

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 21.12.2016

CWP No.13291 of 2016

Narotam Kumar Mittal

...Petitioner

Vs.

State of Haryana & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. R.K.Malik, Senior Advocate, with
Ms. Rimple Kadyan, Advocate, for the petitioner.

Mr. Hitesh Pandit, DAG, Haryana.

Mr. Vikas Chaudhary, Advocate, for respondent No.3.

RAJIV NARAIN RAINA, J. (ORAL)

When the private respondent [No.3] was promoted as Deputy Director, Food & Supplies Department, Haryana on 04.07.2012, his senior – the petitioner was facing five charge-sheets and could not be promoted. In four of the charge-sheets, the petitioner has been exonerated, whereas the 5th charge-sheet under Rule 7 of the Haryana Civil Services (Punishment & Appeal) Rules, 1987 for major punishment has resulted in imposition of recovery of 5% out of the total loss of ₹14,58,591/- caused due to lack of supervision in procurement of wheat stocks, which was determined in a sum of ₹73,000/- & odd. The amount has been deposited by the petitioner towards recovery. On 04.03.2014, the petitioner was promoted to the post of Deputy Director, Food & Supplies Department, Haryana together with one Mr. G.P.S.Sikri. However, in the promotion order, the issue of deemed date of promotion w.e.f. 04.07.2012 i.e. the date on which junior official Mr. Jaipal Singh – respondent No.3 was promoted as Deputy Director was

ordered to be decided later on. The common case is that final orders have not been passed and the matter remains pending despite long passage of time.

It may be noted that Departmental Promotion Committee (DPC) convened on 28.02.2014 considered the suitability of DFSCs for promotion against the two vacant posts of Deputy Director. The relevant extract from the minutes of meeting reads as follows:

“As per minutes of the DPC meeting dated 28.02.2014 placed at F/A, S/Sh. N.K.Mittal and G.P.S.Sikri, DFSCs have been found eligible for promotion as no C/s U/R-7 is pending/going on against them. Their integrity has not been doubted during last 10 years and they are eligible for promotion from the date their junior Sh. Jai Pal Singh was promoted as Deputy Director. Thus, the name of S/Sh. N.K.Mittal and G.P.S.Sikri, DFSCs both senior to Sh. Jai Pal Singh, Deputy Director in the feeder cadre can be considered for promotion against two vacant posts of Dy. Director.”

Thereafter, the matter went to the Chief Secretary, Haryana for concurrence. The Chief Secretary examined the case of the petitioner advising the Administrative Department to act as per Government instructions dated 21.05.1973 and 19.07.1973 according to which the petitioner could be given deemed date of promotion from the date his junior was promoted provided the said recovery should not have affected his integrity. This advice was tendered by the Chief Secretary on 01.04.2014.

The instructions dated 19.07.1993 covering the subject, which had been pointed out by the Chief Secretary, Haryana, are policy guidelines adopted for promotion of officials/officers to higher posts. The policy has been adopted for promotion of the employees whose conduct is subject to enquiry, when their turn comes. In cases of employees, who have been awarded punishment, the Government thought appropriate that to consider their cases for promotion, in such event, to keep in view the equity and rules

of natural justice as well as to keep in mind 5 points enumerated in the instructions requiring the authorities to keep in view in cases of employees, who have been awarded different punishments. Cases of recovery from pay fall in point-(4), which reads thus: 'this punishment does not extend to any period. Therefore, at the time of promotion such punishment should be kept in view considering as a part of overall record'. It is clear that the promoting authority has to keep three principles in mind as are engrafted in the rules. *Firstly*, equity; *secondly*, rules of natural justice; & *thirdly*, all the five points of which point-(4) falls for consideration in this case.

Point to ponder-(4) opens another vista where an employee has been punished and his case for promotion has come up for consideration, then the punishment proposed to be imposed should be kept in view while considering the same as part of "overall record". The overall record of the petitioner, barring the punishment inflicted, is 100% good while only a minimum 70% good ACRs are required for promotion. In a case where posts are to be filled up on seniority-cum-merit, then it is no ground to deny promotion ignoring seniority even in the face of minor punishment of recovery of money. That the post of Deputy Director is filled on the basis of seniority-cum-merit means seniority will play its role and cannot be ignored, depending on the proportion and quantum of the punishment inflicted. There can be no doubt that in this case the punishment is of a minor nature since the charge-sheet was issued under Rule 7 for major misconduct but was not inflicted as the evidence did not support major penalty. It will be presumed in law that the respondent – State kept all these principles in mind, including the punishment of recovery from pay, when it promoted the petitioner as Deputy Director 04.03.2014.

Thereupon, the only question which appears to fall for consideration is to understand as to what special circumstances arose on 04.03.2014, when the petitioner was promoted, to justify denial of retrospective promotion with effect from 04.07.2012. There must be a very valid reason to deprive the petitioner of the period falling in between.

It is Mr. Malik's star contention that when the Government by its own act promoted the petitioner on 04.03.2014, it did not view the minor punishment as serious enough to deny promotion and it follows a priori that the petitioner should be held entitled to deemed date promotion from the day the admitted junior was promoted i.e. on 04.07.2012, there being no effective or reasonable difference in circumstances or the legal position.

The State has contested the petition and put in its written statement. It is their case that the punishment has not been washed out, which is true on account of it having attained finality. It is asserted that the charge proven is one such which affects the integrity of the petitioner and the advice of the Chief Secretary, Haryana, can be read only as guidance when it left the decision making to the Administrative Department as to whether the recovery had affected the officer's integrity. If the recovery affected his integrity, then it is quite permissible that promotion from the back date would not automatically follow.

However, if the argument of the respondents is accepted, even then on 04.03.2014 the position would subsist that integrity still remains under clouds. But this is not the case because the department has on its own promoted the petitioner to the higher post and it will be assumed that he was fit for promotion on all parameters on the basis of seniority-cum-merit. It will also have to be presumed in law that the Government read in the principles of equity, natural justice, and past overall record etc and kept in

view the guidelines in point-(4) and found the conduct of the petitioner in the 5th charge-sheet not sufficient to deny promotion. If that is so, then I see no real difference between the stages of the case existing on 04.03.2014 and therefore on 04.07.2012 except that on the latter date the petitioner faced disability for promotion due to the pending charge sheets. There is thus no cogent reason or valid justification forthcoming from record of a reasonable classification between the two dates setting them apart with different consequences and, therefore, I am inclined to think that the petitioner ought to have been given deemed promotion w.e.f. 04.07.2012, when his junior Jaipal Singh was promoted when the impediments were removed from the way of the petitioner. If the recovery from pay was a serious matter it would disentitle the petitioner from promotion altogether since the punishment was not limited by time and continued to operate as it does till the present and would always even as a Deputy Director in the respondent department.

On his turn of oral address to the court, learned counsel representing respondent No.3 asserts that the petitioner has no case for promotion and relief could have been granted only if the petitioner was ultimately exonerated fully of all the charges without the imposition of any penalty, major or minor and the petitioner was otherwise fit for promotion in every respect, only then promotion could follow as a matter of right with retrospective effect from the date when junior was promoted, namely, his client. The punishment remains in force and therefore, there is hardly any scope left to invoke principles of equity in favour of the petitioner and nor is there any need to invoke the principles of natural justice in this case. The petition deserves to be dismissed.

I have considered the rival contentions addressed on all sides and having given my thoughtful consideration would tend to agree with the

contentions of Mr. Malik that the very fact that the petitioner was promoted on 04.03.2014 with a rider that his retrospective promotion will be decided later on and the fact that it has not been decided so far and in the meantime the private respondent has been promoted to the higher post and joined as Joint Director, Food & Supplies, Haryana on 02.06.2016 is sufficient indicator that the rider has been turned down by inaction to create a fiat accompli without any effort made to pass an order in writing. What makes matters more doubtful as to bona fides in keeping the case pending on the limited issue of retrospective promotion is that the department has only one post of Joint Director, Food & Supplies Department and by the promotion to the higher post, the private respondent cannot take undue advantage of fortuitous circumstances to obstruct the promotion of the petitioner from the date when he was promoted in the year 2012, the post not being a selection post where junior could supersede a senior on merit. There can be no gainsaying that on 04.07.2012, there was nothing impeding the promotion of respondent No.3 since the petitioner was under clouds of the five charge-sheets and had to wait for conclusion of enquiries, one of which has led to minor punishment. It is true that the punishment does not stand washed out and could be used against the petitioner wherever rules permit, but it is another thing to say that the minor punishment of recovery in the matter of promotion has not been seen by the Government itself as an obstruction to the promotion on 04.03.2014. What was true in 2012 would remain true in 2014 when the scene changed. This Court does not put its seal of approval on the conduct of the petitioner in the recovery, whatever it was, as it is no longer an active issue by virtue of the promotion given to the petitioner by the Department on 04.03.2014. If the promotion order had not been passed on 04.03.2014, the fate of the case cannot be predicted as to how it might

turn out. But it seems without doubt that the department found the petitioner fit for promotion and in fact promoted him keeping retrospectivity at bay for separate consideration. It is this denial of denial of retrospective promotion on notional basis which is an error apparent which has to be corrected by a writ of certiorari. To sum up the case in one line - what is sauce for the goose is sauce for the gander.

For the reasons recorded above, I find sufficient merit in the petition for interference in favour of the petitioner. Accordingly, this petition is allowed. The impugned in-action of the respondent – State in not giving effect to the condition in the promotion order dated 04.03.2014 in failing to decide the case regarding deemed date of promotion cannot be kept open till the *Greek Calends*. Non-grant of retrospective notional promotion from the date the junior was promoted is invalidated. As a result, a writ of mandamus is issued to the respondents to consider and decide the petitioner's claim for retrospective promotion from the date his junior was promoted i.e. 04.07.2012 and the further promotion as Joint Director from 02.06.2016 in the light of this order and the principles noticed therein. The consideration is directed to take place within a period of six weeks from the date of receipt of certified copy of this order, either from this Court or from the petitioner, whichever is earlier. Order dasti.

21.12.2016
Vimal

[RAJIV NARAIN RAINA]
JUDGE

Whether speaking/reasoned:
Whether Reportable:

Yes
Yes