

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 29.06.2018

CORAM

THE HONOURABLE MR.JUSTICE SATRUGHANA PUJAHARI

W.P.No.41152 & 41153 of 2016

and

WMP No.35147 and 35148 of 2016

T.Selvaraj

..Petitioner in both WPs

Versus

1. The Union of India
rep. By the Secretary to Government,
Ministry of Railways,
Rail Bhavan, New Delhi.
2. The Director General,
Railway Protection Force,
Rail Bhavan, New Delhi.
3. The Chief Security Commissioner,
Railway Protection Force,
Southern Railway, Moore Market Complex,
Chennai - 3.
4. The Divisional Security Commissioner,
Railway Protection Force,
Thiruvananthapuram ..
.. Respondents 1 to 4 in WP No.41152 of 2016
5. The Senior Divisional Security Commissioner,
Railway Protection Force,
Chennai
..1st respondent in WP No.41153 of 2016

Prayer in WP No.41152 of 2016 :

Writ Petition filed under Article 226 of the Constitution of India, seeking for a writ of certiorarified mandamus calling for the records of the respondents in connection with the impugned order issued by the fourth respondent in No.VXP/535/IPF/13 dated 05.11.2013 and quash the same and direct the respondents to promote the petitioner as Assistant Security Commissioner on par with his juniors in pursuance to the orders passed by the 2nd respondent in No.2013/SEC/E/P/PM2/1 dated 12.08.2013 without reference to the charge sheet pending against the petitioner

No.VXP/227/153/04/2013 dated 10.09.2013, pending criminal case registered in Crime No.627 of 2013 dated 16.09.2013 on the file of the Kottar Police Station, Kanyakumar District and the charge sheet issued to the petitioner in No.VXP/227/153/02/14 dated 06.01.2014 and grant him all consequential service and monetary benefits on par with the petitioner's juniors .

Prayer in WP No.41153 of 2016 :

Writ Petition filed under Article 226 of the Constitution of India, seeking for a writ of certiorarified mandamus calling for the records of the respondents in connection with the impugned order issued by him in No.M/XP/E8/473/DCP/15 dated 21.12.2015 and quash the same and further direct the respondent to issue duty pass for attending the Court proceedings before Judicial Magistrate - II at Nagarkoil in connection with CC No.53 of 2015 and also pay the travelling allowance, besides reimburse the expenses incurred by the petitioner for attending the Court within reasonable time.

For Petitioner : M/s.R.Singaravelan,
in both Wps Senior Counsel for
M/s.C.A.Anburaja

For Respondent(s) : Mr.P.T.Ramkumar
in both WPs Standing Counsel

O R D E R

The case of the petitioner is that originally he was appointed as a Sub-inspector in Railway Protection Force, Southern Railway in the year 1988 and subsequently, he was promoted as Inspector in the year 1996. Thereafter, the petitioner having attained sufficient seniority and having merit for consideration for promotion as Assistant Security Commissioner, the petitioner has been promoted to the post of Assistant Security Commissioner vide order dated 14.08.2013 in X/P.534/P&T/Gaz/2013/II and posted to serve as Assistant Security Commissioner, Kharagpur, South Eastern Railway in an existing vacancy but before he was relieved to join in the new place of posting in the promotional post, as he was indicted in a Criminal case under NDPS Act, he was put under suspension by the 4th respondent vide its order dated 20.08.2013 and thereby, the promotion given was denied vide impugned order dated 05.11.2013 canceling the promotion and a charge memo was also issued to him on 10.09.2013 for his involvement in the criminal case. Aggrieved by the same, the petitioner filed a writ petition before the Madurai Bench and obtained an order of interim stay of all the disciplinary proceedings vide order dated 26.11.2013. However, the 4th respondent after such order of

stay being vindictive issued another charge memo against the petitioner on 06.01.2014 alleging misconduct which stated to have been committed in the year 2012 with regard to use of emergency duty pass and immediately an enquiry officer was appointed to conduct the disciplinary proceeding. The petitioner filed a WP (MD) No.18934 of 2013 challenging initiation of such disciplinary proceeding and got an order of stay of the same in the said writ petition. Thereafter, the order of suspension of the petitioner has been revoked on 31.03.2015 and the petitioner is presently posted as Inspector of RPF. The petitioner came to file this writ petition challenging the denial of promotion to him inter alia on the grounds that even though he was indicted in a criminal case which is otherwise also without any substance and also disciplinary proceedings were initiated against him on some false foundation, he could not have been denied promotion and allowed to join in his new place of posting as no charge and criminal prosecution was pending against him on the date of his promotion and the charges are subsequent to his promotion. Therefore, he has made the prayer as stated earlier. The other writ petition has been filed with regard to denial of duty pass to him to attend the criminal prosecution inasmuch as, he was also getting the duty pass for attending the departmental proceeding.

