

C.W.P No. 8979 of 2014

(1)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P No. 8979 of 2014

DATE OF DECISION: 23.12.2016

Gurmail Singh

.....Petitioner

Versus

State of Punjab and others

.....Respondents

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Animesh Sharma, Advocate
for the petitioner.

Mr. L.S. Virk, Addl. A.G., Punjab.

DAYA CHAUDHARY, J.

The present petition has been filed under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of certiorari quashing the impugned order dated 7.3.2014 (Annexure P-13), vide which, the request of the petitioner for notional promotion to the post of Establishment Officer as well as Superintendent Grade-I along with all consequential benefits w.e.f. 27.8.2010 has been rejected. A further prayer has also been made for issuing directions to the respondents to promote the petitioner to the post of Establishment Officer w.e.f. August, 2011 i.e. when his promotion became due and also to promote the petitioner to the post of Superintendent Grade-I notionally w.e.f. 27.8.2010 instead of 23.1.2012.

Briefly, the facts of the case as made out in the present petition, are that the petitioner joined the Department of Public Work Architecture Wing, Punjab as Clerk on 24.10.1974. Thereafter, he was promoted as Senior Assistant on 16.5.1980 and as Superintendent Grade-II on 31.12.2008 by the Departmental Promotion Committee (hereinafter referred to as 'the DPC'). One Smt. Rajmati, who was junior to the petitioner but was a reserved category candidate was also promoted to the post of Superintendent Grade-II on 31.12.2008 against the post vacated by reserve category candidate w.e.f. 1.1.2009 due to retirement. However, said Smt. Rajmati has been shown to be junior to the petitioner in the seniority list of Superintendent Grade-II. The grievance of the petitioner is that prior to his promotion as Superintendent Grade-II, the roster register was checked by the respondent-Department and the backlog of Scheduled Caste was shown to be 'Nil'. The petitioner was left with three years of service as he was due to retire on 31.1.2012 and the next promotional post from Superintendent Grade-II was to the post of Superintendent Grade-I and thereafter from Superintendent Grade-I to the post of Establishment Officer.

Learned counsel for the petitioner contends that the solitary post of Superintendent Grade-I fell vacant on 27.8.2010 due to promotion of one Smt. Nimral Gautam. The petitioner was having requisite experience on the post of Superintendent Grade-II and was senior most for promotion to the post of Superintendent Grade-I. Thereafter the solitary post of Establishment Officer fell vacant on 31.8.2010 on the retirement of said Nirmal Gautam. Learned counsel further contends that in spite of vacant post and having requisite experience by the petitioner, he was not considered for promotion to the post of Superintendent Grade-I and the

same was kept reserved intentionally, whereas, there was no backlog of reserve category candidate. Learned counsel also submits that the petitioner made various representations but his case was not considered. Having left with no option, the petitioner filed C.W.P. No. 835 of 2011 before this Court for quashing of order dated 22.2.2010 and for promotion to the post of Superintendent Grade-I being the senior most person. The action of the respondent-Department was not fair and justified as even the reply was not filed to the said petition for a period of more than one year. Subsequently the respondent-Department withdrew order dated 22.2.2010 and placed the same on record in the aforesaid petition. The petitioner was promoted to the post of Superintendent Grade-I by the respondent-Department vide order dated 23.1.2012 and a statement regarding the same was also made during the proceedings in C.W.P. No. 835 of 2011 that as the petitioner was promoted to the post of Superintendent Grade-I on 23.1.2012, the present petition had been rendered infructuous.

Learned counsel also submits that due to inadvertent mistake of respondent-Department, the petitioner was not promoted to the post of Superintendent Grade-I on 27.8.2010 till 23.1.2012. He further submits that the petitioner was promoted to the post of Superintendent Grade-I w.e.f. 23.1.2012 instead of 27.8.2010, whereas, he was due to retire on 31.1.2012. At the end, learned counsel for the petitioner submits that the petitioner is entitled for deemed date of promotion w.e.f. 27.8.2010 along with all consequential benefits. Learned counsel for the petitioner has also relied upon the judgments of Hon'ble the Apex Court in **Major General H.M. Singh, VSM Vs. Union of India and another** (2014) 3 Supreme Court Cases 670, of this Court in **Satya Vir Singh Vs. Punjab and Haryana**

High Court 2011 (4) SCT 707 and of Patna High Court in **Dr. Om Prakash Kumar Sah Vs. State of Bihar** 2010 (4) PLJR 111, in support of his contentions.

