

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.03.2017

Coram

THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

W.P.No.28058 of 2013

S.Muthuirluappan

.. Petitioner

vs.

1. Government of Tamil Nadu,
rep. by its Secretary,
Municipal Administration and Water Supply
Department,
Fort St. George, Chennai-600 009.

2. Commissioner,
Corporation of Chennai,
Ripon Building, Chennai-600 003.

.. Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Declaration, declaring G.O.(2Pa)No.54, dated 10.06.2011, Municipal Administration and Water Supply (Ma.Na.3) Department as illegal, arbitrary and contrary to law in so far as not promoting the petitioner to the post of Superintending Engineer with effect from 01.02.2010 in the available vacant position and consequently direct the respondents to promote the petitioner to the post of Superintending Engineer with effect from 01.02.2010, fix the pay scale and revise the terminal benefits payable to the petitioner on the basis he retired in the post of Superintending Engineering.

For Petitioner : Mr.Balan Haridas

For Respondents : Mr.M.L.Mahendran
Govt. Advocate for R1

Mr.G.Anandarangan,
Standing Counsel for R2

ORDER

The prayer in the writ petition is for a Writ of Declaration declaring G.O.(2Pa)No.54, Municipal Administration and Water Supply (Ma.Na.3) Department, dated 10.06.2011, as illegal, arbitrary and contrary to law in so far as not promoting the petitioner to the post of Superintending Engineer with effect from 01.02.2010 in the available vacant position and consequently direct the respondents to promote the petitioner to the post of Superintending Engineer with effect from 01.02.2010, fix the pay scale and revise the terminal benefits payable to the petitioner on the basis that he retired from the post of Superintending Engineer.

2. The petitioner was working as Executive Engineer at the second respondent Corporation. His next avenue of promotion was Superintending Engineer, for which, a panel was prepared for the year 2010-11, and the crucial date was fixed as 01.02.2010. The said panel was approved by the second respondent Corporation through the Council Resolution dated 24.05.2010. At the time of approving the panel by the second respondent, there were two posts of Superintending Engineer vacant and two more posts in that category would become vacant in that year itself. So, in anticipation to fill up all four posts of Superintending Engineer, a panel consisting of five names, including the name of the petitioner, had been approved by the second respondent and the same was, in turn, forwarded to the first respondent for their approval.

3. However, the first respondent took some time to approve the panel, as in the meantime, in view of the election, code of conduct came into force, and ultimately, by the order dated 10.06.2011 in G.O.(2 Pa)No.54, Municipal Administration and Water Supply Department, a panel of only three persons had been approved. The reason for leaving the other two persons, including the petitioner, is that in so far as the other person, namely, one, Mr.K.Kesavan is concerned, he himself had given up the promotion. However, in so far as the petitioner's case is concerned, his name was not approved, because he had, in the meanwhile, superannuated and retired from service on 30.04.2011. That is the only reason that his name was not approved, in spite of his name having been approved by the second respondent corporation and the same was forwarded for approval to the first respondent.

4. By virtue of the said G.O. (2 Pa) No.54, dated 10.06.2011, since the name of the petitioner was not considered for promotion on the ground that he retired from service on

30.04.2011, challenging the same and seeking notional promotion to the post of Superintending Engineer and other consequential benefits, the petitioner has approached this Court with this writ petition with the aforesaid prayer.

5. Heard both sides.

6. Mr. Balan Haridas, learned counsel appearing for the petitioner, would submit that by resolution dated 24.05.2010, the second respondent Corporation had considered the name of eight persons, who were Executive Engineers, to be included in the panel for promotion to the post of Superintending Engineer for the year 2010-11, and out of eight candidates, the petitioner stood as fourth candidate. However, the first candidate, one, S. Mohandraj, since had voluntarily retired, his name was not considered, and the second candidate, one Mr. U. Perumal, was also not considered, because some disciplinary proceedings were pending against him. Therefore, the third candidate one Mr. J. Atlee, was considered as a first candidate, and the petitioner, being the fourth candidate, had also been considered as a second candidate. Apart from these two candidates, three more candidates' names were also included, and thus, together names of five persons had been approved and recommended for approval to the Government.

6.1. Learned counsel would further submit that though, the said approval having been done by the second respondent Corporation, as early as on 24.05.2010, the Government had kept it pending for whatsoever reason, and ultimately decided to finalize the same only in June 2011. By that time, in view of superannuation, the petitioner retired on 30.04.2011. Therefore, without any fault on the part of the petitioner, his name has been removed from the panel, that was already approved by the second respondent, and by this act, the petitioner lost the chance of getting promotion notionally as Superintending Engineer.

7. Mr. Anandarangan, learned Standing Counsel appearing for the second respondent Corporation, would submit that as far as the second respondent is concerned, it has approved the panel of five persons, who were working as Executive Engineers, for promotion to the post of Superintending Engineer, for the year 2010-2011, considering the crucial date as 01.02.2010 and the same had been forwarded to the first respondent for approval. Respondent No.1 has given its approval only on 10.06.2011, through G.O.(2 Pa) No.54, and since, by that time, the petitioner had retired on 30.04.2011 itself, his name was not included, and therefore, the petitioner had no occasion to be considered for giving promotion to the post of Superintending Engineer.