2. A common counter affidavit has been filed by the respondents with the averments that the petitioner's claim in this regard is without any substance, inasmuch as the promotion given was subject to Discipline and Appeal Rules / Vigilance / Criminal Case clearance by the Railways and before according final promotion and allowed to join in the place of posting, as he was involved in a criminal case i.e. under NDPS Act and also departmental proceedings was initiated against him which have been stayed at the instance of the petitioner, his promotion order was canceled vide the impugned order. The same is moreso, inasmuch as, the petitioner was put under suspension for his misconduct before joining.

3. During the course of hearing, the learned counsel appearing for the petitioner submits that it is not in dispute that the petitioner was promoted taking into consideration his merit in service and he was also given a posting in the promotional post at Kharagpur, but before his relieve, he was mischievously indicted in a criminal case and put under suspension and not allowed to join in his place of posting. Thereafter, disciplinary proceeding were initiated against him for such indictment in the criminal prosecution and the disciplinary proceedings being grounded on the same fact, the disciplinary proceeding in this regard has been stayed, pending disposal of the criminal prosecution. However, the Authority

being aggrieved by such order of stay of the disciplinary proceeding by the petitioner, initiated another departmental proceeding on another false foundation in a frivolous charge of misuse of emergency duty pass dates back in the year 2012. The petitioner when challenge the same before the Madurai Bench of this Court vide the writ petition as stated earlier, the Madurai Bench of this Court taking into consideration the merit of the writ petition that is the contention of the petitioner that the same is actuated with malafide to harass the petitioner, interim order was passed staying the same. The petitioner has also been taken back to service by reinstatement. It is the settled position of law, if no charge is pending against a person on the date for consideration of promotion, the promotion given to him cannot be denied on the ground of his subsequent involvement in any criminal case / disciplinary proceeding. In such view of the matter, it is submitted that since no charge was pending against the petitioner on the date of his promotion and he having been promoted, notwithstanding his involvement in a criminal case. So also, drawal of disciplinary proceedings against him, subsequent to such promotion, he could not have been denied the promotion given vide the impugned order of cancellation of promotion. In this regard, reliance has been placed in a decision of the Apex Court, reported in 2013 (4) SCC 161 [Union of India Vs. Anil Kumar Sarkar]. It appears that in the reported decision Anil kumar Sarkar when holding the post of AFA/T-1 in the office of the Financial Advisor and Chief Accounts Officer of the North Frontier Railway (NFR) at Maligaon, a Departmental promotion committee (DPC) was convened by the Union Public Service Commission (UPSC) on 26.02.2002 and on 27.02.2002 for consideration of officers of the Group B of the department for their substantive promotion to Group A (Junior scale) of Indian Railways Accounts Service against the vacancies for various Zonal Railways / Production Unit, Anil Kumar's name was also considered against the vacancies in NF Railway for the year 2001-2002 and accordingly, his name was listed in the selected panel. However thereafter, 4 Memorandum of charges were issued to the respondents, two of which on 13.08.2003 and the another on 01.09.2003 and other on 05.11.2003 alleging some misconduct to have been committed by him in the year 1994-1995, so also, enquiries were completed and show cause notice were served. Basing on the similar charges, CBI also lodged criminal prosecution against him vide 11 different FIR's alleging offence under section 120 -B /420 of the Indian Penal Code and Section 13(1) (d) r/w Section 13(2) of the prevention of corruption Act. On the basis of the aforesaid, subsequent involvement in the criminal charge and drawl of departmental proceeding, he was not accorded promotion. The petitioner came to challenge the same before the Central Administrative Tribunal (CAT) unsuccessfully. Challenging such order of the CAT, the petitioner approached the Gauhati High Court in WP No.744 of

2010, wherein the Gauhati High Court allowed the writ petition, set aside the order of the CAT dismissing the Original Application and directed the respondents therein to issue appropriate order in favour of the respondents for promotion with all consequential benefits. The same being challenged before the Apex Court by the Union of India, the Apex Court placing reliance in the case of [Union of India Vs. K.V. Janaki Raman] reported in 1991 (4) SCC 109 dismissed the Civil Appeal of the Union of India and upheld the order of the Gauhati High Court. The learned counsel appearing for the petitioner placing heavy reliance on the same, submits that the petitioner is entitled to the relief sought for in view of the law laid down in the case of Anil Kumar Sarkar (supra).

