

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.04.2016

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

W.P.Nos.29721 and 27850 of 2012
and
M.P.Nos.1/2014 & 2, 3 of 2012 and
M.P.No.1 of 2012

M.Thiruselvam .. Petitioner in both W.Ps.

.. Vs ..

1. The Director General,
Railway Protection Force,
Railway Board,
Rail Bhavan, New Delhi - 1.
2. The Chief Security Commissioner,
Railway Protection Force,
Southern Railway,
Moore Market Complex, Chennai - 3.
3. The General Manager,
Southern Railway,
Park Town, Chennai - 3.
4. The Divisional Security Commissioner,
Railway Protection Force,
Southern Railways,
Trichy.

.. Respondents in
W.P.No.29721/2012

1. The Additional Chief Security Commissioner,
Southern Railways (Central),
Chennai.
2. The Divisional Security Commissioner,
Southern Railways,
Trichy.

... Respondents in
W.P.No.27850/2012

Prayer in W.P.No.29721/2012:- Petition filed under Article 226 of The Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records of the respondents in connection with the impugned orders issued by the respondents 1, 2 and 4 in No.2012/SEC(E)/PM-2/1, dated 22.06.2012, No.X/P.534/ P&T/Gaz/12, dated 12.07.2012 and No.SXT/P.608/IPF/Vol.IV, dated 17.07.2012 respectively and quash the same and further direct the respondents to promote the petitioner as Assistant Security Commissioner with effect from the date on which his juniors got promoted i.e., on 04.05.2012 in pursuance of inclusion of his name in the promotion order passed by the Railway Board in No.2012/SEC(E)/PM-2, dated 21.03.2012 and grant him all consequential service and monetary benefits.

Prayer in W.P.No.27850/2012:- Petition filed under Article 226 of The Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the 1st respondent in connection with the impugned Memorandum issued in Ref.No.X/P227/DAR/MT,SG dated 02.08.2012 and quash the same and grant such other further relief.

For Petitioner
in both W.Ps. : Mr. T.Ayngaraprabhu
For Respondents
in W.P.29721/2012 : Mr.V.A.Sureshkumar
For Respondents
in W.P.27850/2012 : Mr.P.T.Ramkumar
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COMMON ORDER

By consent of the learned counsel appearing on either side, both the writ petitions are taken up for hearing and disposed of by a common order.

2. The petitioner was promoted from the post of Inspector/RPF to the rank of Assistant Security Commissioner by the proceedings dated 21.03.2012, though on an adhoc basis the posting order was given to the petitioner on 03.05.2012. He accordingly, duly joined in the said post. The petitioner's immediate junior was given posting order on 04.05.2012 and in pursuance of the same, he joined. It is seen that though the promotion was adhoc, the juniors of the petitioner were regularised subsequently from the date of the said adhoc orders.

3. Subsequently, a charge memo dated 11.05.2012 was issued to the petitioner and the allegation against the petitioner appears to be that he has not performed his duty by duly supervising the subordinate officers. A punishment of minor

penalty was imposed on 19.06.2012, which the petitioner duly accepted.

4. The impugned order was passed by the first respondent viz., Director General, Railway Protection Force, New Delhi, on 22.06.2012 withdrawing the adhoc promotion, in view of the fresh proposal to initiate action against the petitioner for major penalty. The said order also says that the petitioner's adhoc promotion as Assistant Security Commissioner would be considered after finalization of the DAR proceedings. As a consequent thereon, by the proceedings dated 12.07.2012, the promotion of the petitioner was cancelled. It was also reiterated in the subsequent proceedings dated 17.07.2012. Challenging the same, W.P.No.29721 of 2012 has been filed. Thereafter, the impugned show cause notice was issued to show cause as to why the petitioner shall not be proceeded for major penalty. Challenging the same, W.P.No.27850 of 2012 has been filed.

5. The learned counsel for the petitioner has raised two submissions. The first submission is with respect to the cancellation of the promotional order that as on the date of the said order, there was no pending proceedings nor any punishment is imposed. The second submission is with respect to the show cause notice dated 02.08.2012 on the ground that the advisory CBI is not binding on the respondents and therefore, there is non-application of mind.

