

In the High Court of Judicature at Madras

Dated : 23.03.2018

Coram

THE HONOURABLE MR.JUSTICE SATRUGHANA PUJAHARI

W.P.No.5437 of 2014

A.Subramani

... Petitioner

Vs.

1.The Secretary to Government  
Public Works (A2) Department  
Secretariat, Chennai - 600 009.

2.The Engineer-in-Chief (Buildings) and  
Chief Engineer (General)  
Public Works Department  
Chepauk, Chennai - 600 005.

... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, issue a Writ of Mandamus, directing the first respondent herein to promote the petitioner as Assistant Executive Engineer under Rule 39(D) of Tamil Nadu State and Subordinate Service Rules without prejudice to the case in Special Case No.5/2003 pending before the Chief Judicial Magistrate-cum-Special Judge, Tirunelveli.

For Petitioner : Mr.Ravi Shanmugam  
For Respondents: Mrs.R.Janaki  
Addl Government Pleader

सत्यमेव जयते  
O R D E R

The petitioner, in this writ petition, seeks a writ of Mandamus to direct the respondent to consider him for promotion to the post of Assistant Executive Engineer notwithstanding the pendency of a Criminal Prosecution against him vide Special Case No.5 of 2003 before the Chief Judicial Magistrate Cum Special Judge, Thirunelveli, in view of Rule 39 (d) of Tamil Nadu State and Subordinate Service Rules (hereinafter referred to as "the Rules").

2. As it appears, the petitioner while in service was indicted in the aforesaid criminal case in the year 1995. The said criminal case is still pending against the petitioner. The

aforesaid being an impediment /disqualification, the petitioner has not been accorded promotion. The representation made by the petitioner to accord him promotion temporarily notwithstanding his indictment in such criminal case, in view of the settled position of law in this regard as well as Rule 39 (d) of the Rules, but the same having been rejected, he has filed this writ petition seeking the relief as stated earlier.

3. No counter affidavit has been filed by the respondent/State even though the writ petition is of the year 2014 and an ample opportunity was given for the same. In such view of the matter, this court is not inclined to adjourn this case further to enable the respondents to file counter affidavit and heard the parties on merit in the absence of the counter affidavit of the respondents.

4. The learned counsel appearing for the petitioner submits that since Rule 39(d) of the Rules empowers the employer to promote a person notwithstanding the pendency of departmental proceedings in the exigency of the work temporarily so also permanently, the indictment of the petitioner in the criminal case and pendency there of as such should not stand on the way of the employer to accord promotion to the petitioner, if he is otherwise suitable. The Apex Court also in the case of State of Punjab and others Vs. Chaman Lal Goyal reported in (1995) 2 SCC 57, in similar such facts and situation directed the employer to consider the promotion of the respondent notwithstanding the pendency of a Departmental Proceeding. The same has also been reiterated by this court in a number of writ petitions including **WP No.9529 of 2013 decided on 19.09.2016 [S.Saravanan Vs. The Principal Secretary to Government of Tamil Nadu, Highways and Minor Ports (HK.1) Department]** and also in **WP No.8771 of 2013 decided on 14.07.2017 [R.Manohar Vs. The Principal Secretary to Government of Tamil Nadu, Highways and Minor Ports (HK.1) Department]**. Hence, the writ petition be allowed and the respondents be directed to consider the petitioner for promotion to the next higher post inasmuch as, the petitioner is suffering for last 23 years due to pendency of such criminal prosecution, submits the learned counsel for the petitioner.

5. The learned counsel appearing for the respondents does not dispute the fact that the pendency of the departmental proceedings is no bar to consider promotion of an indicted employee temporarily in the exigency of the work, in view of Rule 39(d) of the Rules but submits the petitioner being indicted in a criminal case, does not deserve promotion in aid of the aforesaid Rule.

6. To appreciate the contention of the parties it would be apposite to have a look to Rule 39 (d) of the Rules. The relevant portion of the Rules reads as follows:

"Rule 39 (d) Where it is necessary to promote an officer against whom an enquiry into allegations of corruption or misconduct is pending the appointing authority may promote him temporarily pending enquiry into the charges against him. The competent authority shall have discretion to make regular promotion in suitable cases".

7. A perusal of the aforesaid Rule would go to show that the pendency of the disciplinary proceedings is no bar to promote a delinquent public servant working under the Government of Tamil Nadu and governed by the Rules temporarily, if necessity demands. Even in such situations, he can also give him regular promotion.

