



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON:04.01.2017
DELIVERED ON :17.02.2017

CORAM:

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THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS. JUSTICE J.NISHA BANU

W.A.(MD)No.1594 of 2016
and
C.M.P.(MD).Nos. 11959 of 2016

The Principal Secretary,
The Government of Tamil Nadu,
Public Works Department,
St. George Fort,
Chennai - 600 009.

.. Appellant/
Respondent

Vs.

M.Rajan

.. Respondent /
Petitioner

Writ Appeal has been filed under Clause 15 of the Letters Patent, against the order dated 17.08.2016, made in W.P.(MD). No.12142 of 2014 by a learned Single Judge of this Court.

Writ Petition is filed under Article 226 of the Constitution of India,praying this Court to issue a Writ of Mandamus, directing the respondent to issue posting order to the petitioner as Superintending Engineer, Public Works Department, pursuant to the panel dated 02.05.2014

For appellant : Mr.S.Chandrasekar,
Government Advocate

For respondent : Mr.Isaac Mohanlal,
Senior Counsel for Mr.M.Kannan

JUDGMENT

(Judgment of the Court was delivered by **R.SUBBIAH, J.**)

This writ appeal has been filed by the State as against the order passed by a learned Single Judge of this Court in W.P.(MD). No.12142 of 2014, whereby and whereunder the learned Single Judge of this Court directed the appellant to promote the respondent as per the panel prepared on 02.05.2014 in G.O.(D).No.19, on par with his juniors, who have been promoted on 16.07.2014, within a period



of four weeks.

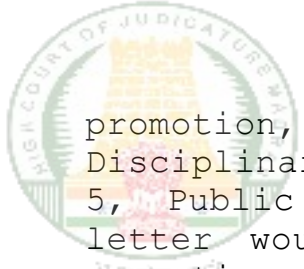
2. The case of the respondent before the learned Single Judge is as follows;

The respondent has been working as Executive Engineer in the appellant Department. He has completed 29 years of service. In the panel for promotion to the post of Superintending Engineer issued by the appellant, dated 02.05.2014, the respondent's name found place in Serial No.6. While so, the appellant had given promotion by his order dated 16.07.2014 to the other persons deleting the name of the respondent. According to the respondent, on the crucial date of preparation of panel for promotion, there was no charge or proceedings pending against him and therefore, he ought to have been promoted to the post of Superintending Engineer and the appellant has discriminated him without any just cause. Hence, he has come up with the writ petition for a direction to the appellant to issue posting order to him as Superintending Engineer.

3. The appellant has resisted the above submission by filing a detailed counter affidavit before the learned Single Judge stating that it is true that the name of the respondent was taken up for consideration for promotion to the post of Superintending Engineer for the year 2013-2014. But, based on the vigilance report, the Government has issued a letter No.32548/E1/2012-5, dated 01.07.2014, requesting the Commissioner for Disciplinary Proceedings, Tirunelveli, to conduct an enquiry against the respondent and two others. Therefore, the Commissioner for Disciplinary Proceedings has framed charges against the respondent and two others and served the same on 30.07.2014. In the meanwhile, the Government, vide order dated 16.07.2014, has issued promotion and posting orders to the Executive Engineers, except the respondent herein. Since the enquiry was pending against the respondent, he has not been considered for promotion. Thus, he prayed for dismissal of the writ petition.

4. After hearing both sides, the learned Single Judge has, by relying upon the decisions of the Hon'ble Supreme Court in (a) Union of India and others Vs. K.V.Jankiraman, reported in (1991) 4 SCC 109 and (b) Union of India and others Vs. Anil Kumar Sarkar, reported in (2013) 4 SCC 161, held that since on the date of drawing the panel, there was no charge memo against the respondent, he ought to have been promoted and accordingly, issued direction as prayed for. Aggrieved over the same, the present appeal has been filed by the State.

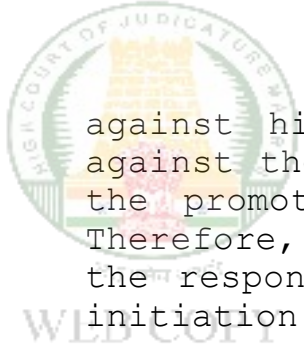
5. The learned Government Advocate appearing for the appellant submitted that the learned Single Judge has allowed the writ petition on the ground that on the date of drawing the panel for promotion to the post of Superintending Engineer, no charge memo was pending, however, before issuing orders for



promotion, he was subjected to enquiry before the Tribunal for Disciplinary Proceedings, Tirunelveli in Letter No.32548/E1/2012-5, Public Works Department, dated 01.07.2014. Further, this letter would go to show that even on the date on which the promotion panel was acted upon i.e., on 16.07.2014, the proceeding was pending before the Commissioner for Disciplinary Proceedings as against the respondent herein. Therefore, the pendency of the proceeding should be held against the respondent herein. Since the proceeding was pending before the Tribunal, the appellant has not given promotion to the respondent to the post of Superintending Engineer. The learned Single Judge has not taken note of the fact that the disciplinary proceeding was pending against the respondent before the Tribunal on the date of issuing promotion order to the other persons in the panel. Thus, he prayed for dismissal of the order passed by the learned Single Judge.