6. Though the above said contentions have been raised, the learned counsel for the petitioner submitted that the second contention need not be gone into for the present and the petitioner is ready and willing to go through the proceedings in pursuant to the show cause notice issued. Hence, it is submitted that the first issue will have to be adjudicated upon.

7. The learned counsels appearing for the respondents, based on the counter affidavit, submitted that the promotional order was adhoc and in view of the pending proceedings, it was duly cancelled. Therefore, no interference is required, particularly, when the petitioner is ready and willing to go through with the show cause notice issued to prove his case.

8. As rightly submitted by the learned counsel for the petitioner, the order dated 21.03.2012 does give the petitioner a vested right, though promotion is adhoc one. Perhaps, the impugned order dated 22.06.2012 clearly says that the petitioner should be once again promoted though adhoc after finalization of the DAR proceedings. Admittedly, on the date of the promotional order passed on 22.06.2012, the petitioner did not have any pending proceedings nor any punishment imposed. It is not in dispute that the petitioner was given in charge for the promotional post thereafter like that of his juniors. All his

juniors were promoted with retrospective effect from the date of their initial adhoc promotional order. It is also not in dispute and as seen from the records produced by the petitioner, which prima facie show. The averments in the counter affidavit filed are not correct. The petitioner has not been arrayed as accused in the pending criminal case, in which, charge sheet has been laid and the trial is said to be going on. In fact, the petitioner is said to be shown only as a witness in the above said criminal case.

9. Considering the very same issue, this Court, in W.P.No.18765 of 2013, dated 21.11.2014, was pleased to hold as follows:-

"6. The facts as narrated above are not in dispute. Admittedly, at the time of either drawing the panel and thereafter, there was no departmental proceedings initiated against the petitioner. Perhaps, that is the reason why, though the petitioner was considered for a promotion, his name has been kept in the sealed cover. The tentative decision was taken only on 19.03.2013. Even the said decision is not against any Officer, as it made to probe into certain incident alleged to have been happened in the department. The Central Bureau of Investigation has also closed its report on 30.03.2013. It is also not in dispute that the persons juniors to the petitioner have been promoted. His placement in the juniors is also not disputed, as he had obtained 86.690 marks. It is settled law that in a departmental proceedings, the initiation would start with the issuance of charge memo. In the absence of any initiation by way of such issuance of a charge memo, an officer cannot be denied promotion. The issue involved in this writ petition is no longer res integra. Considering the same, the Supreme Court, in Union of India Vs. Anil Kumar Sarkar, (2013) 4 SCC 161, was pleased to hold after relying upon the earlier decisions rendered in Coal India Ltd. Vs. Saroj Kumar Mishra, (AIR (2007) SC 1706), Chairman cum Managing Director, Coal India Limited and others V. Ananta Saha and Others ((2011) 5 SCC 142), Union of India Vs. K.V.Jankiraman ((1991) 4 SCC 109) and Uco Bank V. Rajinder Lal Capoor ((2007) 6 SCC 694), as follows:

17. In para 17, this Court further held: (Union of India v. K.V.Janakiraman, (1991) 4 SCC 119) '17. Conclusion 1 should be read to mean that the promotion etc. cannot be withheld

merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. After finding so, in the light of the fact that no charge sheet was served on the respondent-employee when the DPC met to consider his promotion, yet the sealed cover procedure was adopted. In such circumstances, this Court held that (K.V. Janakiraman case, SCC p.124, para 32) 32....The Tribunal has rightly directed the authorities to open the sealed cover and if the respondent was found fit for promotion by the DPC, to give him the promotion from the date of his immediate junior Shri M. Raja Rao was promoted pursuant to the order dated April 30, 1986. The Tribunal has also directed the authorities to grant to the respondent all the consequential benefits. We see no reason to interfere with this order. The appeal, therefore, stands dismissed. (emphasis supplied)

18. The principles laid down with reference to similar office memorandum are applicable to the case on hand and the contrary argument raised by the appellant-Union of India is liable to be rejected.

