Mr. Deepa Sreekumar.

CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD.

OA.213/2005 with MA.352/2006

Date of Decision: 06 -09-2006

Mr.R.B.Sreekumar : Applicant(s)

Mr.N.H.Seervai for
Ms.Deepa Sreekumar :Advocate for the applicant(s)

Versus

Union of India & ors.: Respondent(s)
State of Gujarat

Mr.B.N.Doctor &
Mr.Sunit Shah for
Res.No.1 to 5 .
None for Res.No.6
though duly served.
Mr.Saurabh Singh for
Mrs.N.V.Malkan for
Res.No.7 : Advocate for the respondent(s)

CORAM:
Hon'ble Mr. A.S. Sanghvi : Member (J)
Hon'ble Mr.Shankar Prasad : Member (A)

Central Administrative Tribunal

Shri R.B.Sreekumar, IPS,
(1971 Batch)
Additional Director General
of Police (Police Reforms)
Gujarat State,
Gandhinagar
G-6, Samarpan Flats,
Gulbai Tekra, Ellisbridge,
Ahmedabad-380 006. : Applicant

Advocate: Mr.N.H.Seervai for
Ms.Deepa Sreekumar

Versus

1. Government of Gujarat,
Notice through the
Chief Secretary,
New Sachivalaya,
Gandhinagar.

2. Chief Secretary,
Government of Gujarat,
New Sachivalaya,
Gandhinagar.

3. Principal Secretary,
Department of Home,
Government of Gujarat,
New Sachivalaya,
Gandhinagar.

4. Director General of Police,
State of Gujarat,
Police Bhavan,
Sector 18, Gandhinagar.

5. Mr.Narendra Modi or his
Successor,
Home Minister,
State of Gujarat,

New Sachivalaya,
Gandhinagar.

6.Mr.K.R.Kaushik, IPS,
(1972 Batch)
Commissioner of Police,
Ahmedabad City,
C/2, Satyam Flats,
Nex to Govt. Ladies Hostel,
Near Gujarat College,
Ellisbridge, Ahmedabad.

7.Union of India,
Notice through:
Secretary,
Ministry of Home Affairs,
Griha Mantralaya, North Block,
New Delhi-1. : Respondents

Advocate: Mr.B.N.Doctor
& Mr.Sunit Shah
for Res.Nos.1 to 5.
None for Res.No.6
though duly served.
Mr.Saurbh Singh for
Mrs.N.V.Malkan for
Res.No.7

ORDER
OA.213/2005 With MA.352/2206

Date: 6 -9-2006

Hon'ble Mr.A.S.Sanghvi : Member (J)

The applicant Mr.R.B.Sreekumar, an IPS officer of 1971 batch is at present working as Additional Director General of Police in the State of Gujarat. On dated 23.2.2005, a notification

No.IPS/10/05/681/B dated 23.2.2005 was issued by the Home Deptt. of the State of Gujarat whereby promotions to the post of DGP were notified. One of the persons promoted is Mr.K.R.Kaushik i.e. the respondent No.6. Since the respondent No.6 Mr.Kaushik is junior to the applicant, assuming that he was either not considered for promotion, or was superseded in promotion to the post of Director General of Police, the applicant approached this Tribunal with the present OA alleging unfair practice, malafides, ulterior motive and victimisation against the respondent No.5 the Chief Minister of the State of Gujarat, for his supersession in promotion. He has submitted inter alia that he has put in 34 years of commendable and dot-less service as an IPS officer and has been extended all the promotions except that of the Director General. He has been awarded President's Medal for meritorious service in 1990 and again in 1999. According to him, he has served in Gujarat Police Service most sincerely. No departmental inquiry has been pending against him nor he is facing any prosecution for criminal charge. He has never been suspended nor is there any adverse remarks in his ACR in last 34 years. Alleging that his supersession was only on account of his conflict with the respondent No.5 i.e. the Chief Minister of Gujarat, he had initially sought to get

the notification quashed and set aside.

2. However, when the respondent No.1 in his written reply to the OA pointed out that the case of the applicant for promotion to the post of DGP was duly considered by the DPC and in view of the pending prosecution for criminal charge DPC has kept its recommendation in a sealed cover, the applicant has amended the OA and has challenged the action of the DPC in keeping its recommendations in the sealed cover. Hence, after the amendment of the OA, the position is that the applicant is no more challenging his supersession in promotion to the post of DGP but he is challenging the action of the respondents in keeping the recommendations of the DPC in sealed cover so far his case is concerned. According to him, the so called pending criminal proceedings were initiated in the year 1986 when he was Superintendent of Police, Bhuj. A communal riot had broken out in the month of July 1986 in Bhuj and he had directed arrest of certain persons from both the communities with a view to control the riots and achieving the normalcy at the earliest. Some miscreant element had thereafter lodged a private complaint before the learned JMFC, Bhuj on 14.7.86 and the learned JMFC after holding an inquiry under Section 202 of CRPC had directed the issuance of process against other accused but had

declined to issue any process against him. The complainant had then approached the Hon'ble High Court and in view of the directives of the Hon'ble High Court, the learned JMFC had directed issuance of process against the applicant also. A special public prosecutor was also provided to applicant by the State of Gujarat to defend him in that criminal proceedings. Since criminal prosecution was lodged without obtaining sanction from the State under Section 197 of CRPC, the applicant had moved an application for his discharge but the same has come to be rejected by the learned JMFC, Bhuj. He has moved criminal revision application before the Hon'ble High Court of Gujarat, challenging the order of the learned JMFC and the Hon'ble High Court vide its order dated 29.10.2002 has stayed the criminal proceedings before the learned JMFC, Bhuj. The applicant has alleged that even though these proceedings were in the knowledge of the State of Gujarat and the officers of the Home Deptt. the same have never come in the way of his getting promotions from SP to DIG,IGP and Additional DGP. He has given instances of other Police Officers facing either criminal prosecutions or departmental proceedings and still getting promoted. He has contended that the decision to keep the recommendations of the DPC in sealed cover in his case has been taken only with a view to

victimise him and deprive him of his due promotion till he retires. Contending that the guidelines issued by the Central Govt. nowhere contemplates observing the sealed cover procedure in case of a criminal prosecution initiated on a private complaint, the applicant has submitted that the action of the DPC in directing observance of the sealed cover procedure is clearly in contravention of the guidelines and being illegal and unreasonable deserves to be quashed and set aside. He has asserted that there is no criminal prosecution or prosecution for criminal charge pending against him and has prayed for a relief of declaration that adoption of sealed cover procedure by the Departmental Promotion Committee/Screening committee and the acceptance of that recommendation by Respondent NO.5 is violative of principles and guidelines issued by the respondent No.7, Union of India and therefore, violative of Article 14, 16 and 21 of the Constitution of India, and therefore illegal and unconstitutional. He has further prayed for quashing and setting aside the same and for a direction to the respondents No.1 to 5 to open the sealed cover and act in accordance with the assessment made by the DPC in his case.

3. We may at this juncture record that Mr.Seervai, learned counsel appearing for the applicant has

made a statement at the bar that he is not pressing the relief prayed in para-8-C to G and part of the statement made in para-8-H i.e."suffers from colourable exercise of power, political motive, perverse, based on factual and legal malafides, bias, prejudice and actuated out of sense of victimization". He has also fairly conceded that some of the allegations made in the OA i.e. prior to the amendment of the same are now irrelevant and immaterial in view of the case of the applicant being confined only to the challenge to the action of the DPC in keeping the assessment of the applicant for promotion to the post of DGP in the sealed cover. We also note that the respondents have already moved MA.352/2006 for expungment of certain allegations made in the OA. We shall be dealing with the same at the later stage.

4. The respondent NO.1,2-5 and Respondent NO.7 have filed their written reply to the OA. The respondent NO.1 in his reply to the amended OA has pointed out that the case of the applicant for promotion to the post of DGP was duly considered as per the guidelines dated 15.1.99 issued by the respondent NO.7. It is also pointed out that along with the other eligible officers the case of the applicant was also placed before the Screening Committee/DPC comprising of Respondent

No.2 to 4 and Additional Chief Secretary (Planning), General Administration Department. The Screening Committee had duly considered all the cases and noting that prosecution for criminal charge is pending against the applicant, had kept its recommendations in a sealed cover. According to them,the observations of the Screening Committee are as under:-

> " Judicial Magistrate First Class, Bhuj has ordered on 29.7.02 a process issue against Shri R.B.Srikumar in a Criminal Application in 2189/90 to 219/90. Against the order of process issue, a revision application has been filed in Gujarat High Court by Shri R.B.Sreekumar. Gujarat High Court has granted stay in October, 2002.Revision Application NO.418 to 420/2002 is still pending in the Gujarat High Court.
>
> Since the prosecution for criminal charge is pending (as on the date of the meeting of the Committee) against Shri R.B.Sreekumar in the sealed cover.
>
> Recommendation of the committee is kept in sealed cover"