6. Countering the submission made by the learned Government Advocate, the learned senior counsel appearing for the respondent submitted that neither on the date of drawing the panel for promotion to the post of Superintending Engineer viz., 02.05.2014 nor on the date on which other Executive Engineers were promoted on 16.07.2014, no charge memo was pending as against the respondent. Only when the charge memo is issued by the disciplinary authority to the employee, it can be said that the disciplinary proceeding has been initiated against the employee. Admittedly, in this case, the charge memo was issued only on 28.07.2014 i.e., much after the date of drawing the panel and the date on which promotion was given to the other Executive Engineers. Therefore, considering this aspect, the learned Single Judge has rightly allowed the writ petition. There is no need to interfere with the order of the learned Single Judge. Thus, he prayed for dismissal of this writ appeal.

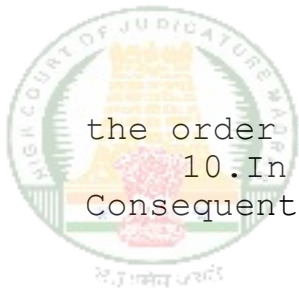
7. Keeping the submissions made by the learned counsel appearing on either side, we have carefully gone through the entire materials available on record. Admittedly, neither on the date of drawing the panel for promotion to the post of Superintending Engineer nor on the date on which the panel for promotion was acted upon, there was no charge memo issued/pending against the respondent. As per the dictum laid down by the Hon'ble Supreme Court in **Union of India and others Vs. K.V.Jankiraman**, reported in (1991) 4 SCC 109 and (b) **Union of India and others Vs. Anil Kumar Sarkar**, reported in (2013) 4 SCC 161, consideration of case of an employee for promotion, selection grade, crossing of efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of any preliminary inquiry/criminal investigation against him. The departmental proceedings/criminal prosecution can be stated to be initiated against the employee, only when a charge memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued



against him. Here, in this case, the charge memo was issued against the respondent only on 28.07.2014, ie., after acting upon the promotion panel by giving promotion to the other persons. Therefore, it can be reasonably held that exclusion of the name of the respondent from the promotion panel merely on the ground of initiation of disciplinary proceedings cannot be accepted.

8. At this juncture, the learned Government Advocate appearing for the appellant submitted that as per Sub Para 1 in Para II of Part A in the Schedule XI under Section 7(1) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, "in cases where enquiry (except Tribunal for Disciplinary Proceedings enquiry) including preliminary or detailed enquiry by the appropriate investigating authority is pending against a member of a service and no specific charges have been framed, promotion or appointment of such member of service shall be considered on the basis of merit revealed through Annual Confidential Reports, Record Sheets and punishments imposed". Thus, the said Act itself does not contemplate that framing of charges by the Tribunal for disciplinary proceedings is necessary for non inclusion in the panel / denial of promotion to a member of service. Since, in this case, the disciplinary proceeding was pending before the Tribunal for Disciplinary Proceedings, exclusion of the name of the respondent from the promotion panel on the ground of pendency of the proceedings before the Tribunal cannot be stated to be illegal.

9. We are not inclined to accept the said contention, because it is not the case of the appellant that preliminary or detailed enquiry before framing of charges was conducted by the Tribunal for Disciplinary Proceedings. On the other hand, it is seen that in this case, preliminary enquiry was conducted by some other authority. In fact, in the first paragraph of letter of the Principal Secretary to the Government, to the Commissioner for Disciplinary Proceeding in letter No.32548/E1/2012-5, dated 01.07.2014, the Principal Secretary has requested the Commissioner for Disciplinary Proceedings to conduct an enquiry into the allegations substantiated by the appropriate investigating authority. Therefore, it is clear that in this case, the preliminary enquiry to substantiate the allegation has been conducted by an appropriate investigating authority and not by the Tribunal for Disciplinary Proceedings before framing charges. Therefore, the exceptional clause relied upon by the learned Government Advocate will not be helpful to the case of the appellant. Further, in view of the categorical decision of the Hon'ble Supreme Court in the decisions, cited supra, that consideration of case of an employee for promotion, selection grade, crossing of efficiency bar or higher scale of pay cannot be <https://hcservices.mca.gov.in/hcservices/> on the ground of pendency of any preliminary inquiry, we are also of the view that exception clause can be overruled. Thus, we do not find any infirmity or illegality in



the order passed by the learned Single Judge.

10. In the result, this Writ Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar[CS II]

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Sub Assistant Registrar

To

1. The Principal Secretary,
Government of Tamil Nadu,
Public Works Department,
St. George Fort,
Chennai - 600 009

+1cc to Special Government Pleader, SR.9225

+1cc to Mr.M.Kannan, Advocate, SR.9097

Pre-Delivery Judgment made in

Writ Appeal (MD) No.1594 of 2016

17.02.2017

GCG

KK-BS-24.02.2017-5p-4c