Learned counsel for respondent-State has opposed the submissions made by learned counsel for the petitioner. He submits that the claim of the petitioner for promotion as Superintendent Grade-I w.e.f. 27.8.2010 instead of 23.1.2012 and further promotion to the post of Establishment Officer w.e.f. August, 2011, is baseless. There is no rule/procedure to promote the petitioner on completion of qualifying service. Learned State counsel further submits that Smt. Rajmati, Superintendent Grade-II was adjusted at carry forward point No. 23, which was reserved for Scheduled Caste. Learned counsel also submits that no person junior to the petitioner was ever promoted and the petitioner cannot claim promotion as a matter of right.

Heard the arguments advanced by learned counsel the parties and have also gone through the impugned order and other documents available on the file.

The grievance of the petitioner in the present petition is that he was entitled for promotion to the post of Superintendent Grade-I w.e.f. 27.8.2010 instead of 23.1.2012. The case of the petitioner was to be considered for promotion from the post of Superintendent Grade-II to the post of Superintendent Grade-I on 27.8.2010 and to the post of Establishment Officer after one year i.e. in August, 2011. However, the petitioner's case for promotion to the post of Superintendent Grade-I was ignored and having left with no option, he filed C.W.P. No. 835 of 2011 before this Court, whereby, the order standing on the way of petitioner's

promotion was withdrawn and he was promoted to the post of Superintendent Grade-I w.e.f. 23.1.2012 when he was due to retire on 31.1.2012. The petitioner retired as Superintendent Grade-I and after retirement, he made a representation for notional promotion to the post of Superintendent Grade-I w.e.f. 27.8.2010 and thereafter to the post of Establishment Officer w.e.f. August, 2011.

The petitioner and one Smt. Rajmati, who was junior to the petitioner and was a reserved category candidate, were promoted to the post of Superintendent Grade-II on the same date i.e. 31.12.2008. Smt. Rajmati was promoted against the post vacated by one reserve category candidate w.e.f. 1.1.2009. No doubt prior to the promotion of the petitioner as Superintendent Grade-II, the roster register was checked by the respondent-Department and the backlog of the Scheduled Caste was found to be 'Nil'. The next promotion from the post of Superintendent Grade-II was to the post of Superintendent Grade-I. Thereafter to the post of Establishment Officer. The single post of Superintendent Grade-I fell vacant on 27.8.2010 due to promotion of one Smt. Nirmal Gautam. The petitioner was having requisite experience for the post of Superintendent Grade-I and was the senior most eligible person for promotion to the post of Superintendent Grade-I but the case of the petitioner was not considered for promotion and the post was kept reserved for reserve category candidate, whereas, there was no backlog for reserve category candidate. The promotion of the petitioner to the post of Superintendent Grade-I was due on 27.8.2010 but he was not promoted till 23.1.2012 and ultimately retired on 31.1.2012 as Superintendent Grade-I. It has also been argued by the learned counsel for the petitioner that the petitioner was also having the charge of

Establishment Officer w.e.f. 31.8.2010 till the date of his retirement and nothing has come on record to show as to whether any inquiry/complaint was pending against him. Not only the promotion to the post of Superintendent Grade-I was delayed for more than one year but the petitioner could not be promoted to the post of Establishment Officer on due date of promotion i.e. in the month of August, 2011.

Similar issue was dealt with by the Delhi High Court in case **Union of India and others Vs. G.D. Goel** ILR (2008) Supp. (1) Delhi 44, wherein, it was held as under:-

“The principle which can be deduced is that if a promotion is denied to an employee because of the mistake of the administration and due to no fault of the said employee, then the authorities are bound to pay the arrears of salary etc. upon giving him the benefit of retrospective promotion after realizing that mistake. This principle would be extended even to those cases where due to sheer negligence, carelessness or on account of malafides an employee denies the benefit of promotion to the employee at a proper time when it becomes due and gives him afterwards though retrospectively. (Also see *State of Kerala and others Vs. E.K. Bhaskaran Pillai* – JT 2007 (6) SC 83; *Mohd. Ahmed Vs. Nizam Sugar Factory and others* – (2004) 11 SCC 210; *Nalini Kant Sinha Vs. State of Bihar and others* – 1993 Supp (4) SCC 748).