4. Per contra, the learned counsel appearing for the respondent submits that since the petitioner was involved in a case of serious misconduct i.e. in a criminal case of drug trafficking for which a criminal prosecution against him is pending under the NDPS Act and he is facing trial therein and also in the departmental proceeding charge memo having already been issued to him, though the same have been stayed by this Court the petitioner has no case, inasmuch as his promotion was subject to the Discipline and Appeal Rules / Vigilance / Criminal Case clearance and before joining in the promotional post he has incurred disqualification by his aforesaid alleged misconduct and the same is adhoc one. The case of Anil Kumar Sarkar was a regular promotion and not subject to any order and as such the same has no application to the present set of facts and as such, of no assistance. Hence, he submits to dismiss the writ petition seeking promotion as devoid of merits.

5. I have carefully gone through the facts and submissions, so also, the law laid down in the case of Anil Kumar Sarkar (cited supra). In the case of Anil Kumar Sarkar the Apex Court has upheld the view of the Gauhati High Court with regard to the fact that when a person already selected for promotion, had no criminal charge/ departmental proceeding pending on the date of promotion, even if indicted in a criminal case with regard to an offence committed anterior to the date of promotion and also departmental proceedings are initiated against him for any such misconduct which are admittedly disqualification for being considered for promotion subsequent to such selection for promotion, the same is no ground to deny him the promotion given, by consequential posting in the promotional post. Since, Anil Kumar Sarkar had no such disqualification on the date of promotion and was already accorded promotion notwithstanding the disqualification for being considered for promotion incurred by him subsequent to such promotion, direction was given to accord him promotion and posting. The aforesaid decision of the Guwahati High Court was

upheld by the Apex Court in the decision cited (supra). The petitioner's case is squarely covered by the ratio laid down in the case of Anil Kumar Sarkar (cited supra). In view of the same, I have no hesitation to say that the petitioner has made out a case to quash the impugned order of the fourth respondent pursuant to the Board decision and direct the respondents to allow the petitioner to join the promotional post notwithstanding the same was awaiting the formal approval of the authority and subject to certain clearness as initiated, more particularly when he was already given an order of posting in a promotional post.

6. So far as the writ petition No.41153 of 2016 is concerned, the petitioner filed this writ petition seeking for a direction to the respondent to issue duty pass for attending the Court proceedings before Judicial Magistrate II at Nagarkoail in connection with the criminal case pending against him which has been refused to him vide impugned order dated 21.12.2015 by the sole respondent, inasmuch as, even though, he was earlier issued with the duty pass to attend the disciplinary proceedings initiated by the department. It is not disputed by the counsel appearing by the petitioner that criminal prosecution and departmental proceeding though being grounded on the same facts but are distinct and different. In a departmental proceeding, the department proceeds against the delinquent public servant for his misconduct as a public servant, inasmuch as he allegedly conducted himself in a manner prohibited for public servant. The same as such has nexus with his office as a public servant. Hence, when he was proceeded departmentally for alleged misconduct and asked to participate, the same is treated as duty and duty pass are issued. However, a criminal prosecution launched having no nexus to official duty, the petitioner claim for duty pass therefore on the stated ground is misconceived. Hence, the writ petition filed seeking direction for issuance of duty pass to him and treat the period as attending the Court to defend him as duty period, appears to be fallacious and as such, the writ petition filed in this regard is liable to be dismissed. However, the petitioner being attending the Court to defend himself on the direction of the Court, needless to say that he is entitled to leave as admissible to him to participate in the Criminal trial.

7. Therefore, for the foregoing reasons, this Court allows the prayer of the petitioner in WP No.41152 of 2018, consequently quashed the impugned order of the fourth respondent vide Ref.No.VXP/535/IPF/13 dated 05.11.2013 and direct the respondent concerned to post the petitioner in the promotional post, notwithstanding his subsequent involvement in the criminal case, as well as pendency of the departmental proceedings, pursuant to the order of promotion given to him as

Assistant Security Commissioner, in a suitable place as the respondents deem fit and proper within six weeks from the date of receipt of copy of this order. But so far WP No.41153 of 2016 is concerned, the same stands dismissed being devoid of merit. No costs. Consequently, the connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Union of India
rep. By the Secretary to Government,
Ministry of Railways,
Rail Bhavan, New Delhi.
2. The Director General,
Railway Protection Force,
Rail Bhavan, New Delhi.
3. The Chief Security Commissioner,
Railway Protection Force,
Southern Railway, Moore Market Complex,
Chennai - 3.
4. The Divisional Security Commissioner,
Railway Protection Force,
Thiruvananthapuram ..
5. The Senior Divisional Security Commissioner,
Railway Protection Force,
Chennai

+2ccs to Mr.P.T.Ramkumar, Advocate, S.R.No.42061 & 42062
+2ccs to M/s.C.A.Anburaja, Advocate, S.R.No.41814 & 41813

W.P.No.41152 and 41153 of 2016

KK(CO)
CS/31/07/18