

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 19.06.2019

CORAM:
THE HONOURABLE MR.JUSTICE S. VAIDYANATHAN

W.P.No.1750 of 2015
and W.M.P.No.2 of 2015

T.Shanmugam

.. Petitioner

Vs

- 1.The Union of India
Represented by its Secretary,
Ministry of Shipping,
No.1, Parliamentary Street,
New Delhi 110 001.
 - 2.The Union of India,
Represented by its Secretary,
Ministry of Finance, Department of Expenditure,
North Block,
New Delhi 110 001.
 - 3.Chennai Port Trust,
Represented by its Chairman,
Chennai- 600 001.
 - 4.The Chief Medical Officer,
Chennai Port Trust Hospital,
Chennai - 600 001.
- ... Respondents

Prayer: The Writ Petition is filed, under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus to call for the records relating to the impugned order issued by the second respondent in reference No. nil dated 02.08.2011 and quash the same, further direct the third respondent herein to upgrade the petitioner post as senior physiotherapist with effect from 30.05.2007 in Class II post with scale of pay of Rs.8,600-14,600/- (pre revised) with all other attendant and monetary benefits.

For Petitioner : Mr.C.Mahendran

For R1 & R2 : Mr.K.Gunasekar,
Senior Panel Counsel for Central Govt.

For R3 & R4 : Mr.J.Sathayanarayana Prasad

ORDER

The petitioner has filed the present writ petition challenging the impugned order issued by the second respondent dated 02.08.2011 and seeks to quash the same and to direct the third respondent herein to upgrade the petitioner post as senior physiotherapist with effect from 30.05.2007 in Class II post with scale of pay of Rs.8,800-14,600/- (pre revised) with all other attendant and monetary benefits.

2. Facts of the case:-

a) The Petitioner joined as Physiotherapist on 02.08.1984 in the 3rd respondent Port Trust, which is a Class III post and at that point of time, the prescribed qualification was Diploma in Physiotherapy.

b) The petitioner acquired degree in Physiotherapy and also acquired Master degree in Psychology. The 3rd respondent Port Trust revised the eligibility criteria for appointment to the post of Physiotherapist from Diploma to a Degree in Physiotherapy with effect from 23.07.1999. In Mumbai Port Trust, the said post had promotional avenue to the Senior Physiotherapist and it is the grievance of the petitioner that Chennai Port Trust had no such scope, whereas in the case of nurses and Pharmacists, they had promotional avenue upto Class II post as Matron and Assistant Controller of Stores respectively.

c) It is averred in the Writ Petition that post of Physiotherapist is an isolated post, there was no avenue of promotion. As per Chairman's Proceeding based on Ministry's letter No.LB/12012/94-RO dated 19.09.1995, 3rd respondent effected benefits by way of upgrading the post for those who are stagnating in the same post for more than 15 years. It is the case of the petitioner that under the said scheme, petitioner was denied upgradation benefits and hence approached this Court.

d) The Petitioner further submits that even after 3rd respondent Board's approval to upgrade the post of Physiotherapist as Senior Physiotherapist Class II and forwarded the proposal to the 1st respondent on 09.07.2007 for sanction, for various reasons, the 1st respondent on 03.12.2009, advised the 3rd respondent to send the revised proposal for consideration in the light of the provisions contained in RSP Regulation notified on 07.01.2009.

e) It is stated by the petitioner that even though he possessed Master's degree in Physiotherapy, he was languishing in Class III post for more than 30 years whereas his counterpart in Mumbai Port Trust, had the benefit of scale of pay of

Rs.9100-15,100 (pre revised) where the post has been classified as Class I post.

f) The Petitioner filed W.P.No.9440 of 2011 for upgradation and during the pendency of the said Writ Petition, the respondent passed impugned order dated 30.08.2011, and W.P.9440/2011 has been disposed of by this court by order dated 24.01.2012, giving liberty to the petitioner to challenge the impugned order of the 1st respondent dated 30.08.2011.

g) This Court in W.P.No.8469 of 2012, by order dated 6.11.2012, granted the relief to Petitioner, by quashing the impugned order dated 30.08.2012 and directed the Secretary to Government, Ministry of Finance, to upgrade the petitioner as Senior Physiotherapist from 30.05.2007 in Class-II post with the scale of pay of Rs.8600-14600 with subsequent revisions and with all monetary benefits.

h) Aggrieved by the above said order passed in W.P.No.8469 of 2012, Respondents have filed W.A.No.2220 of 2013 and W.A.No.434 of 2014 before this Court and a Division Bench of this court by order dated 10.07.2014, pointed out that on the basis of the representation of the Writ petitioner/T.Shanmugam, seeking time to challenge the order dated 02.08.2011 passed by the Ministry of Finance, Department of Expenditure, which is found in paragraph No.5 of the typed set filed in W.A.No.2220 of 2013, disposed of the Writ Appeals granting liberty to the writ petitioner/T.Shanmugam to challenge the said order in separate proceedings.