5. It is further submitted by the respondent No.1 that the recommendations of the Screening Committee being advisory in nature, the State Govt. has an option to either agree or disagree with the recommendations of the Selection Committee. The competent authority having agreed with the views of the Selection Committee, recommendations of the Selection Committee are kept in the sealed cover. Since the recommendations are in the sealed cover,

it is not known whether the Selection Committee had recommended the applicant suitable or unsuitable for promotion. The stage for agreeing or disagreeing with the recommendations of the selection committee has not come and therefore, the OA is premature. The allegations of malafide against Respondent No.2-4 more particularly respondent No.5 are absolutely baseless. The respondents have urged that the applicant should be directed to delete the said allegations, averments and statements made against Respondents No.2-4 and more particularly respondent NO.5.With regard to the allegations of the applicant of his getting promotion despite pending criminal case at Bhuj, the respondent has submitted that the attention of the previous selection committees was not drawn to the fact of the issuance of the process against the applicant. It may also be due to over sight. The applicant however cannot take advantage of the said fact and claim further promotion asking Govt. to ignore the fact of pending prosecution against him. As regards cases of promotions of the other Police Officers cited by the applicant , the respondent has maintained that the promotion in the case of Mr.S.S.Khandwawala was given inadvertently as the issuance of process was not brought to the notice of the Selection committee at the relevant time. They have however, asserted that after the

conviction of Mr.Khandwawala he has not been given any further promotion. As regards Mr.Vanjara, according to the respondent the Selection committee met on 17.1.2003 to consider his promotion to the post of DGP and at that time no criminal proceedings were pending against him in any Court. It has however, come to the notice of the State Govt. that on 6.7.2003 a charge sheet has been filed against him for offence under Section 147, 148, 149,23, 504, 560(2) 427 etc. of IPC

6. In their composite reply after the amendment of the OA, the respondent No.1 to 5 have denied allegations of prejudice, malafide, bias made by the applicant against the respondent NO.5 and also have denied the averments that the action of the DPC in keeping his assessment for promotion to the post of DGP in sealed cover was arbitrary, illegal or invalid. It is contended that the DPC was constituted as per the guidelines dated 15.1.99 of the Govt. of India and the respondent NO.5 had no role either in the constitution of the DPC or in the procedure adopted by the DPC or assessment of the respective candidates. It is also contended that the respondent No.2 to 5 are mis-joined as parties in this OA and they are required to be deleted as no relief is prayed against them and no issue arises in the OA which cannot be decided

without their presence on record. The Respondent NO.5 has no opportunity to consider the recommendation of the Selection Committee on merit as the assessment of the applicant is kept in the sealed cover and therefore, he has been unnecessarily impleaded as a party and placed him in an embrassing position. It is also pointed out that on one hand the applicant is seeking prayers in Original Application to set aside adoption of sealed cover procedure by making allegations of political motives,perversity, factual and legal malafide, bias, prejudice,sense of victimisation, etc. and on the other hand seeks further direction to consider the case of the applicant for promotion in accordance with the assessment which amounts to indirectly taking away authority and powers of concerned competent authority to consider the recommendation of the selection Committee after sealed cover is opened at appropriate time and thereby indirectly preventing the competent authority from exercising authority under guidelines dated 15.1.99 . It is also contended by the respondents that the applicant has suppressed the fact of his facing disciplinary proceedings while securing promotions to the post of Additional DGP on 9.8.2000. He was charge sheeted on 17.11.99 by Govt. of India but the fact was not brought to the notice of the State Govt. and this resulted

into his being given promotion to the post of Additional DGP in the year 2000. According to them, if the State Govt. was acting with any malafides, the applicant would never have secured the promotion to the post of Additional DGP. According to them when the DPC was apprised of the pending criminal case against the applicant before the Court of learned JMFC, Bhuj, the DPC had recommended keeping their assessment in the sealed cover as per the guidelines of the Govt. of India. With regard to the legal assistance provided to the applicant, the respondents have contended that rendering such legal assistance to the applicant for defending the criminal complaint filed against him does not tantamount to the State Govt. of Gujarat defending the applicant in the Court of law. Rendering of such legal assistance is a matter of course and the same cannot be treated as ascribing knowledge of the pending criminal case to the State Govt. They have maintained that the DPC has rightly kept the assessment of the applicant for promotion to the post of DGP in the sealed cover and urged that the OA be dismissed with costs.

7. Before we proceed further to examine the rival contentions, a brief history of the undisputed facts, in the contextual backdrop of which this

case has arisen, is absolutely necessary for understanding the nature of the case. The applicant while serving as SP,Bhuj-Kutch in 1986 had dealt with some riots in Bhuj. According to him he had been successful in controlling the riots but some political activist had filed private criminal complaints against him and four other Police Officers. It appears that in all three criminal complaints were lodged before the learned Chief Judicial Magistrate , Bhuj and after holding inquiry under Section 202 of the CRPC, the learned Chief Judicial Magistrate vide his order dated 10.9.90, directed issuance of process for offences under Section 323,324,341,342,504 and 506(2) of the IPC against the accused except the applicant herein. Since the learned Judicial Magistrate had not directed issuance of the process against the applicant herein Criminal Revision Applications No.358-360/90 were preferred by the complainant before the Hon'ble High Court of Gujarat. The Hon'ble High Court of Gujarat vide order dated 24.12.90 while disposing of the CRAs directed the learned Judicial Magistrate to issue the process against the applicant herein. Pursuant to this direction, learned Chief Judicial Magistrate vide order dated 30.4.91 directed issuance of process in all the three cases against the applicant also. It is not clear when the processes were served on the

applicant but on dated 21.9.96, the applicant had moved an application for his discharge in view of the sanction to prosecute required under Section 197 of the CRPC having not been granted against him. This application exhibit 100 on the file of the learned JMFC Bhuj-Kutch, is decided by the learned JMFC Bhuj-Kutch on 29.7.2002 rejecting the said application. Against the decision of the learned JMFC Bhuj-Kutch refusing to discharge him, the applicant has preferred Criminal Revision Application No.418-420/02 before the Hon'ble High Court of Gujarat and the Hon'ble High Court of Gujarat vide its order dated 29th October, 2002 has granted stay of the further proceedings before the learned JMFC. Undisputedly, the criminal Revision Application before the Hon'ble High Court is still pending .

8. In the meantime the applicant has come to be promoted from SP to DIG ,IGP and to Additional DGP. Only when he was due to be considered for promotion to the post of DGP in the year 2005 the Department placed the material regarding the pending criminal case against him in the Court of JMFC Bhuj before the DPC and the DPC in its meeting dated 12.2.2005 after considering his case for promotion to the post of DGP has recorded the following minutes:-

" Judicial Magistrate First Class, Bhuj has ordered on

29.7.02 a process issue against Shri R.B.Sreekumar in a Criminal Application in 2189/90 to 2191/90. Against the order of process issue, a revision application has been filed in Gujarat High Court by Shri R.B.Sreekumar. Gujarat High Court has granted stay in October, 2002.Revision Application No.418 to 420/2002 is still pending in the Gujarat High Court.

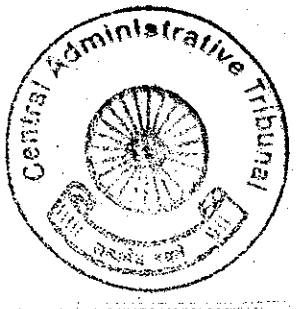
Since the prosecution for criminal charge is pending (as on the date of the meeting of the Committee) against Shri R.B.Sreekumar in the sealed cover.

Recommendation of the committee is kept in sealed cover"

9. The recommendations of the DPC are the bone of contention between the parties. However, before proceeding further to deal with the arguments advanced at the bar and the respective contentions of the parties, we may further point out that the applicant on learning about the issuance of the notification dated 23.2.2005 and finding that his junior was promoted to the post of DGP while his name was not in that notification and assuming that he was superseded in the said promotion, approached this Tribunal by moving the present OA alleging bias, malafides, arbitrariness etc. against the respondents. However, when the respondents pointed out in the reply that he had not been superseded as believed by him, and that the DPC had kept its assessment of his fitness for promotion in the sealed cover, the applicant has amended the OA and challenged the action of the DPC

in keeping its assessment in the sealed cover. The respondents had however, moved an MA.644/2005 seeking decision of the issue regarding jurisdiction of the Tribunal as a preliminary issue on the ground that the applicant had not exhausted the alternative statutory remedy of appeal provided under Rule 16 of All India Service (Discipline & Appeal) Rules, 1969 and hence, the OA cannot be entertained by the Tribunal in view of the provisions of Section 20 of the Administrative Tribunals Act, 1985. The MA has come to be rejected on 8.2.2006 by this Tribunal and against the rejection of that MA, the respondents have moved the Hon'ble High Court by way of Spl.CA No.9571/06. The Hon'ble High Court of Gujarat vide its order dated 2.5.2006 after hearing the learned counsel of both the parties had directed issuance of Rule and stayed the operation of the proceedings before this Tribunal. Against this order of the Hon'ble High Court staying the proceedings before this Tribunal, the present applicant has preferred SLP No.8905/06 before the Hon'ble Supreme Court and the Hon'ble Supreme Court has on dated 3.7.06 passed the following order:-

> "Taken on Board.
> Issue notice
> Interim stay of the impugned order.
> The Tribunal may proceed with the hearing of the matter but the final order may not be implemented."



10. Pursuant to the order of the Hon'ble Supreme Court, the Division Bench of the Hon'ble High Court vide its order dated 7.8.2006 has observed as under:-

> " Last time, when the matter was placed before this court, the learned counsel for the parties brought to our notice an order dated 12.5.2006 passed by the Hon'ble Supreme Court of India in SLP (Civil)NO.8905/06 and has prayed for time till today i.e. 7.8.2006. Accordingly, the matter was kept today.
>
> Today Mr.Mehul Mehta for Ms.Deepa Sreekumar for the respondent places on record an order of issuing fresh notice to respondent No.6 & 7 by the Hon'ble Supreme Court of India and requested to adjourn the matter. Ms.Sangeeta Vishen for the petitioners has no objection. We make it clear that on a note filed by either party, the matter be placed for further hearing after SLP(Civil) NO.8905/2006 is disposed of by the Hon'ble Supreme Court."

11. Since the Hon'ble Supreme Court has directed the Tribunal to proceed with the hearing of the matter, the applicant had applied for early hearing of the OA and the learned counsel for the respondents agreeing for such hearing, we have heard the learned counsel of both the parties at length.