In those cases where concerned employees seniors as well as juniors are granted the benefit of promotion and the salary for the period in question, same should invariably be given to such

an employee who is given belated promotion retrospectively as non grant of arrears of pay and allowances of the higher post for the relevant period, in such circumstances, would amount to hostile discrimination.”

Same view was taken by the Calcutta High Court in the case of **Dr. Sibdas Roy Vs. State of West Bengal and others** (2008) 2 Cal LJ 286.

Similar issue was there before this Court in **Satya Vir Singh's case (supra)**. The relevant portion of the said judgment is reproduced as under:-

“The facts of the case in hand depict a picture of an employee, who has been made to suffer because of no fault of his nor there being any reason why he should have not been appointed at the first place. The facts reveal a story where a helpless employee had been knocking at the doors of temple of justice for claiming his right on the administrative side. May be due to overcautious approach of the High Court or to avoid complications, despite there being no hitch or impediment in giving the appointment to the petitioner, merely because of the pendency of the writ petition, the petitioner was deprived of his right of appointment despite being selected in accordance with law. An employee, who is ready and willing to work, is deprived of his right to work none other than by the High Court itself and above all, when he is not a party to the litigation. Despite representations, his claim is kept pending and thereafter when that right of appointment has been acknowledged and accepted from the date the vacancy arose, he

is being deprived of his consequential benefits.

It is a settled preposition of law based on the maxim *actus curiae neminem gravabit*, which means that the act of the Court shall prejudice no one. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of justice. A person cannot be penalized for no fault of his. In a case where merely because of pendency of the writ petition, a person is deprived of his right despite there being no legal impediment, the Court is under an obligation to undo the wrong done. It may not be a direct act of the Court but a consequence thereof, for which the sufferer can, in no manner, be held responsible. Similarly, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. Concept of restitution becomes applicable in such cases otherwise the party would continue to get benefit by merely instituting the litigation despite losing the case in the Court. In such a situation, the Court cannot sit as a mute spectator but should pass order, which would expressly neutralize the effect of such unmerited litigation. As far as possible, Courts must always aim to preserve and protect the rights of parties and extend help to enforce them rather than deny relief and thereby render the rights themselves otiose. Another basic principle of jurisprudence is “*ubi jus ibi remedium*”, which means where there is a right, there is a

remedy. Such a course would be more conducive and better conform to a fair, reasonable and proper administration of justice and, therefore, needs to be adopted, followed and enforced by the Courts of law.

In **Kalabharati Advertising vs. Hemant Vimalnath Narichania**, 2011 (1) RCR (Civil) 216, the Hon'ble Supreme Court while considering the effect of the ultimate dismissal or withdrawal of a case and the consequence of the effect of the interim relief in para-15 held as follows:-

“15. No litigant can derive any benefit from the mere pendency of a case in a Court of Law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the Court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim “Actus Curiae neminem gravabit”, which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized, as the institution of

litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. xxx xxx xxx xxx xxx”

In paras 18 and 21, it was held as follows:-

“18. In **South Eastern Coalfields Ltd. vs. State of M.P. & Ors.**, AIR 2003 SC 4482, this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting the applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the Court and the act of such party. There is nothing wrong in the parties demanding to be placed in the same position in which they would have been had the Court not intervened by its interim order, when at the end of the proceedings, the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the Court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so.

Any opinion to the contrary would lead to unjust if not disastrous consequences. xxx xxx xxx”

“21. In **Badrinath vs. State of Tamil Nadu & Ors.**, 2000 (4) S.C.T. 832: AIR 2000 SC 3243, this Court observed that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders.”

Hon'ble the Apex Court in the case of **Nalini Kant Sinha Vs. State of Bihar** 1993 AIR (SC) 1358 held the petitioner entitled for arrears along with interest as she had suffered mentally. In that case, the petitioner was denied promotion wrongly but subsequently notional promotion was given and the mistake was rectified.

In the present case also there was inaction on the part of respondent-Department and case of the petitioner was not considered, whereas, he was entitled for promotion not only on the post of Superintendent Grade-I but thereafter on the post of Establishment Officer as well.

Accordingly, the present petition is allowed and the respondent-Department is directed to give notional promotion to the petitioner as Superintendent Grade-I as well as Establishment Officer w.e.f. 27.8.2010 and August, 2011, respectively. However, it is clarified that the

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petitioner shall not be entitled for any financial benefits and the notional promotion will be considered towards pensionary benefits only.

23.12.2016

pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes