceedings are pending against the officer.

28. In this context, we have gone through the judgement of the Hon'ble Apex Court in the case of **Union of India vs. K.V. Jankiraman & Others**, reported in **AIR 1991 SC 2010**, by which several appeals were decided. These were the appeals from various judgements of the Central Administrative Tribunal. Para 6, 7 and 8 of the judgment of **K.V. Jankiraman's Case** (Supra) deals with the questions which were involved in those appeals are reproduced as under :-

“6. 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 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 a person, 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 authorities are keen in investigating them, ordinarily it would not take much time to collect the relevant evidence and finalize 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 in consistent with each other. Those conclusions are as follows :-

“(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;

(1)

(2)

(3)

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

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that it what the Full Bench-has intended, the two conclusions can reconciled with each other. The conclusion No 1 should be read to mean that the promotion etc. cannot be withheld merely because 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.

We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal.

7. The Full Bench of the Tribunal, while considering the earlier Memorandum dated 30th January, 1982 has, among other things, held that the portion of paragraph 2 of the memorandum which says “but no arrears are allowed in respect of the period prior to the date of the actual promotion” is violative of Articles 14 and 16 of the Constitution because withholding of salary of the promotional post for the period during which the promotion has been withheld while giving other benefits is discriminatory when compared with other employees who are not at the verge of promotion when the disciplinary proceedings were initiated against them.

The Tribunal has, therefore, directed that on exoneration, full salary should be paid to such employee which he would have received on promotion if he had not been subjected to disciplinary proceedings.

We are afraid that the Tribunal’s reference to paragraph 2 of the Memorandum is incorrect. Paragraph 2 only recites the state of affairs as existed on January 30, 1982 and the portion of the Memorandum which deals with the relevant point is the last sentence of the first sub-paragraph after, clause (iii) of paragraph 3 of the Memorandum which is reproduced above. That sentence reads as follows:

“But no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion”.

This sentence is preceded by the observation that when the employee is completely exonerated on the conclusion of the disciplinary court proceedings, that is, when no statutory penalty, including that of censure, is imposed he is to be given a notional promotion from the date he would have been promoted as determined by the Departmental Promotion Committee. This direction in the Memorandum has also to

be read along with the other direction which follows in the next sub paragraph and which states that if it is found as a result of the proceedings that some blame attaches to the officer then the penalty of censure at least should be imposed. This direction is in supersession of the earlier instructions which provided that :

In a case there departmental disciplinary proceedings have been held, warning” should not be issued as a result of such proceedings.

There is no doubt that when a employee is completely exonerated and is not visited the penalty even of censure indicating thereby that he was not blameworthy in the least, he should not be deprived of any benefits including the salary of the promotional post. It was urged on behalf of the appellant-authorities in all these cases that a person is not entitled to the salary of the post unless he assumes charge of the same. The relied on FR. 17 (1) of the Fundamental Rules and Supplementary Rules which read as follows:

“F.R. 17 (1). Subjects to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.”

It is further contended on their behalf that the normal rule is “no work no pay”. Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension. When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.

We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of “no work no pay’ is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17 (1) will also be inapplicable to such cases.

We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence, due to the acts attributable to the employee etc. In such circumstances,

the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated from disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardize public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz, "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

To this extent we set aside the conclusion of the Tribunal on the said point.

8. *The Tribunal has also struck down the following portion in the second sub-paragraph after clause (iii) of paragraph 3 which reads as follows: "If any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the court proceedings against him, the findings in the sealed cover/covers shall not be acted upon" and has directed that if the proceedings result in a penalty, the person concerned should be considered for promotion in a Review DPC as on the original date in the light of the results of the sealed cover as also the imposition of penalty, and his claim for promotion cannot be deferred for the subsequent DPCs as provided in the instructions. It may be pointed out that the said subparagraph directs that" the officer's case (supra) for promotion may be considered in the usual manner by the next DPC which meets in the normal course after the conclusion of the disciplinary/court proceedings". The Tribunal has given the direction in question on the ground that such deferment of the claim for promotion to the subsequent DPCs amounts to a double penalty. According to the Tribunal, "it not only violates Articles 14 and 16 of the Constitution compared with other employees who are not at the verge of promotion when the disciplinary proceedings are initiated against them but also offends the rule against double jeopardy contained in Article 20 (2) of the Constitution". The Tribunal has, therefore, held that when an employee is visited with a penalty as a result of the disciplinary proceedings there should be a Review DPC as on the date, when the sealed cover procedure was followed and the review DPC should consider the findings in the sealed cover as also the penalty imposed. It is not clear to us as to why the Tribunal wants the review DPC to consider the penalty imposed while considering the findings in the sealed cover if, according to the Tribunal, not giving effect to the findings in the sealed cover when a penalty is imposed amounts to double jeopardy. However, as we read the findings of the Tribunal, it appears that the Tribunal in no case wants the promotion of the officer to be deferred once the officer is visited with a penalty in the disciplinary proceedings and the Tribunal desires that the officer should be given promotion as per the findings in the sealed cover.*