12. Mr.N.H.Seervai, learned counsel appearing for the applicant has submitted that the applicant coming within the zone of consideration, was duly considered by the DPC for promotion to the post of

DGP but the action of the DPC in keeping its assessment in the sealed cover is patently illegal, unjustified and invalid. The reasons given by the DPC for such an unusual action on their part is that the prosecution for criminal charges is pending against the applicant requiring them to keep their recommendations in the sealed cover. According to Mr.Seervai, the DPC has failed to notice that no charge has been framed in the criminal proceedings pending against the applicant and that in fact there was no prosecution against the applicant. He has elaborated that since no criminal case instituted on police complaint or police report was before the JMFC-Bhuj, it cannot be said that the prosecution for criminal case is pending against the applicant. The guidelines dated 15.1.99 issued by the Govt. of India providing general principles regarding mode of selection etc. for promotion and functions of Screening Committee etc,, nowhere provides for keeping the assessment of the DPC in the sealed cover in a case where a criminal case lodged on a private complaint is pending. The guidelines issued by the Govt. of India and more specifically para-11 of those guidelines only contemplates a criminal prosecution lodged by police and not by private individuals. He has emphasized that since the criminal case against the applicant was lodged by a private person and

the criminal case has not yet reached, the stage of trial and no charge has been framed by the learned Magistrate against the applicant, it was not open for the DPC to consider that a prosecution for criminal charge is pending against the applicant and thereby deny promotion to the applicant. He has further submitted that the criminal case against the applicant is pending since 1986 or more specifically from 1991 but between 1991 and 2005 the applicant has been given promotions to the post of DIG, IGP and Additional DGP. The State Govt. according to him, cannot deny the knowledge of the pending criminal case against the applicant as the State Govt. had provided legal assistance to the applicant for defending his criminal case before the JMFC as well as in the High Court. Relying heavily on the decision of the Hon'ble Supreme Court in the case of Union of India vs. Jankiraman & Ors reported in 1991 (4) SC 109 , Mr.Seervai, learned counsel for the applicant has submitted that the ratio of this decision directly applies to the case of the applicant as this is the only case decided by the Supreme Court relating to the criminal prosecution. All other subsequent decisions according to him, either relate to the departmental proceedings or relating to the sanction of prosecution. In Janki Raman's case, the Supreme Court has clearly laid down 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 and the sealed cover is to be resorted to only after the charge memo/charge sheet is issued. Since the applicant has not been served with any charge sheet by the Police, if the ratio in the case of Jankiraman is applied, the applicant cannot be said to be facing a criminal prosecution and the sealed cover procedure cannot be resorted to in his case. According to him Govt. also never intended the prosecution for criminal charge to mean a prosecution initiated on the complaint of a private person. Withholding of promotion or keeping the assessment in the sealed cover on the ground that some criminal case lodged by some disgruntled element against the Police Officer is pending, would seriously prejudice the interest of the concerned officer and would encourage the interested persons to lodge fake criminal complaints against officers who are due for promotion. He has further submitted that reading para 19 with para 11 of the guidelines leave no manner of doubt that what is contemplated by the Govt, of India is a prosecution initiated on police report and not otherwise. According to him, since

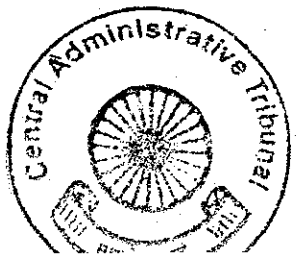
para 19.1 of the guidelines provides that to ensure that the disciplinary case/criminal prosecution instituted against an officer is not unduly prolonged and all efforts to expeditiously finalise the proceedings are taken so that the need for keeping the case of officers in sealed cover/covers is limited to the barest minimum, the appointing authorities concerned should comprehensively review such cases on the expiry of six months from the date of convening the first Screening Committee, the same will become otiose or redundant, if the criminal prosecution referred to in para-11 relates to a private complaint. It would not be possible for the competent authority or appointing authority to review such cases, if the pending prosecution is initiated on a private complaint. Hence, para 19.1 read with para 11 makes it abundantly clear that the intention of the Govt. was to consider the prosecution for criminal charge as the prosecution initiated on the police report.

13. Mr.Sunit Shah and Mr.B.N.Doctor, learned counsels, appearing for respondents No.1-5 on the other hand has stoutly defended the action of the DPC in keeping the assessment of the suitability of the applicant for promotion to the post of DGP in sealed cover and submitted that the guidelines dated 15.1.99 issued by the Govt. of India and

applicable to IPS officers make no distinction whatsoever between a criminal prosecution initiated on a police report or otherwise. Referring to the heading of para 11 of the guidelines, Mr. Shah has submitted that para-11 of the guidelines apply in the cases of the officers under cloud and relates to the procedure to be followed in their cases. According to him, the moment it is admitted that the applicant is facing criminal prosecution whether it is initiated on police report or on a private complaint, it cannot be denied that the officer is under cloud. Since he was an officer under cloud and this fact was brought to the notice of the DPC by the department, the DPC was clearly under an obligation to keep its assessment in the sealed cover. According to him, if an officer under cloud is promoted, it will undermine the confidence of common man in the system and would clearly raise several unwarranted questions. It is his conduct and the behaviour which is to be considered by the DPC and not mere pendency of prosecution for criminal charge. Relying on a decision in the case of State of Punjab vs. Ajaib Singh reported in AIR 1995 SC 975 he has submitted that the Supreme Court in the case of a Police Officer charged with committing murder and getting promoted during the pendency of his appeal has shown their disapproval of such action.

14. Mr.Shah has further referred to the decision in the case of Delhi Development Authority vs. H.C.Khurana reported in AIR 1993 SC 1488 and submitted that the Supreme Court denied to read something more than what was said in the Jankiraman's case. It has nowhere been said in Jankiraman's case that the sealed cover procedure is to be resorted to only in the cases instituted on police report and not otherwise. Since the Supreme Court was dealing with the case of prosecution initiated on the service of the charge sheet by the police, the words disciplinary charge memo/charge sheet are used in the judgment and it is laid down that the sealed cover procedure is to be resorted to only after the charge memo/charge sheet is issued. It however,does not necessarily mean that the Supreme Court excluded the criminal prosecution lodged on the complaint of a private person. He has further submitted that the decision in Jankiraman's case has been again considered in the case of Union of India vs. Kewal Kumar reported in AIR 1993 SC 1585 and the Supreme Court has gone to the extent of saying that the sealed cover procedure is attracted even when a decision has been taken to initiate disciplinary proceedings or decision to accord sanction to prosecute taken or criminal prosecution is launched. According to him, in the instant case, the criminal prosecution

is not only launched but is pending against the applicant and as such, the DPC could not have ignored this fact. Referring to the submissions of the past promotions extended to the applicant, even though the criminal case against the applicant was pending, he has pointed out that none of the DPCs at the relevant time were made aware about the pending criminal case against the applicant. Referring to para 11.1 of the guidelines, he has submitted that the obligation is cast on the department to bring to the notice of the concerned Screening Committee the fact about the suspension of the officer, issuance of the charge sheet and the pendency of the disciplinary proceedings and the pendency of prosecution on criminal charge. It is not the function of the DPC to collect the evidence and the DPC cannot bring its own personal knowledge in taking a decision of keeping the recommendations in the sealed cover. According to him, if the fact of the pending criminal prosecution was not brought to the notice of the DPC earlier, the Govt. was not going to be benefited in any way. If the same was not brought to the notice of DPC at the relevant time, obviously the gainer was applicant. According to him, merely because he was provided with legal assistance to defend the criminal case, it cannot be presumed that the Govt. or concerned authority



had knowledge of the pending criminal prosecution against the applicant. He has further submitted that para 19 of the guidelines cannot in any manner be read to control para-11. Even if both the paras are read together the interpretation that the criminal prosecution contemplated in para-11 is only with respect to the prosecution initiated on a police report is not at all possible or justified. Even if the criminal prosecution initiated on the police report is pending, the appointing authority cannot control those proceedings and get an expeditious disposal of the same. It is for the criminal Court to control the proceedings before it and therefore, when the review of the sealed cover procedure is contemplated in para 19, the same does not apply only to the cases lodged on the police complaint.

15. So far the Central Govt. i.e. the Respondent NO.7 is concerned, though it is the author of the guidelines and even though Mr.Saurabh Singh, learned counsel appearing for Mrs. N.V.Malkan for respondent No.7 was specifically asked to obtain instructions as to the applicability of these guidelines to the criminal cases lodged on private complaint, Mr.Singh has submitted that he has not received any instructions from the Central Govt. According to him, he had repeatedly asked the

respondent NO.7 to furnish necessary instructions in this regard, but has not received any instructions, and as such, he is not in a position to make any submissions. This is clearly a deplorable situation and I strongly deprecate the conduct of the respondent No.7, the Union of India, in not showing any inclination to assist the Tribunal in the decision on the matter.

16. Before I proceed to deal with the rival submissions, I would like to point out that though the outcome of this case depends mainly on the pending Special Criminal Revision Application No.418-420/02 before the Hon'ble High Court, the applicant without first obtaining a decision in those CRAs has for the reasons best known to him, proceeded with this OA first. It is quite obvious that if he succeeds in the pending CRAs before the Hon'ble High Court and the Criminal proceedings pending against him before the learned JMFC, Bhuj are quashed on the ground of non availability of sanction to prosecute, the very basis on which the DPC's decision to keep its assessment in the sealed cover will be knocked out. In any case, since he has now chosen to challenge the DPC's decision, we have duly considered his case.