i) The petitioner filed Review Application Nos.163 and 164 of 2014 as against the order passed in W.A.No.2220 of 2013 and W.A.No.434 of 2014 which had been dismissed by a Division Bench of this court by order dated 03.12.2014. The contention of the writ petitioner herein is that the impugned order dated 02.08.2011 issued by the 2nd respondent was not at all served on him and in view of the liberty given in W.A.No.2220 of 2013 and W.A.No.434 of 2014 dated 10.07.2014, the impugned order dated 02.08.2011 is challenged in this Writ petition.

3. According to the learned counsel for the petitioner, when there is no avenue of promotion and when he had been stagnated in the same post for more than three decades, the rejection of his request for upgradation on the ground that it lacks functional justification is not correct. Further, the view of the 2nd respondent in the impugned order that the acceptance of the instant proposal may attract similar demands from other posts as well is arbitrary. The learned counsel further submits that the Supreme Court in number of cases held that there should be atleast one avenue of promotion during the entire career of service and submitted that in the case of petitioner, it is not

even a plea of promotion and only sought for upgradation based on similar proposal and recommendation and therefore, the rejection of proposal by the impugned order dated 02.08.2011 is bad in the eye of law and the same is liable to be interfered with.

4. Respondents 1 and 2 filed common counter affidavit and in paragraph 10, it is stated that each Major Port have separate autonomous identity having their own Recruitment Rules; drawing parity with regards to promotional avenues for each post is not practically possible.

5. Respondents 3 and 4 also filed their common counter affidavit and in paragraph 6, it is stated that vide Board Resolution No.44, the Board resolved to approve Chairman's/3rd respondent's proposal to upgrade one post of Physiotherapist (UG) in the scale of pay of Rs.5500-11380 (Class III) to the post of Senior Physiotherapist in the scale of pay of Rs.8600-14600 (Class II), subject to 1st respondent's sanction. However, the 1st respondent did not approve it due to financial implications.

6. Heard both sides.

7. It is not in dispute that the petitioner is working as Class III Physiotherapist since the date of his joining in the 3rd respondent Port on 02.08.1984. It transpires from the submission of the learned counsel for the petitioner that the petitioner was initially appointed as Physiotherapist Upper Grade and got further upgraded on 19.09.1995 and once again on 02.08.2014 as Class III Physiotherapist. There is no post of Senior Physiotherapist existing in the Chennai Port Trust, but the said post of Senior Physiotherapist got higher scale of pay and is existing in Mumbai Port Trust.

8. It is seen that the post in the Chennai Port Trust can be upgraded based on functional justification and in order to avoid similar demands from other posts, the demand/request of the petitioner has been rejected by the Ministry of Finance by the impugned order dated 02.08.2011.

9. It is a matter of record that the Petitioner herein, earlier, approached this court by filing W.P.No.9440 of 2011 and thereafter, by filing W.P.No.8469 of 2012, the petitioner succeeded, however, the same had been challenged by the respondents in W.A.No.2220 of 2013 and 434 of 2014. The petitioner again preferred Review Application in Rev.App.No.163 and 164 of 2014. A Division Bench of this court granted liberty to the Writ petitioner/T.Shanmugan to challenge the order dated 02.08.2011 passed by the Ministry of Finance, in a separate proceedings. Therefore, the Petitioner has filed the present

writ petition seeking the aforesaid relief.

10. Assailing the contentions of the learned counsel for the petitioner, the learned counsel for the 1st respondent submitted that creation of post is within the purview of the employer and the employee has no right to claim and in this regard, relied on a decision of Supreme Court reported in 2008(1)SCC 683 [Divisional Manager, Aravali Golf Club and another Vs. Chander Hass and another].

11. The undisputed fact is that the courts cannot sit in the Administrative side and propose to create post. There is no matter of ambiguity in the proposition of law laid down by the Supreme Court of India as held in the decision 2008 (1) SCC 683 [cited supra]. On the other hand, the petitioner who has put 3 decades of service, submitted representations to consider his case for upgradation on the basis of similar Resolution of the 3rd respondent, but, it is unfortunate that the 2nd respondent had time and again rejected it, holding that the proposal lacks functional justification, consequently, the petitioner had not seen any monetary benefits in the said post, so far, which was available to similar staff working in Mumbai Port Trust.