According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is

necessary to improve his conduct and to enforce discipline and ensure purity in the administration, in the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principal, for the same reasons, the so officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only 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. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from the date when for his conduct before that date he is penalized in praesenti. When an employee is held guilty and penalized and is, therefore, not promoted at least till the date on which he is penalized he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering a employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of "paragraph 3 of the said memorandum. We, therefore, set aside the said findings of the Tribunal. In the circumstances, the conclusions arrived at by the Full Bench of the Tribunal stand modified as above. It is needless to add that the modifications which we have made above will equally apply to the Memorandum of January 12, 1988.

29. In addition to *ibid* judgment, we have also gone through following judgments of Hon'ble Courts which have opined that promotion cannot be withheld merely because some disciplinary proceedings are pending against the employee and further it is only when a charge-memo/Charge-sheet in disciplinary proceedings is issued to the employee that it can be said that a departmental proceeding is initiated against the employee:-

- (a) **In the case of Union Of India vs. Dr. (Smt.) Sudha Salhan reported in AIR 1998 SC 1094, in para 6 of the judgement, The Hon'ble Apex Court has held as under -**

"6. The question, however, stands concluded by a Three Judge decision of this Court in Union of India Vs K.B. Janki Raman (1991) 4

SCC 109, which the same view has been taken. We are in respectful agreement with the above decision. We are also of the opinion that if on the date which the name of a person is considered by the Departmental Promotion Committee for promotion to the higher post, such person is neither under suspension nor has any departmental proceedings been initiated against him, his name, if he is found meritorious and suitable, has to be brought on the select list and the "sealed cover" procedure cannot be adopted. The recommendation of the Departmental Promotion Committee can be placed in a "sealed cover" only if on the date of consideration of the name for promotion, the departmental proceedings had been initiated or were pending or on its conclusion, final orders had not been passed by the appropriate authority. It is obvious that if the officer, against whom the departmental proceedings were initiated is ultimately exonerated, the sealed cover containing the recommendation of the Departmental Promotion Committee would be opened and the recommendation would be given effect to".

(b) In the case of Bank of India and Another vs. Degala Suryanaryana reported in AIR 1999 SC 2407 in para 6 of the judgement, Hon'ble Apex Court has held as under -

"14. However, the matter as to promotion stands on a different footing and the judgments of the High Court have to be sustained. The sealed cover procedure is now a well established concept in service jurisprudence. The procedure is adopted when an employee is due for promotion, increment etc, but disciplinary/criminal proceedings are against him and hence the findings as to his entitlement to the service benefit of promotion, increment etc. are kept in a sealed cover to be opened after the proceedings in question are over (see Union of India Vs. K.V.Janki Raman, AIR 1991 SC 2010, 2113. As on 1-1-1986 the only proceedings pending against the respondents were the criminal proceedings which ended into acquittal of the respondents wiping out with retrospective effect the aDiscipline & Vigilanceerse consequences, if any, flowing from the pendency thereof. The departmental enquiry proceedings were initiated with the delivery of the charge-sheet on 3.12.1991. In the year 19986-87 when the respondent became due for promotion and when the promotion committee held its proceedings, there were no departmental enquiry proceedings pending against the respondents. The sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 withheld for the D.E. proceedings initiated at the fag end of the year 1991. The High Court was therefore right in directing the promotion to be given effect to which the respondent was found entitled as on 1.1.1986. In the facts and circumstances of the case, the order of punishment made in the year 1995 cannot deprive the respondent of the benefit of the promotion earned on 1.1.1986."

(c) In the case of Union of Indioa & Ors vs. Anil Kumar Sarkar reported in J.T. 2013 (4) Supreme Court 103- in para 14, 15 and 17 of the judgement, Hon'ble Apex Court has held as under -

"14. In Coal India Limited & Ors Vs. Saroj Kumar Mishra, AIR 2007 SC 1706, this Court, in para 22 has held that a departmental proceeding is ordinarily said to be initiated only when a charge-sheet is issued.

15. In Chairman-cum-Managing Director, Coal India Limited and Others Vs. Ananta Saha and Others (2011) 5 SCC 142, this 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)”

We also reiterate that the disciplinary proceedings commence only when a charge sheet is issued. Departmental proceeding is normally said to be initiated only when a charge sheet is issued.

17. In the light of the above discussion and in view of the factual position as highlighted in the earlier paras, we hold that the ratio laid down in Janki Raman’s case (supra) are fully applicable to the case on hand, hence we are in agreement with the ultimate decision of the High Court. Consequently, the appeal filed by the Union of India fails and the same is dismissed. However,, there will be no order as to costs.”

30. The contention of the learned counsel for the respondents is that since a Court of Inquiry is pending, this would amount to cognizance of offence having been taken and as such the applicant cannot be allowed promotion. We are not impressed with the argument of learned standing counsel. The Court of Inquiry has been defined in Section 177 of the Army Rules, 1954 as under :-

*“177. Courts of Inquiry – (1) A court of inquiry is an assembly of officers or of junior commissioned officers or of officers and junior commissioned officers, warrant officer or non commissioned officers, **directed to collect evidence, and if so required to report with regard to any matter which may be referred to them.***

(2) The court may consist of a Presiding Officer, who will either be an officer or a junior commissioned officer, and of one or more members. The Presiding Officer and members of court may belong to any Regt or Corps of the service according to the nature of the investigation.

(3) A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps.”

31. Section 177 of Army Rules, 1954 makes it evident that the purpose of Court of Inquiry is to collect evidence with regard to any matter which may be referred to the Court of Inquiry. The court may consist of a Presiding Officer, who will either be an officer or a junior commissioned officer, and of one or more members. The Presiding Officer and members of court may belong to any Regiment or Corps of the service according to

the nature of the investigation. A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps. In true sense, it is a fact-finding body. It is only after the conclusion of the Court of Inquiry that a decision is taken by the competent authority that whether any case for disciplinary or administrative action is made out against any personnel and he should be proceeded with for the offence found to have been committed.

32. In the present case, General Officer Commanding-in-Chief after perusal of Court of Inquiry did not proceed with further course of action and opined in his wisdom that 'Censure' is an appropriate form to be awarded for the said conduct to the applicant and given opportunity to the applicant to show cause and reply. Accordingly, a Show Cause notice dated 06.03.2013 was served on 18.03.2013 to the applicant and he replied to show cause notice on 23.05.2003. Outcome of reply from respondents is still awaited? This delay of approximately 4 months gave us a feeling that concerned authorities perhaps are in a dilemma, what to do? It is also pertinent to note that admittedly, since August 2011, the matter regarding promotion of the applicant is pending with the Respondents. In view of the above, we are of the considered view that the delay in the process of taking decision on applicant's promotion is not only unjust, illegal but also not in conformity to law as laid down by the Hon'ble Supreme Court in the case of K.V. Jankiraman (Supra). We are of the considered opinion that after approval for promotion, if Discipline & Vigilance Ban, Type 'A' is imposed due to pendency of the Court of Inquiry and the Officer is not promoted, **in view of the settled law, as discussed above, the officer ought to have been considered for**

promotion on his turn. As regards applicant's prayer for consideration of General Cadre selection, it may be considered by the respondents after consideration of prayer for promotion in accordance with rules/regulations and law.

33. Thus in the result, Original Application is partly allowed. The respondents' action of imposing Discipline & Vigilance Ban Type 'A' with effect from 13.02.2013 is hereby set aside and the respondents are directed to pass orders regarding promotion of the applicant to the rank of Brigadier in conformity to law as laid down by the Hon'ble the Apex Court in the case of K.V. Jankiraman and others (Supra) within six weeks from the date a certified copy of this order is served.

33. There shall be, however, no order as to costs.

(Lt Gen B. S. Sisodia)
Administrative Member

(Justice V. K. DIXIT)
Judicial Member

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