17. It is clear from the rival contentions that the

main question that requires examination and answer is as to whether the criminal prosecution lodged on private complaint is covered under the guidelines of Govt. of India dated 15.1.99 and even if it is not covered, whether the decision of the DPC to keep its assessment of the suitability of the applicant for promotion to the post of DGP in the sealed cover can be interfered with by this Tribunal by way of judicial review. So far the guidelines issued by the Govt. of India on dated 15.1.99 are concerned, para-11 which is most relevant for the purpose of decision of the issue involved in this OA reads as under:-

> "11. At the time of consideration of the cases of officers for promotion, details of such officers in the zone of consideration falling under the following categories should be specifically brought to the notice of th concerned Screening Committee:-
>
> (a) Officers under suspension,
> (b) Officers in respect of whom a charge-sheet has been issued and disciplinary proceedings are pending,
>
> (c) Officers in respect of whom prosecution for criminal charge is pending."
>
> 11.2 The Screening Committee shall assess the suitability of the officers coming within the purview of the circumstances mentioned , above, along with other eligible candidates, without taking into consideration the disciplinary case/criminal prosecution which is pending. The assessment of the Committee including "unfit for promotion" and the grading awarded by it will be kept in a sealed cover. The cover will be superscribed "findings regarding the

suitability for promotion to the scale of ..... in respect of Shri.....not to be opened till the termination of the disciplinary case/criminal prosecution against Shri....."

18. A plain reading of the above para clearly indicates that the para-11.1 casts obligation on the department to furnish details of the officers in the zone of consideration falling under the categories specified in (a) to (c), to the concerned DPC or the Screening Committee and one of the categories specified is of officers in respect of whom prosecution for criminal charge is pending. The first question that arises is that if the department fails in its obligation to furnish all the details in case of a particular officer about prosecution for criminal charge, then whether the DPC can be faulted for the same. Neither para 11 nor any other para of the guidelines cast any obligation on the DPC to collect the evidence or material to satisfy itself about the pendency or non pendency of prosecution for criminal charges against the concerned officer. Hence, if the department fails in providing the necessary information about the pendency of prosecution for criminal charge, the assessment of the DPC with regard to that officer cannot be said to have been vitiated. The contents of para 11.2 clearly implies that the function of the DPC is only to consider

the material brought to its notice and to assess the suitability of the officers falling within the zone of consideration for promotion on the strength of the material brought to its notice. If any of the officers falling within the zone of consideration is facing a prosecution for criminal charge or is under suspension or facing a disciplinary proceedings, then the DPC is required to consider his case and to assess the suitability of the concerned officer irrespective of the pendency of the disciplinary case or criminal prosecution and to keep its assessments in the sealed cover till such proceedings are over. Hence, when sufficient material is brought to the notice of the DPC that some criminal prosecution or criminal case is pending against the concerned officer, the adoption of the procedure of sealed cover by the DPC cannot ordinarily be questioned.

19. However, in the instant case, the applicant is facing a criminal prosecution initiated on private complaint. So far the criminal procedure code is concerned, no distinction is made between a criminal case instituted on a private complaint and a criminal case instituted on police report. It is only when on the report of the Police Officer under Section 173 of the CRPC, Magistrate takes cognizance of the offence that a criminal case on

the police report can be said to have been initiated. Similarly in the case of private complaint only after the Magistrate take cognizance of the offence after holding due inquiry under Section 202 and issues process under Section 204 of the CRPC that a criminal prosecution can be said to have been started. Hence, what is required to start a criminal prosecution is the Magistrate taking cognizance of the offence. Once the Magistrate has taken cognizance of the offence and process are issued, the criminal prosecution can be said to have been started. No doubt, in the trial of the warrant cases instituted on the police report and private complaint the procedure prescribed is slightly different but in both the cases, the criminal prosecution is initiated on the Magistrate taking cognizance of the offence. In Jankiraman's case the Supreme Court has observed 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 contention of Mr.Seervai for the applicant is that since no charge sheet was given to the applicant, the DPC could not have construed the criminal case pending against the applicant as a criminal prosecution initiated

against him. Though the Supreme Court has used the word charge sheet while describing the police report under Section 173, the same is not used in the Criminal Procedure Code but it is only commonly understood. However, mere submission of the charge sheet or report under Section 173 also cannot initiate a criminal prosecution as the charge sheet being defective or for any other reason can be rejected by the Court. It is, therefore, only when on the submission of the charge sheet or final report by the Police under Section 173, the Magistrate takes cognizance of the offence that the criminal prosecution can be said to have been initiated. Since there is no distinction between a prosecution initiated on the submission of a police report under Section 173 and on the Magistrate taking cognizance on a private complaint, it cannot be said that what was contemplated by the Supreme Court in Jankiraman's case (supra) was only the criminal prosecution lodged by the police. In the instant case, undisputedly the learned JMFC had earlier declined to issue process against the applicant when the criminal case was lodged against the applicant and others. However, after the directions of the Hon'ble High Court in Criminal application NO.360/90 the Chief Magistrate by its order dated 30.4.91 had directed issuance of process against

the applicant for the offence under Section 323,504, 506(2) and 346 of IPC. The applicant had thereafter on dated 21.9.96 applied for his discharge on the ground of no sanction for prosecution being obtained by the complainant under Section 197 of the CRPC. That application admittedly after hearing is dismissed by the learned JMFC , Bhuj and against that order of the learned JMFC , Bhuj the applicant has preferred CRA No.418 to 420/02 before the Hon'ble High Court. These facts therefore, clearly reveal that not only the cognizance of the criminal prosecution on private complaint was taken by the learned JMFC but thereafter the applicant had taken steps in the proceedings to get himself discharged indicating thereby that criminal prosecution is pending against him. Though learned JMFC has admittedly not framed charge against the applicant, his rejection of applicant's application for discharge clearly indicates his application of mind and his inclination to frame charge against the applicant. It therefore, cannot be denied that a criminal proceedings though at present stayed by the Hon'ble High Court are pending against the applicant and he is facing prosecution for criminal charge. The words criminal charge used in para 11.1 of the guidelines cannot be construed as the charge framed by the Magistrate after the accused has appeared

before him. The suitable meaning of the word charge used in para 11.1 would be 'accusation' rather than the charge as framed by the Magistrate.

20. The question now is when a prosecution for criminal charge is found to be pending against the applicant, even if the said prosecution is initiated on private complaint, whether the DPC taking cognizance of the pending prosecution and deciding to keep its assessment of the suitability of the applicant for promotion to the post of DGP in the sealed cover can be said to be illegal, invalid or arbitrary. Obviously, it is a question of interpreting the words prosecution for criminal charge and when more than one interpretation is possible and DPC has adopted one interpretation, the Tribunal in exercise of its power of judicial review cannot substitute the other interpretation. It is a settled position of law that when more than one interpretation of a particular clause is possible and the concerned authority has adopted one interpretation, the Tribunal sitting in judicial review of that interpretation cannot substitute its finding for the finding of the concerned authority.

21. In the case of **Union of India & Anr. V.G.Ganayutham** reported in **1997 (7) SCC 463** the

Supreme Court referring to the administrative decision and the judicial review thereto has observed as under:-

> "According to Wednesbury's case while examining reasonableness of an Administrative decision, the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view."

22. Again in the case of **Apparel Export Promotion Council v. A.K.Chopra** reported in **JT 1999(1) SC 61** the Supreme Court has laid down as under:

> "The High Court cannot substitute its judgment for that of administrative authority. Even though judicial review of administrative action must remain flexible and its dimension not closed, yet the Court in exercise of the power of judicial review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial Review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process.
>
> The Court while exercising the power of Judicial Review must remain conscious of the fact

that if the decision has been arrived at by the Administrative Authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the Court cannot substitute its judgment for that of the Administrative Authority on a matter which fell squarely within the sphere of jurisdiction of that authority."

23. Since it cannot be denied that the prosecution for criminal charge is pending against the applicant the decision of the DPC to keep its assessment of the suitability of the applicant for promotion to the post of DGP in the sealed cover cannot be faulted and cannot be interfered with by this Tribunal by way of judicial review of the same. The DPC was not required to consider whether the prosecution for criminal charge pending against the applicant was instituted on a private complaint or instituted on a police report. The guidelines also have not made any distinction between the two. The law also does not make any distinction between the two as the criminal prosecution code is silent about it.

24. The contention that the very criminal proceedings were pending against the applicant when he was given three promotions earlier is hardly of any relevance. Merely because the earlier DPCs were not apprised of this pending criminal

proceedings, the decision of the present DPC to keep its assessment in the sealed cover cannot be faulted with, when the fact about the pending criminal prosecution is brought to its notice. The applicant also cannot derive any mileage from the fact that earlier DPCs were not intimated about the pending criminal prosecution against him and had recommended for his promotions. Any action taken erroneously or inadvertently cannot act in perpetuity. Promotions recommended by the DPC in ignorance of the fact of the pending criminal prosecution cannot entitle the applicant to claim further promotion on the same ground. The decision of Apex Court in State of Bihar vs. K.P.Singh 2000 SCC (L & S) 845 refers. It was also suggested that some of the Members of the DPC were aware about the pending criminal prosecution against the applicant as the department had provided legal assistance to the applicant to defend the pending criminal prosecution against him. There is hardly any merit in this submission. The DPC is constituted of Chief Secretary, one non IPS officer of the rank of Chief Secretary and working in the State Govt. , Director General of Police, and Additional Member with rank not less than Additional Secretary to Govt, of India. Since the Members of the Screening Committee or DPC act as such in view of the designation, the Member of the DPC may not be the Member of another

DPC. In applicant's case, when he was recommended for promotion to DIG post by the DPC convened in 1986, he was not facing any prosecution at that time. Thereafter, he was recommended for promotion to the post of IG by the DPC convened on 18.11.93 and Additional DGP's post by the DPC convened on 16.11.1998. The DPC minutes for the year 1993 and 1998 brought on record by the learned counsel for the respondents reveal that so far DPC of 1993 and 1998 were concerned, no intimation or material showing the pendency of the criminal case against the applicant was provided to the DPC but on the contrary it was certified that there was no disciplinary proceedings or criminal proceedings pending against him. Hence, it is evident that both the DPCs were not aware about the pending criminal prosecution against the applicant and their decision to recommend him for promotions was clearly in ignorance of the fact of the pending criminal prosecution. However. The factum of the pending criminal case was brought to the notice of the DPC of 2005 and once that fact was brought to the notice of the DPC, the DPC has taken a decision to keep its assessment in the sealed cover. Hence, any decision taken in ignorance of the fact cannot entitle the applicant to claim that the same decision be reiterated by the DPC of 2005 and its recommendations pertaining to him cannot be kept in

a sealed cover.

25. Mr.Seervai , learned counsel for the applicant has expressed concern about the possible abuse of the private complaints. According to him, interested persons with a deliberate intention of depriving the concerned employee of his promotion would resort to filing of the private complaint. The Supreme Court therefore, in Jankiraman's case has not treated the private compliant at par with the prosecution lodged on the police report. It is difficult to agree with this submission. If the intention of the Supreme Court in Jankiraman's case was to make a distinction between a prosecution lodged on police report and a prosecution lodged on private complaint and exclude the prosecution lodged on private complaint from the purview of the sealed cover procedure, the Supreme Court would have definitely said so in so many words, On the contrary in para-29 of the judgment in Janki raman's case the Supreme Court has inter alia observed as under:-

> "An employee has no right to promotion. He has only a 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 a 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 a date when for his conduct before that date he is penalised in praesenti."

26. The above observations are clear indication of the Hon'ble Supreme Court considering conduct of the employee as being more relevant than criminal prosecution. Again thereafter, in the case of State of Punjab vs. Ajaib Singh reported in AIR 1995 SC 975 and relied on by Mr.Sunit Shah, learned counsel appearing for the respondents, the Supreme Court dealing with promotion of a police officer facing charge of murder has made the following pertinent observations:-

"Before closing this case, we shall be failing in our duty if we do not record our serious disapproval of the manner in which the Government not only reinstated but promoted the officer when the appeal by it against his acquittal was pending in this Court. In our opinion, the Government would have been well advised to adopt the sealed cover procedure, a firmly established and well known practice in service law. Murder by a police officer is provocative. The trial of the officer and conduct of the Government both are in public glare. It is not the competency or efficiency of the officer but his conduct and behaviour and approach of the Government towards such officer which is measured in social scale. Such unwarranted actions of the Government shakes the confidence of common man in the system. He loses faith in it when a person who is standing trial in appeal is promoted."

27. The above observations clearly suggest that the Hon'ble Supreme Court was of a clear opinion that

while considering the case of an employee under cloud, the DPC is also required to consider his conduct and behaviour and effect of his promotion on the common man. If an employee enjoying higher position in Govt. is promoted pending the criminal proceedings public interest may suffer and there may be a public ridicule. In fact the applicant himself has cited the case of Mr.S.S.Kandwavala to show that he was also promoted pending criminal prosecution. His case clearly highlights the necessity of including private complaint in the meaning of pending criminal complaint and not excluding the same. Mr.Kandwavala, an IPS Officer, as the record reveals, was facing a criminal prosecution instituted on a private complaint but inspite of such pending criminal prosecution he had come to be promoted as IGP and Additional DGP. The criminal prosecution pending against him has resulted into his conviction and sentence by the additional Session Judge , Junagadh placing the Govt. in an awkward position. It is also to be noted that Mr.S.S.Kandwavala's name was also placed before the DPC of 2005 which considered applicant for promotion to the post of DGP. The department had then pointed out the award of sentence of five years by the Additional Session Judge, Junagadh to Mr.Kandwavala and it appears that he was not considered fit to be promoted to the post of DGP.

It may be that the DPC finding that a criminal prosecution can result into conviction and learning the lesson from the incidence of Mr.Kandwawala may have adopted a cautious approach so far the case of the applicant was concerned.

28. Furthermore, the restrictive meaning of the criminal prosecution sought to be advanced by Mr.Seervai cannot be accepted for the simple reason that if such a restrictive meaning is adopted then in all cases of custodial deaths or torture to the accused persons, police officers will succeed in getting promotions unmindful of the pending criminal complaints against them. Invariably in such cases of violation of human rights etc. the complaints will be from the private persons and if such criminal prosecution instituted on private complaints are to be considered as not included in clause(c) of para-11.1 of the guidelines then clearly irrespective of such complaints the accused police officer will succeed in getting further promotions and thereby making a mockery of the administrative system. So far the question of the abuse of the private complaints is concerned, anybody who indulge into filing a false criminal complaint risks being prosecuted for malicious prosecution. Hence, on mere concern of abuse of the provision of private complaint, it cannot be held

that pendency of a criminal prosecution lodged on private complaint does not entitle the DPC to keep its assessment of the suitability for promotion of the concerned officer ind the sealed cover.

29. The above reasoning leads me to hold that the action of the DPC in keeping its assessment of the suitability of the applicant for promotion to the post of DGP in sealed cover, viewed from any angle ,cannot be said to be arbitrary, illegal or invalid. When the same is not arbitrary, it cannot be malafide also. Hence, the decision of the DPC in keeping its assessment of the suitability of the applicant for promotion to the post of DGP in the sealed cover cannot be interfered with by this Tribunal.

30. Before parting with the judgment, I would like to deal with the pending MA.352/2006. This MA is moved by the respondents for expungment of certain averments and allegations made by the applicant in his OA. According to the respondents, these allegations mainly made against the respondent NO.5 are irrelevant immaterial and are scandalising in nature. It is also submitted by Mr.B.N.Doctor as well as Mr.Sunit Shah, learned counsels for the respondents that none of these allegations are related to the issue involved in the amended OA and

as such, they being irrelevant and baseless shold not be allowed to remain on record.

31. I have gone through those allegations made in the OA and there is hardly any doubt in my mind that most of these allegations or averments are irrelevant so far the decision of this amended OA is concerned. It may be that when the OA was filed on the assumption on the part of the applicant that he was superseded in promotion to the post of DGP these allegations might have been relevant but once it is found that he was not superseded and his assessment of suitability for the post of DGP was kept in the sealed cover by the DPC and thereafter he has amended the OA to challenge the decision of the DPC to keep its assessment in the sealed cover, these allegations and averments have clearly become irrelevant and immaterial. In fact, if at later point of time the sealed cover is opened and it is found that he was assessed as fit for promotion these allegations will not only be irrelevant and meaningless but would be seen as having been made with some ulterior motive. Surprisingly instead of dealing with these assertions in the MA, the applicant has questioned the jurisdiction of this Tribunal to direct expungment of these pleadings. It is contended that since the Tribunal is not a Civil Court and does not have inherent jurisdiction

as that conferred upon the Civil Court under Section 151 of the CPC no such directions for deletion can be given. I am surprised at such an approach adopted by the applicant. In no case he can say that the allegations and averments made by him in the OA are relevant or material so far the decision of the issue involved in this OA is concerned. He also conveniently forges that he had moved an amendment application for amendment of OA, thereby conceding the position that Tribunal has jurisdiction to permit amendments in pleadings. The amendments of pleadings do not constitute mere addition or modification of pleadings, it also constitutes deletion of the pleadings also. In fact the law of pleadings requires pleadings of only relevant and material grounds and to contend that the Tribunal lacks inherent jurisdiction to direct expungment of irrelevant and immaterial pleadings is to show complete ignorance of the rule position. Section 22 of the Administrative Tribunals Act, 1985 inter alia provides that the Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Govt. the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its

inquiry and deciding whether to sit in public or in private. When the Tribunal has already been entrusted with powers to regulate its own procedure the question of the Tribunal lacking inherent jurisdiction in directing deletion of irrelevant immaterial and fictitious pleadings cannot be questioned. We hold that the Tribunal has such a jurisdiction and direct that the averments and allegations as enumerated in para 3 & 4 of the MA be expunged from the main OA.

32. After this judgment was over, my learned brother Mr.Shankar Prasad expressed his disagreement with the view taken by me and has placed some reliance on the decision of Central Administrative Tribunal, Madras Bench in **OA.824/2004** in the case of **C.S.Khairwal vs. Union of India** and expressed an opinion that in view of the decision of the co-terminal Bench being binding, the matter will be required to be considered by the Full Bench. I am unable to agree with his view so far the Madras Bench decision is concerned . It does not lay down any law and on facts also has no application to the present case. In the case before the Madras Bench the concerned officer's recommendations were kept in the sealed cover by the DPC on the ground that an FIR was lodged

against him. There was no question of his being charge-sheeted or any charge having been framed against him, the Madras Bench was not even required to consider the stage of framing of charges having arrived at, as there was no charge sheet at all . The Madras Bench has only referred to the decisions of Supreme Court ~~in Jankiraman's case~~ and said that the position of law is very clear that the trial in a warrant case starts with the framing of charge and there is no ratio in that decision which would be applicable to the facts of the instant case. It is in clear terms stated by the Madras Bench that "it is seen when the DPC met in 2002, only the FIR dated 17.2.96 was pending. In this case, the charges had not been framed at the time when DPC was held and are still stated to be pending". This very sentence makes it clear that there was no charge sheet filed against the concerned officer and only the FIR was filed against him. It is quite obvious that the case has absolutely no application so far the facts of the instant case is concerned. In my opinion, the matter therefore, does not deserve to be referred to the Full Bench as there is no question of disagreement on the point of DPCs being not empowered to keep its recommendations in the sealed cover when only FIR was lodged against the concerned officer.