8. The Apex Court also in the case of State of Punjab and others Vs. Chaman Lal Goyal reported in (1995) 2 SCC 57 in paragraph No.12 has held as follows:

"12. Applying the balancing process, we are of the opinion that the quashing of charges and of the order appointing enquiry officer was not warranted in the facts and circumstances of the case. It is more appropriate and in the interest of justice as well as in the interest of administration that the enquiry which had proceeded to a large extent be allowed to be completed. At the same time, it is directed that the respondent should be considered forthwith for promotion without reference to and without taking into consideration the charges or the pendency of the said enquiry and if he is found fit for promotion, he should be promoted immediately. This direction is made in the particular facts and circumstances of the case though we are aware that the rules and practice normally followed in such cases may be different. The promotion so made, if any, pending the enquiry shall, however, be subject to review after the conclusion of the enquiry and in the light of the findings in the enquiry. It is also directed that the enquiry against the respondent shall be concluded within eight months from today. The respondent shall cooperate in concluding the enquiry. It is obvious that if the respondent does not so cooperate, it shall be open to the enquiry officer to proceed exparte. If the enquiry is not concluded and final orders are not passed within the aforesaid period, the enquiry shall be deemed to have been dropped."

9. Since the aforesaid decision has been rendered in the case of pendency of the departmental proceedings, the State counsel has opposed that such prayer with the submission that since the same was relatable to a delay in departmental proceedings, the petitioner has no case for promotion as he is indicted in a criminal case.

10. However, this Court in the case of **S.Saravanan (cited Supra)** taking note of the order made in WP Nos.2220 of 2006, 21085 of 2006, 24786 of 2006 and 5568 of 2007 in similar facts and situations i.e even though a criminal case was pending against the petitioner in the said case in Paragraph 7 and 8 held as follows :

" 7. Keeping the submissions made by the learned counsel on either side on mind and the fact that the Criminal case foisted against the petitioner has been kept pending for the past twelve years and the trial has not yet been commenced, further in addition that in identical situation, this Court has given directions to promote the petitioners therein, I am of the view that following the same, similar orders can be passed in the case of the petitioner also.

8. In view of the same, following the orders passed by this Court in the above referred writ petitions, a direction is issued to the respondent to consider the name of the petitioner for promotion as Assistant Divisional Engineer under Rule 39(d) of Tamil Nadu State and Subordinate Service Rules, and pass appropriate orders, within a period of two weeks, from the date of receipt of a copy of this order. With the above observation, this writ petition is disposed of. No costs."

11. This Court also placing reliance on the decisions of **S.Saravanan (cited Supra)**, in the case of **R.Manohar (Cited Supra)** in Paragraph 6 in similar facts and situations passed the order as follows :-

"6. In such view of the matter, this Court has no institution in setting aside the impugned order dated 24.12.2012, rejecting the claim of the petitioner for promotion to the post of Divisional Engineer. Therefore, the writ petition is allowed with a direction to the respondent to consider and grant promotion to the petitioner as Divisional Engineer with effect from the date of his Juniors were promoted with all consequential and attendant benefits. It is also made clear that the said

promotion is subject to the final outcome in the criminal proceedings which is pending against the petitioner. The said direction shall be complied with within a period of one month from the date of receipt of copy of this order. No costs".

12. It appears that there is inordinate delay in disposal of the Criminal prosecution against the petitioner. This Court in similar facts and situation had directed the authority concerned to consider the promotion of such a public servant indicted in Criminal Case extending the benefit of Rule 39(d) of the Rules as seen from the decisions of this Court in the case of **S.Saravanan and R.Manohar (Cited Supra)**. Therefore, this Court sees no apparent reasons not to extend such benefit to the petitioner.

13. Hence, this Writ petition is disposed of with a direction to the respondent, more particularly the 1<sup>st</sup> respondent to consider the case of the petitioner for promotion temporarily, if he is otherwise found to be suitable for the same, notwithstanding the pendency of the aforesaid Criminal Prosecution, within a period of two months from the date of receipt of a copy of this order, if there is no other legal impediments. However, such promotion if any accorded shall be subject to the result of the criminal prosecution. But in these circumstances, there shall be no order as to costs.

Sd/-  
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1.The Secretary to Government  
Public Works (A2) Department  
Secretariat, Chennai - 600 009.

2.The Engineer-in-Chief (Buildings) and  
Chief Engineer (General)  
Public Works Department  
Chepauk, Chennai - 600 005.

+1 cc to Mr.Ravishanmugam Advocate sr 22627

+1 cc to the Govt Pleader sr 22848

W.P.No.5437 of 2014  
and  
M.P.No.1 of 2014

aa22/05/2018