7.1. In this regard, learned Standing Counsel for the second respondent would also submit that since it is an executive post, unless the approval is given by the Government, promotion and appointment cannot be made for the post of Superintending Engineer. Therefore, for the delay caused at the hands of the first respondent in making the approval, the second respondent Corporation cannot be blamed, and therefore, the prayer sought for by the petitioner cannot be granted, at this juncture, since, the petitioner had retired from service on 30.04.2011 itself.

8. Mr.A.Zakir Hussain, learned Government Advocate appearing for the first respondent, would submit that even though the panel was forwarded by the second respondent, the first respondent had to get some clarifications from the second respondent, and in the meanwhile, the general election had been announced. Therefore, since by virtue of the Code of Conduct coming into force, these promotions and postings have not been finalized, and it was taken up for approval only during June 2011, and, at that time, it was brought to the notice of the first respondent that the petitioner had retired on 30.04.2011. Therefore, his name was not included in the approved panel and only the names of other three persons were approved. It is submitted that since the petitioner had already retired from service on 30.04.2011, he cannot seek any further promotion, at this juncture, and therefore, the prayer sought for cannot be granted.

9. This Court has considered the rival submissions made by the respective parties through their learned counsels.

10. It is an admitted fact that the petitioner was eligible to be considered for promotion to the post of Superintending Engineer for the year 2010-2011, considering the crucial date as 01.02.2010. Accordingly, the second respondent Corporation, through their resolution, has approved the panel of five persons, including the petitioner, on 24.05.2010. At that time, there were two (2) posts of Superintending Engineer vacant and two more posts of Superintending Engineer were likely to become vacant. Therefore, in order to fill up all the four vacancies in the post of Superintending Engineer, a panel of five persons, including the petitioner, had been approved and recommended by the second respondent through their resolution dated 24.05.2010, as stated above.

11. In this regard, the relevant portion of the resolution of the second respondent is reproduced hereunder :

கு,,,, நடப்ப, நிதி ஆண்டில் கண்காணிப்ப, பொறியாளர் பதவியில் இரண்டு

பணியிடங்கள் (பேருந்து சாலைத்துறை மற்றும் இயந்திரப் பொறியியல் துறை) காலியாக உள்ளன. மேலும் தற்போது பணிபுரிந்து வரும் இரண்டு கண்காணிப்பு , பொறியாளர்களுக்கு தலைமைப் பொறியாளர்களாக அரசு பதவி உயர்வு, அளிக்கும் பட்சத்தில் மேலும் இரண்டு காலி பணியிடங்கள் உருவாக வாய்ப்புகள் உள்ளன. ஆக மொத்தம் இவ்வாண்டில் நான்கு கண்காணிப்புப் பொறியாளர் பணியிடங்கள் காலியாக வாய்ப்புள்ளன.ரு

12. For whatever reasons the panel recommended by the second respondent had been kept pending from 24.05.2010, till 10.06.2011, for which, the petitioner cannot be blamed, and therefore, service benefits accrued on the petitioner, at the time of consideration of his name, for including it in the panel, taking into account the crucial date as 01.02.2010, shall also not be taken away or abrogated, merely because, the petitioner had retired from service.

13. Out of the five persons, whose names have been recommended in the panel, the petitioner, admittedly, stood at the second place and from the averments made in the resolution of the second respondent dated 24.05.2010, which has been extracted above, at least two posts were vacant already, since the petitioner was the second person in the panel, if the said panel had been approved immediately by the first respondent, the petitioner would have been given promotion and appointed in the second post, which was vacant then. Merely because, administratively, the approval has been delayed, the accrued right on the petitioner cannot be denied.

14. No doubt the petitioner had retired from service, on attaining superannuation, on 30.04.2011. The said superannuation had taken place almost a year after the panel was approved and recommended by the second respondent Corporation. Therefore, though enough time was available to the first respondent to give approval of the said panel, for one reason or the other, of-course, on the administrative side, could not be given by the first respondent, within the said one year period and it was apparently, given only on 10.06.2011. This administrative delay, in any circumstance, cannot be put against the petitioner, that too, in a manner prejudicial to the accrued service benefits of the petitioner.

15. In this context, learned counsel appearing for the petitioner has relied upon a judgement of the Hon'ble Apex Court in 2014 (3) SCC 670 in the matter of Major General H.M.Singh, VSM V. Union of India and Another. Learned counsel for the petitioner, in particular, relied upon paragraphs 28 and 33 of the said judgment, which read thus :

".... 28. The question that arises for

consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition, that the respondents were desirous of filling the vacancy of Lieutenant General, when it became available on 1.1.2007. The factual position depicted in the counter affidavit reveals, that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view, that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29.2.2008, and thereafter, by a further Presidential order dated 30.5.2008. The above orders clearly depict, that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant General, (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet), stands affirmed. The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant General, would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary.