1. Union of India V. K.V. Janakiraman ((1991) 4 SCC 109: 1993 SCC (L&S) 387 : (1993) 23 ATC 322:

19. In Coal India Limited & Ors. vs. Saroj Kumar Mishra, AIR 2007 SC 1706, this Court, in para 22, has held that 18. A departmental proceeding is ordinarily said to be initiated only when a charge-sheet is issued.

20. In Chairman-cum-Managing Director, Coal India Limited and Others vs. Ananta Saha and Others, (2011) 5 SCC 142, this Court held as under:

27. There can be no quarrel with the settled legal proposition that the disciplinary proceedings commence only when a charge-sheet is issued to the delinquent employee. (Vide Union of India v. K.V.

Janakiraman, (1991) 4 SCC 109 and UCO Bank v. Rajinder Lal Capoor, (2007) 6 SCC 694)

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

issued.

22. Learned ASG, by drawing our attention to the decision of this Court in Union of India and Another vs. R.S. Sharma, (2000) 4 SCC 394 submitted that in spite of decision of this Court in Jankiraman case (supra) in view of para 7 of the office memorandum and in the light of the fact that proceedings were initiated both criminal and departmentally, the High Court committed an error by overlooking para 7 of sealed cover process and contended that the direction issued by it cannot be sustained. We have carefully gone through the factual position and the ultimate ratio laid down by this Court in R.S. Sharma's case (supra). Even though in the said decision, this Court has distinguished the decision in Jankiraman case (supra) and held that the same is not applicable to its case, in the light of the conditions mentioned in para 2 as well as para 7 of the office memorandum dated 14.09.1992 and of the categorical finding that none of the conditions mentioned therein has been fulfilled, we are of the view that the decision in R.S. Sharma case (supra) is not helpful to the case of the appellant.

7. In view of the above said pronouncement, the legal position is very explicit that merely because an informal enquiry is initiated against an alleged incident and the same is at the preliminary stage, an employee cannot be denied promotion. Therefore, in the light of the said pronouncement, this Court is of the view that the petitioner is entitled to succeed.

8. Coming to the second submission made on behalf of the learned Senior Counsel appearing for the respondents, this Court is of the view that the respondents have taken a contrary view in the counter affidavit regarding the application of DOPT OM dated 14.09.1992. The reliance made upon the Board's resolution dated 26.03.2013 cannot be made applicable to the present case retrospectively. Even otherwise, in the present case, the CBI has filed the closure report on 30.03.2013. Therefore, the circular also cannot have any application as it is applicable to a case where the Vigilance have recommended for initiation of penalty proceedings. From the facts, it is clear that but for the tentative decision taken, the petitioner would have been promoted

along with others. Therefore, on facts, the decision made by the Board followed by the Circular cannot have application to the case on hand.

9. Accordingly, the writ petition stands allowed. Consequently, the respondents are directed to open the sealed cover and include the petitioner's name in the promotion of Grade G Officer on the basis of DPC-13 at the appropriate place to which he is eligible and grant promotion with all consequential benefits within a period of eight weeks from the date of receipt of a copy of this order. It is also made clear that the order passed in this writ petition will not stand in the way of the respondents proceeding further against the petitioner in accordance with law in pursuant to the charge memo dated 06.09.2013. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed."

10. The ratio laid down in the above decision would be applicable to the case on hand. Admittedly, there was no proceedings pending on the date of adhoc promotion order passed against the petitioner. While there is no dispute that all his juniors, in pursuant to the said orders issued as in the case of the petitioner, were promoted on a permanent basis with retrospective effect, the right of the petitioner cannot be taken away by subsequent proceedings. Even otherwise till the issuance of impugned show cause notice dated 02.08.2012, no charge sheet has been filed, since the stage would come thereafter. It appears that there was an interim order granted and despite the same, a charge sheet was issued for the major penalty thereafter. It is submitted that the said charge sheet was also withdrawn in pursuance of the notice issued. Be that as it may, till the filing of the writ petition, there was no charge sheet filed for major penalty and therefore, there is no initiation in the eye of law. Even assuming that the same can be put against the petitioner relating to the promotion order passed on 21.03.2012, the fact remains that on the crucial date, which is to be taken into account, the petitioner was eligible. In other words, as in the case of the petitioner's juniors, but for the proceedings, the petitioner would have been promoted with retrospective effect from the date of initial promotion on 21.03.2012.