33. For the aforesaid reasons, I hold that the decision of the DPC to keep its assessment of suitability of the applicant for promotion to the post of DGP in sealed cover is not arbitrary, illegal or invalid and cannot be interfered with by this Tribunal. The applicant is therefore, not entitled to any relief prayed by him. The OA being devoid of merit deserves to be rejected. MA.352/06 also requires to be allowed. The OA is accordingly, dismissed with no order as to costs. MA.352/06 is allowed and the allegations and averments made in the OA, as enumerated in para-3 & 4 of the MA, are directed to be expunged.

-Sd-

(A.S.Sanghvi)
Member (J)

34. Since both the Members have not agreed on the point of the applicant facing prosecution on a criminal charge, the matter requires to be referred to the Hon'ble Chairman as per the provisions of Section 26 of the Administrative Tribunals Act, 1985. We, therefore, direct the registry to place the matter before the Hon'ble Chairman for referring the following point to the third Member for decision:

"Whether the expression officers in respect of

whom prosecution of criminal charge is pending in para 11 of the guidelines dated 15.1.99 of Govt of India excludes the prosecution on private complaint and whether the prosecution can be said to have been started only after the framing of the charge."

-Sd-

(Shankar Prasad)
Member (A)

-Sd-

(A.S.Sanghvi)
Member (J)

ab

तैयार करनेवाला
Prepared by 17/08/06
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Compared by
सहि प्रतिलिपि
TRUE COPY

अनुभाग अधिकारी (न्या.)
Section Officer (J)
केन्द्रीय प्रशासनिक अधिकरण
Central Administrative Tribunal
अहमदाबाद न्यायपीठ
Ahmedabad Bench

35. I had the privilege of going through the judgment recorded by my learned brother. I regret my inability to agree with the same for reasons discussed below.

36. A Full Bench of the Tribunal in K.Ch.Venkata Reddy & Ors. vs. Union of India & Ors.,1987 (3) ATC 174 was considering the matter relating to sealed cover procedure as contained in DOPT OM dated 30th January, 1982. The said OM amongst others provided that sealed cover procedure should be resorted to in cases of officers under suspension or against whom disciplinary proceedings are pending or a decision taken by the competent disciplinary authority to initiate disciplinary proceedings or against whom prosecution has been lodged in a Court of law or sanction for prosecution has been issued. It is also provided for action to be taken on the conclusion of such disciplinary proceedings/criminal prosecution. The UPSC was consulted before the issue of these guidelines. The Full Bench held:

> "30. There are two conflicting concepts here. A right to be considered for promotion is a right flowing from the conditions of service & once an employee is found fit for promotion, his promotion cannot arbitrarily be withheld and a junior promoted instead in the face of Arts. 14 & 16 of the Constitution. On the other hand, the purity of public service requires that a person under a cloud i.e., person against whom disciplinary or criminal proceedings had been initiated

and are pending, should get himself absolved of the charges before he is actually promoted. It will be against public interest if any employee who is being proceeded against say on a charge of corruption were to be promoted while facing the corruption charges. It is only to keep a proper balance between ..... these two concepts, instructions have been issued from time to time to adopt the sealed cover procedure which is intended to protect the interest of the employee in the matter of promotion and also to advance the public interest and to sustain the purity of public service.

33. The existing sealed cover procedure contemplates that a person against whom disciplinary proceedings had been initiated and are pending may also be considered for promotion and if he is found fit and selected, his results shall be kept in a sealed cover to be opened and acted upon after the completion of the said proceedings. The sealed cover procedure also contemplates that if an officer is completely exonerated he will be restored to all the benefits except the back salary, and that if there is a delay of more than two years in the conduct of the departmental enquiry of the criminal proceeding, the sealed cover may be opened and the results of the same be given effect to tentatively subject to the ultimate result of the proceedings. It also provides that where the official is awarded a penalty at the conclusion of the enquiry the results of the sealed cover will not be given effect.

37. Similarly, the provision that in the event of the official being given a penalty at the conclusion of the disciplinary proceedings the results of the sealed cover should not be given effect to or acted upon is open to attack on the ground that the official having already been punished with a penalty. Not giving effect to the findings in the sealed cover will amount to a double penalty and this will not only violate Arts. 14 and 16 of the Constitution when compared with other employees who are not at the verge of promotion when the disciplinary proceedings were initiated against them but also offend the rule against double jeopardy contained in Art. 20(2) of the Constitution. In cases of imposition of penalty on the conclusion of the disciplinary proceedings, there should be a review DPC as on the date when the sealed cover procedure was followed which will consider the findings in the sealed cover as also the penalty imposed.

38. To make the sealed cover procedure quite

valid and beyond attack under Arts. 14, 16 and 20(2), we strike down that portion of para 2 of the instructions dated 30th January, 1982 which says, "but no arrears are allowed in respect of the period prior to the date of actual promotion" and direct that on exoneration, the salary, which the person concerned would have received on promotion if he had not been subjected to disciplinary proceedings, should be paid along with the other benefits such as proforma and fixation of increments, etc. We also strike down that portion of paragraph 3(iii) second sub para which says "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 finding in the sealed cover shall not be acted upon" and direct that if the proceedings end 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 deterred for the subsequent DPCs as provided in the instructions.

39. Thus our conclusions are;

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

(2) Withholding of promotion of an official after finding him fit on the ground that disciplinary or criminal proceedings are pending against him cannot be treated to be a penalty under Rule 11 (2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965;

(3) The instructions issued by the Central Government embodying the sealed cover procedure do not conflict with CCS(CCA) Rules, 1965 and as such it is quite valid except for the portions indicated above which have been struck down by us.

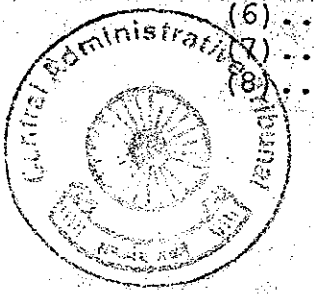
(4) The sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before;

(5) .....

(6) .....

(7) .....

(8) ....."



37. The said 1982 circular had been modified in January 1988 pursuant to the decision of Apex Court in the case of Union of India vs. Tejinder Singh, reported in (1991) 4 SCC 129.

38. The Three Judge Bench of Apex Court in Union of India vs. K.V. Jankiraman was considering an appeal from the aforesaid Full Bench decision and other connected matters. It had also taken note of the provisions of the subsequent 1988 circular. The Apex Court held:

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

memo/charge sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p.196, para 39)

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

(2) ....

(3) ....

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

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

29. 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 principle, for the same reasons, the 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 a 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 a 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 a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, 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 an 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 denied 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."

39. The decision in Delhi Development Authority vs. H.C. Khurana, AIR 1993 SC 1483 is given in the context of 1988 OM. A charge sheet was framed on

11.7.90 and despatched on 16.7.90. It could not be served as the respondent had proceeded on medical leave. The DPC met on 28.11.90. The charge sheet could finally be served on 25.1.91. The High Court allowed the writ petition holding that charge sheet was not served before the DPC meeting. The Apex court has referred to para 14 & 17 of the decision in Jankiraman's case. It went on to hold as under:

> "The context in which the word 'issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch of the charge-sheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the Government Servant, if so inclined to evade the service and, thereby frustrate the decision and get promotion inspite of that decision. Obviously, the contrary view cannot be taken. It allowed the appeal".

40. The decision in Union of India Vs. Kewal Kumar, AIR 1993 SC 1588 has been given in the context of the January 1988 circular. In the aforesaid case the department had taken a decision on 20.11.89 to initiate disciplinary proceedings against the respondents for imposition of major penalty on the basis of the FIR recorded by the CBI, on 30.9.88. The charge sheet was actually issued on 1.8.90. The DPC had met on 23.11.89. The Apex Court distinguished H.C. Khurana and held that the case was squarely covered by sub para (ii) & (iv) of

1988 guidelines.

The Apex Court accordingly allowed the appeal and quashed the order of the C.A.T, which had quashed the order resorting to the sealed cover proceedings.

41. In the case of Union of India vs. Dr. Sudha Salhan, 1998(3) SCC 394, the DPC met on 8.3.89. The decision to place her under suspension was taken on 16.4.1991 and the charge sheet was issued on 8.5.91. The Tribunal accordingly held that the sealed cover procedure could not have been resorted to in her case. The Apex Court dismissed the appeal.

42. The three Judge Bench in State of Madhya Pradesh & another vs. Syed Naseem Zahir & Ors., 1993 Supp (2) SCC 225 was considering the case of a Superintending Engineer in the Irrigation department. A decision has been taken on 30.1.87 to initiate the disciplinary proceedings but the charge sheet was actually issued on 15.4.88. The DPC in its meeting held on 28.10.87 had kept the proceedings in sealed cover. The departmental enquiry against the applicant had been completed and the charges were proved. In the facts and circumstances of that case the Apex Court held that

the sealed cover should not be opened.

43. It would thus be clear from the foregoing discussions that the decisions in Jankiraman & other cases except Syed Naseem Zahir is in the context of 1982 and 1988 circulars. They are given in the context of the departmental proceedings. The expression "prosecution has been lodged in a court of law or sanction for prosecution has been issued" was considered and it was held that the appropriate stage is filing of charge sheet in criminal Court.

44. The Apex Court in Haryana State Cooperative Land Development Bank vs. Neelam, 2005 SCC (L&S) 601 has held:

"A decision, as is well known, is an authority of what it decides and not what can logically be deduced therefrom (Bharat Forge Co. Ltd., vs. Uttam Manohar Nakate and Kalyan Chandra Sarkar v. Rajesh Ranjan, SCC p. 58, para 42: Scale para 42).

45. Pursuant to the decision in Jankiraman's case the above guidelines have been modified. The expression regarding pending criminal proceedings in the 1992 OM reads as under:

"Prosecution in respect of a criminal charge is pending".

46. This very expression has been used in the case of guidelines issued in the case of IAS/IPS officers. There is a major difference in as much as the 1992 guidelines provide for grant of adhoc promotion in consultation with CBI. No such adhoc promotion is visualised in the case of AIS officers. Para 5 of the 1992 OM refers.

It is also to be noted that para 11.2 of the guidelines in case of IPS Officers reads as under:

> "Screening Committee shall assess the suitability of the applicant coming within the purview of the circumstances mentioned above along with other eligible candidates without taking into consideration the disciplinary case/criminal prosecution which is pending".

47. IPS (Appointment by Promotion) Regulations, AIS (D & A) Rules in matters of suspension and special procedure in certain cases also refer to criminal cases. There are discussed in subsequent paragraphs.

48. The Apex Court in G.S. Bhullar vs. UOI [2006 SCC (L&S) 659] was considering the scope of explanation 1 below Regulations 5(5) to I.P.S. (Appointment by Promotion) Regulations as it then existed. The said explanation was as under :

"The proceeding shall be treated as pending

only if a chargesheet has actually been issued to the officer or filed in a Court as the case may be."

They also referred to the following proviso to Rule 7(3) :

> "Provided that if an officer whose name is included in the select list, after such inclusion, issued with a chargesheet or chargesheet is filed against him in a Court of law, his name in the select list will be deemed to be provisional."

The Apex Court held "A conjoint reading of Explanation 1 to Regulation 5(5) and the proviso to Regulation 7(3) speaks about the chargesheet being filed against an officer in a Court of law. There is no concept of charges being framed under regulation."

49. Rule 3(3) of AIS (Discipline & Appeal) Rules 1969 provides as under :-

> "A member of the Service in respect of, or against, whom an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government be placed under suspension until the termination of all proceedings relating to that charge if the charge is connected with his position as Member of the Service or is likely to embarrass him in the

discharge of his duties or involves moral turpitude."

We may note in this connection the language of Rule 10 (1)(b) of CCS (CCA) Rules, which is as under :-

> "10(1). The Appointing Authority or any authority to which it is subordinate or the Disciplinary Authority or any other authority empowered in that behalf by the President, by general or special order, may place a Government servant under suspension-
>
> (b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial:"

50. Rule 14 of AIS (D & A) Rules provides for special procedure in 3 the situations mentioned therein including the case where any penalty is proposed on a member of service on the ground of conduct which led to his conviction in a criminal case. The applicant has to be given an opportunity of representing against the proposed penalty. This proviso has been added in 1988 after the decision in Tulsiram Patel. The DOP&T has also issued detailed guidelines for exercise of power under Rule 19 of CCS (CCA) Rules, which is pari materia this rule after the decision in Tulsiram Patel. O.M. dated 11/11/1985 & 04/04/1986 refers. Whether similar principles apply in case of AIS officers is not clear.

51. They would show that different expressions have been used in different situations. We are aware that an integrity certificate has to be given before the meeting of selection committee and a no deterioration certificate before the actual appointment is made in case of appointment by promotion.

52. The learned counsel for the applicant has argued that 11.1(c) does not envisage private complaint. In any case the stage of framing of charge, when the trial can be said to commence, is the appropriate stage and the same is yet to be reached in the instant case.

The State of Gujarat have argued that words "prosecution", "trial & charge" take their meaning from the context. They have further argued that issue of processes in a case instituted on a complaint is akin to filing of chargesheet. They have relied on the decisions of Apex Court in the case of G.J. Mhatre vs. State of Maharashtra & Ors., (2004) 7 SCC 768, Bipinchandra Parshottamdas Patel vs. State of Gujarat, AIR 2003 SC 2256 and the decision of Himachal Pradesh High Court in Gandharv Lal vs. State of Himachal Pradesh, 1980 Criminal Law Journal, 1189.

53. The Apex Court in para 6 of the judgment in Mhatre's case has referred to the decision in Bhagwan Singh's case and has gone on to state that if the police investigation does not disclose any offence the informant is entitled to notice and to being heard. The course of action open to Magistrate on receipt of police report is also discussed. The Apex Court further held:

> "10. We may add here that the expressions "charge-sheet" or "final report" are not used in the Code, but it is understood in Police Manuals of several States containing the rules and regulations to be a report by the police filed under Section 170 of the Code, described as a "charge-sheet". In case of reports sent under Section 169 i.e., where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e., referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, there is nothing in Section 173 specifically providing for such a notice.
>
> 13..... In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. There aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Regd) v. Union of India. It was specifically observed that a writ petition in such cases is not to be entertained."

54. The minority judgment in B.P. Patel vs. State of Gujarat sets out the necessary fact. The

applicant was the President of Anand Municipality and two FIRs under different sections of IPC read with Arms Act and Bombay Police Act were registered. He was detained in custody during investigation. Director Municipalities placed him under suspension under Section 40 of Gujarat Municipalities Act. The appeal was dismissed. The learned single Judge dismissed the Writ Petition on the ground that detention in judicial custody during pretrial should be interpreted to mean "detention in jail during process of trial". While the Division Bench did not agree with the reasoning that even pretrial detention is covered it agreed with the interpretation that detention was within the process of trial and would be during trial within the meaning of Act. It was contended before the Apex Court that such detention was not detention within trial. It was contended by the State that the term "trial" has to be seen in the context of purport and object of the Act. The majority judgment held:

> "5. The proper meaning of words - "detained in prison during trial" in Part II of sub-Section 40(1) could only be deciphered in the above contextual backdrop. The meaning of these words should be in perfect tune with the spirit of Section 40. Otherwise, the purpose of section will be defeated. Therefore, word "trial" used in the expression "detained in prison during trial" cannot be singled out and cannot be

accorded with a restricted meaning. The meaning will have to promote the reason and spirit of Section 40 of the Act.

9. Since the purpose of the Section 40 is to ensure the proper functioning of the office of the President or Vice-President of the Municipalities by keeping the public confidence the concentration is on the expression detention in prison. For obvious reasons a person who is detained in prison cannot effectively function as a President or Vice-President of a Municipality. So any person detained in prison cannot be allowed to hold the office. This is the purpose of Part II in Section 40(1). The words "during trial" is used so as to exclude the situations like preventive detention or detention in police custody. If the words employed in a provision are capable of two meanings or casts doubts as to the actual meaning, then it has to be interpreted in the light of the object of the legislation. Word by word interpretation is not a welcome method of interpretation. Words, vehicles of legislative intentions, take colour from the context in which it is used. Hence the interpretation of the words 'during trial' will have promote the purpose of Section 40. As already pointed out. Object of this Section is to keep shady characters away from local bodies and to pave way to persons with high integrity and good moral conduct to hold public offices. This large interest could only be promoted if the word 'trial' is given a broad meaning. This intention is vividly displayed by choosing the expression "under the provisions of any law for the time being in force" in Part II of Section 40(1). Which means the provision is designed to cover any 'detention in prison' under provisions of any law. Only by this interpretation, the textual meaning of 'during trial' matches the contextual spirit of Section 40 that aims to ensure the smooth functioning of the office and to keep confidence of people in the institution."

Justice S.B. Sinha in his minority judgment has held:

"27. The very fact that an inquiry or investigation will not be 'trial' is a clear pointer to the fact that so long as an investigation or an inquiry does not come to an end, a trial does not commence."

"28. Thus, whereas in an inquiry or investigation evidence is collected, the same is adduced during trial. Evidence may be collected behind the back of the accused, but the same has to be adduced only in his presence."

"39. So far as the sessions trial is concerned, indisputably the same begins upon framing of charge as provided for under Chapter XVIII of the Code of Criminal Procedure, 1973."

"42. We are not oblivious of the fact that the word trial, may in different situations be interpreted differently, having regard to the text and context thereof, as was the case in The State of Bihar v. Ram Naresh Pandey, (1957 SCR 279) wherein having regard to omission of the definition of the word 'trial' in Code of Criminal Procedure, 1898 it was held that the power of the public prosecutor to withdraw a case in terms of Section 494 of Criminal Procedure Code, 1898 may be held to be applicable both at the stage of inquiry or trial. In Omparkash Shivprakash v. K. I. Kuriakose and others, {(1998) 8 SCC 633} interpreting the provisions of Prevention of food Adulteration Act, 1954, it was held that a trial begins when under Section 251 the Magistrate asks the accused as to whether he pleads guilty or not and thus the provisions of Section 20A of the Prevention of Food Adulteration Act, 1954 can be invoked only after reaching the stage envisaged under Section 254(1) of the Code. This Court observed:

> "We will examine the relevant provisions to ascertain as to when the trial in a case involving offences under the Act would commence. Section 16-A of the Act empowers a Judicial Magistrate of the First Class to try the offence under Section 16(1) of the Act in a summary way. Chapter XXI of the Code deals with summary trials of which Section 262 says that the procedure specified for trial of summons cases shall be followed for summary trial subject to some variations. Chapter XX is titled "Trial of Summons Cases by Magistrate". Section 251 of the Code is the commencing provision of that chapter. It requires that when the accused appears or is brought before the Magistrate the particulars of offence shall be stated to him and he shall be asked whether he pleads guilty or not.

Section 254(1) of the Code says that if the Magistrate does not convict the accused he shall proceed to hear the prosecution and "take all such evidence".

The above scrutiny of the relevant provisions reveals that the trial of offences under the Act begins when the Magistrate asks the accused whether he pleads guilty or not as envisaged in Section 251 of the Code. If the Magistrate opts to hold summary trial. Hence, evidence in a trial under the Act can be adduced only after recording the plea of the accused as envisaged in the said section. Thus, it is clear that a Magistrate can implead any person under Section 20-A of the Act only after reaching the stage envisaged in Section 254(1) of the Code."

44. It is trite that a law leading to disqualification to hold an office should be clear and unambiguous like a penal law. In the event a statute is not clear, recourse to strict interpretation must be made for construction thereof.

49. It is also well-known that there exists a principle against doubtful penalisation."

50. Francis Bennion's Statutory Interpretation states that the principle of legal policy known as the principle against doubtful penalization, requires strict construction of penal enactments. Although often referred to as though limited to criminal statutes, the principle in fact extends to any form of detriment.

52. It is relevant to note that Service Rules also provide for suspension of a holder of a post and therein it is ordinarily mentioned that holder may be placed under suspension if he is detained in custody either during investigation or trial. Thus, whenever the legislature thinks fit to provide for suspension of a holder of a post when he is in custody, the stages of the case is specifically mentioned."

53. While providing for different standards in the matter of issuance of order of suspension, the legislature must have in mind the impact of institution of cases which, in its opinion, would amount to moral turpitude and other offences. So far as offences under

the statutes other than specified in the first part of the statute are concerned, the legislature did not evidently intend that an order of suspension be issued automatically without making an investigation in relation thereto."

55. The Hon'ble Himachal Pradesh High Court has held:

"The language employed in Section 244 would thus go to suggest that the trial of warrant case instituted otherwise than on a police report would commence only after the accused appears or is brought before a Magistrate and the Magistrate proceeds to hear the prosecution and takes evidence as may be produced in support of the prosecution. There are of course proceedings conducted by the Magistrates in respect of warrant cases instituted otherwise than on a police report before the stage of Section 244 is reached but such proceedings would not constitute a part of the trial either of the accused or of the case. Complaints to the Magistrates are filed under Chapter XV of the Code which is under the heading 'Complaints to Magistrates'. Initial proceedings on these complaints like issue of process and supply of documents etc., are conducted under Chapter XVI of the Code which is under the heading 'commencement of proceedings before Magistrates'. Next comes Chapter XIX which is under the heading 'trial of warrant cases by Magistrates'. These three separate headings allotted to the three different chapters, namely, Chapters XV, XVI and XIX would further strengthen the conclusion that the trial of warrant cases instituted otherwise than on police report would commence only when the case reaches the stage enabling the Magistrate to comply with the provisions of Section 244 of the Code. It thus follows that the trial of a warrant case instituted otherwise than on a police report cannot be said to have commenced till the accused appears or is brought before a Magistrate and the Magistrate proceeds to hear the prosecution and takes all such evidence as may be produced in support of the prosecution."

56. The Apex Court in S.K. Kashyap vs. State of Rajasthan, AIR 1971 SC 1120 has held :-

"27..... Under Section 251-A (2) if, upon consideration of all the documents referred to in Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge him. This provision that the Magistrate may discharge the accused where the charge against the accused appears to be groundless indicates that the word "charged with" cannot be said to mean framing of a charge. It is because the charge or the allegation or accusation against the accused is groundless that he is discharged.

28. Again, in Section 252 it will appear that the Magistrate in any case instituted otherwise than on a police report shall proceed to hear the complainant and take evidence in support of the prosecution. Under Section 253, if, upon taking the evidence referred to in Section 252, and making such examination of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out, the Magistrate shall discharge him. The provisions contained in Sections 252 and 253 are cases where the Magistrate deals with warrant case instituted not on a police report but upon a complaint.

29. These three Sections i.e., Sections 251-A, 252 and 253 indicate that an accused can be discharged by the Magistrate if the charge appears to be groundless. Charge is framed under Section 254 of the Code of Criminal Procedure when the Magistrate upon evidence and examination is of opinion that there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which could be ordinarily punished by them that he shall frame in writing a charge against the accused. The charge under Section 255 of the Code of Criminal Procedure is read and explained to the accused and he shall be asked whether he is guilty or has any defence to make."

57. A Three Judge Bench of the Apex Court in R.B. Mithani vs. State of Maharashtra, AIR 1979 SC 94 held as under:

"In a warrant case instituted otherwise than on a police report, 'discharge' and 'acquittal' of accused are distinct concepts applicable to different stages of the proceedings in Court. The legal effect and incidents of 'discharge' and 'acquittal' are also different. An order of discharge in a warrant case instituted on complaint, can be made only after the process has been issued and before the charge is framed. Section 253 (1) shows that as a general rule there can be no order of discharge unless the evidence of the prosecution witnesses has been taken and the Magistrate considers for reasons to be recorded, in the light of the evidence, that no case has been made out. Sub sec. (2) which authorises the Magistrate to discharge the accused at any previous stage of the case if he considers the charge to be groundless, is an exception to that rule. A discharge without considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under S. 254 and frame charge against the accused. Section 254 shows that a charge can be framed if after taking evidence or at any previous stage, the Magistrate, thinks that there is ground for presuming that the accused has committed an offence triable as a warrant case."

Once a charge is framed, the Magistrate has no power under S. 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of S. 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Ss. 254 to 258 to a logical end. Once a charge is framed in a warrant case, institute3d either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Ss. 349 and 562 of the Code of 1898 (which correspond to Ss.325 and 360 of the Code of 1973).

Excepting where the prosecution must fail for a fundamental defect, such as want of sanction, an order of acquittal must be based upon a finding of not guilty turning on the merits of the case and the appreciation

of evidence at the conclusion of the trial.

If after framing charges the Magistrate whimsically, without appraising the evidence and without permitting the prosecution to produce all its evidence, discharges the accused, such an acquittal, without trial, even if clothed as discharge will be illegal."

58. The Apex Court in K.M. Mathew vs. State of Kerala, AIR 1992 SC 2206 has held :-

"It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused."

59. A 4 Judge Bench of the Apex Court in Chandra Deo Singh vs. Pradyut C. Bose, AIR 1963 SC 1430 has held :

"The entire scheme of Ch. XVI of the Code of Criminal Procedure shows that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has

not been issued; nor can be examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. AIR 1960 SC 1113, Ref. to.

No doubt, one of the objects behind the provisions of S. 202, Cr.P.C., is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under S. 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry."

60. The majority decision in Sankaran Moitra vs. Sadhna Das & Another, 2006(4) SCC 584 has held :-

"The complainant argued that want of sanction under Section 197(1) CrPC did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. This submission cannot be accepted. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of the Supreme Court, clearly indicate that a prosecution hit by that provision cannot be launched without the contemplated sanction. It is a condition precedent, as it were, for a

successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. One cannot therefore accede to the request to postpone a decision on this question. Postponing a decision on the applicability or otherwise of section 197(1) CrPC can only lead to the proceedings being dragged on in the trial court and a decision by the Supreme Court, here and now, would be more appropriate in the circumstances of the case especially when the accused involved are police personnel and the nature of the complaint made is kept in mind."

61. It would appear from the minority decision in B.P. Patel (supra) (no opinion having been expressed by majority) that summons trial commences when the Magistrate asks the accused as to whether he pleads guilty and the Sessions case with the framing of charge. The 3 Judge decision in R.B. Mithani has held that trial commences in both types of warrant cases with the framing of charge. The Apex Court in K.K. Mathew (supra) has held that order issuing processes is an interim order and can be altered or modified. The accused has no locus standi till the stage of issue of process. The Apex Court in Sankaran Moitra has held that the question of protection of 197 Cr.P.C. has to be examined at the earliest.

On the other hand the submission of chargesheet is the culminating on & of police investigation. The Magistrate has to proceed on receipt of such report in accordance with law.

62. The Madras Bench of the Central Administrative Tribunal in O.A.824/2004 in C.R. Khairawar vs. UOI has after referring to the decision in R.B. Mithani (supra) has considered identical expression in the case of IAS Officers. It has held that trial in a criminal case starts with the framing of charge and prior to it, it is only an enquiry. The pendency of preliminary investigation would not be sufficient to hold that disciplinary/criminal proceedings are pending. It means that framing of charge is the stage. The decision in 1975 Cri LJ 1256 (Richard Winn Harcos vs. State of WB) & AIR 1953 Madhya Bharat High Court, I had also been cited. The Tribunal also found that charge sheet was not filed. It held that sealed cover procedure could not be resorted to. The Tribunal directed convening of Review DPC.

63. A decision of coterminous Bench is binding on us. In case of disagreement the matter has to be referred to the Hon'ble Chairman for constituting a full / large Bench. The decision of 3 Judge Bench of Apex Court in S.I. Rooplal vs. Lt. Governor Delhi AIR 2000 SC 594 refers.

64. The provision regarding promotion of IPS officers is contained in IPS (Pay) Rules. These guidelines are filling the gaps.

The decision regarding interpretation of the guidelines is a pure question of law.

The Apex Court in UOI vs. V.G. Ganayutham (thro LRs) has referred to the decision in Council of Civil Service Unions vs. Minister for the Civil Service. It refers to the grounds of "illegality", "irrationality" and procedural impropriety. The said decision says -

> "By "illegality" as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must given effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the State if exercisable."
> (Administrative law, Wade & Forsyth,
> (7th Edn.) Pg.1014)

65. Having regards to the decision of the coterminous Bench, I am of the view that the DPC has erred in keeping the findings in sealed cover. The respondents are directed to open the sealed cover and to take a decision thereon within two months of the receipt of the order. Whether this conduct, which is the subject matter of dispute in the criminal case, can be considered as part of the overall service record in spite of the stay granted by the Honourable High Court is a question that needs consideration only after opening of the sealed cover. There shall be no order as to costs. I agree with the decision of my brother regarding expungement of certain proceedings.

-Sd-

(SHANKAR PRASAD)
MEMBER (A)

Central Administrative Tribunal

vtc.

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