....

33. Insofar as the present controversy is concerned, there is no doubt whatsoever, that a clear vacancy against the rank of Lieutenant General became available with effect from 1.1.2007. At that juncture,

the appellant had 14 months of service remaining. It is not as if the vacancy came into existence after the appellant had reached the age of retirement on superannuation. The present case is therefore, not covered by the technical plea canvassed at the hands of the learned senior counsel for the respondents. The denial of promotion to the appellant mainly for the reason, that the appellant was on extension in service, to our mind, is unsustainable besides being arbitrary, specially in the light of the fact, that the vacancy for which the appellant was clamouring consideration, became available, well before the date of his retirement on superannuation. We have, therefore, no hesitation in rejecting the basis on which the claim of the appellant for onward promotion to the rank of Lieutenant General was declined, by the Appointments Committee of the Cabinet."

16. If the said principle, as set out in the judgement cited supra, is applied in the present facts of the case, the claim of the petitioner that even though he retired subsequently, he shall be entitled to get the promotional benefits, at least by way of notional promotion, cannot be easily brushed aside.

17. In view of the said facts and circumstances obtaining in the instant writ petition, this Court is of the view that the petitioner shall be entitled to get notional promotion from the date, it become due to him, that is, either from the crucial date, that is, 01.02.2010, or, at least from the date, when, it was approved by the second respondent Corporation, that is, on 24.05.2010.

18. In the result, the following orders are passed in this writ petition :

- (1) The impugned order, in so far as the non-inclusion of the name of the petitioner for promotion to the post of Superintending Engineer, is declared unlawful and consequently, it is declared that the petitioner shall be entitled to get notional promotion either from 01.02.2010 or 24.05.2010, as Superintending Engineer, and accordingly, he shall be entitled to get all the service benefits.
- (2) The respondents herein are directed to give such notional promotion and service benefits to the petitioner, and in that respect, necessary orders shall be passed and the benefits shall be disbursed to the petitioner, within a period of eight weeks from the date of receipt of a copy of this order.

19. With these directions, the writ petition is allowed.
However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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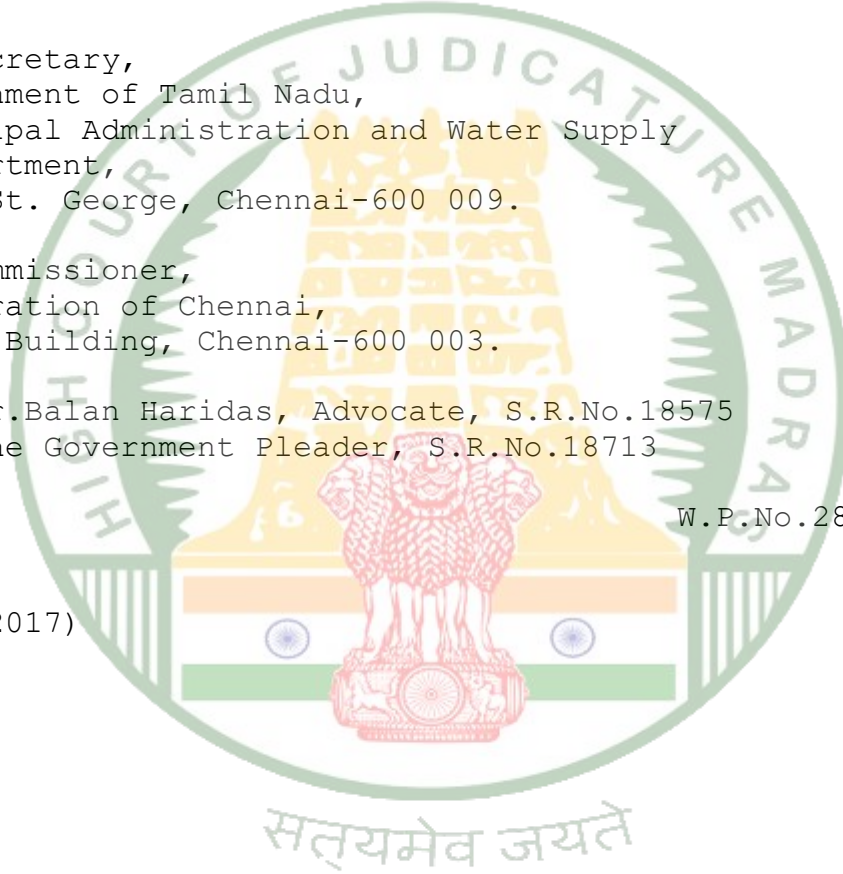
To

1. The Secretary,
Government of Tamil Nadu,
Municipal Administration and Water Supply
Department,
Fort St. George, Chennai-600 009.
2. The Commissioner,
Corporation of Chennai,
Ripon Building, Chennai-600 003.

+1cc to Mr.Balan Haridas, Advocate, S.R.No.18575
+1cc to the Government Pleader, S.R.No.18713

W.P.No.28058 of 2013

SVI (CO)
RS (13/04/2017)



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