11. Accordingly, W.P.No.29721 of 2012 is allowed and the impugned orders dated 22.06.2012, 12.07.2012 & 17.07.2012 are hereby set aside. Consequently, the respondents are directed to give promotion to the petitioner as in the case of his immediate juniors. Appropriate promotional orders will have to be given

to the petitioner, within a period of four weeks from the date of receipt of a copy of this order. The other writ petition in W.P.No.27850 of 2012 is disposed of giving liberty to the petitioner to give reply to the show cause notice dated 02.08.2012, within a period of four weeks from the date of receipt of a copy of this order. After receipt of the same, the proceedings will have to be concluded by the respondents concerned within a period of three months. It is made clear that the order passed by this Court to give promotion to the petitioner is subject to the further orders to be passed depending upon the outcome of the departmental proceedings initiated against the petitioner by way of punishment. The connected miscellaneous petitions are closed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

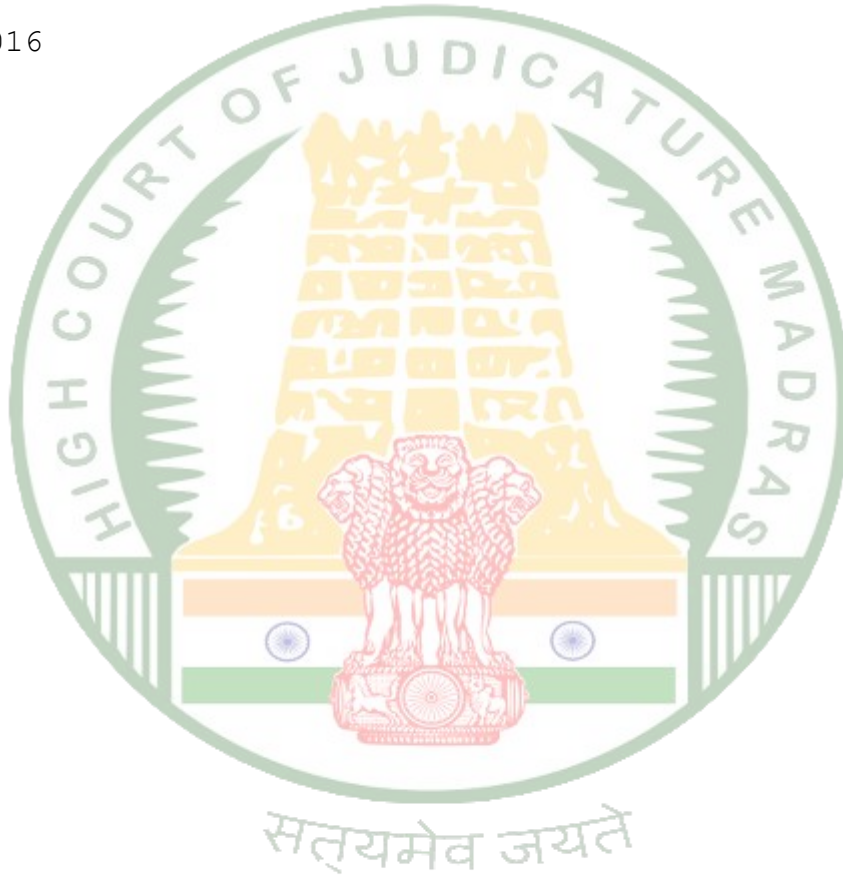
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To

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Railway Protection Force,
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Southern Railways, Trichy.

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