12. It is relevant to point out herein that this court in the earlier Writ Petition filed by the petitioner, viz., in W.P.No.8469 of 2012, by order dated 06.11.2012, gone into details of the proposal of the department as well as the rejection of Ministry of Finance and held in paragraphs 7, 8 as follows:-

"7. The 3rd respondent sought approval of the resolution dated 11.12.2009, from the first respondent. In the meantime, the petitioner filed W.P.No.9440 of 2011 before this Court seeking for a direction to the first respondent to sanction the upgradation of the post of Physiotherapist(UG) in Class-III post, as Senior Physiotherapist in Class-I post and to consequently promote the petitioner by upgrading him as Senior Physiotherapist in Class-I Post with effect from 30.05.2007, with all consequential service and monetary benefits. The said W.P.No.9440 of 2011 was disposed of on 24.01.2012, giving liberty to the petitioner to question the order dated 30.08.2011 of the first respondent refusing to upgrade the post of Physiotherapist as Senior Physiotherapist. The order of the first respondent dated 30.08.2011 is as follows:-

"I am directed to refer to your letter No.P1/2137/2007/H dated 04.01.2011 on the subject cited above and to say that the matter has been examined in consultation with Integrated Finance Wing

of this Ministry and Department of Expenditure, Ministry of Finance. In this regard it is informed that the proposal for upgradation of one post of physiotherapist in the pay scale of Rs.5500-11380 (Class-III) (Pre-revised) to Sr. Physiotherapist in the pay scale of Rs.8600-14600 (Class-II) (Pre-revised) in the Medical Department of Chennai Port Trust has not been agreed to by Ministry of Finance Department of Expenditure."

The above narration of facts makes it clear that the 3rd respondent decided to upgrade the post of Physiotherapist in Class-III post to Senior Physiotherapist in Class-II post.

8. From the reading of the counter affidavit filed by the first respondent, it is clear that he has also concurred with the decision taken by the third respondent. However, since the second respondent refused to approve the action, the proposal of the third respondent was rejected. The impugned order does not disclose any reason for rejection of the proposal by the second respondent. But, it is simply stated that the second respondent has not agreed the proposal. However, in the counter affidavit filed by the first respondent, the following are stated as the reasons given by the second respondent:

"As per prevailing norms, all proposals having financial implications are referred to the Ministry of Finance for approval. Since the request made by the petitioner involved Financial Implications, the matter was referred to the Ministry of Finance for consideration. The Ministry of Finance has turned down the proposal on the ground that the proposal lacks functional justification. Moreover, the posts are not upgraded to give promotional prospects to the incumbents. Also, the acceptance of the instant proposal may attract similar demands from other posts as well."

It is stated in the counter affidavit of the first respondent that the second respondent (Ministry of Finance) rejected the proposal on the ground that the proposal lacks functional justification. But, the second respondent has not chosen to file any counter affidavit explaining the reasons for rejecting the proposal sent by the third respondent."

However, it is pointed out in the impugned order of the 2nd respondent that the acceptance of the proposal will open the Pandora Box and that similar demands may arise in the department. The said reason stated by the 2nd respondent for rejecting the proposal, is also a point of concern and same

cannot be bushed aside.

The Apex Court in a decision reported in AIR 1989 SC 1972 Council Of Scientific And ... vs K.G.S. Bhatt And Anr. , has made it very clear that there should be avenues of promotion so that the employee concerned will get an opportunity of advancement which is required for a whole career and therefore one must, be given an opportunity to advance. In the above cited decision, the Supreme court in paragraph 9, held as follows:-

"9. That then is the scope of bye-law 71(b)(ii). But that does not mean that we should interfere with the relief granted to respondent-1. By pointing out the error that crept into the decision of the Tribunal, we need not to take to its logical end which will defeat justice. Respondent-1 is not a lay-man. He is a highly qualified engineer. Although joined service with a diploma in Engineering, he later passed Bachelor of Engineering (B.E.) and also acquired M. Tech. degree and one more diploma (D.P.M.). He was however, left without opportunity for promotion for about twenty years. This is indeed a sad commentary on the appellant's management. It is often said and indeed, abroitly, an organisation public or private does not 'hire a hand' but engages or employees a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well. (See : Principles of Personnel Management by Flipo Edwin B. 4th Ed. p. 246). Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both no managerial employees and their supervisors". (See : Personnel Management by Dr. Udai Pareek p. 277). There cannot be any modern management much less any career planning, man-power development, management development etc. which is not related to a system of promotions. (See : Management of Personnel in Indian Enterprises by Prof. N.N. Chatterjee, Chap. 12 p. 128). The appellant appears to have overlooked this basic requirement of management so far as respondent-1 was concerned till N.R. & A.S. was introduced."

In yet another decision, reported in (2008) 1 SCC 683 [Aravali Golf Club Vs. Chander Hass], the Supreme Court held that the

courts cannot take upon themselves the power of creation of a post. In paragraph 15 of the said decision, it is held as follows:-

"15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside."

13. In the case on hand, it is clearly seen that the Chennai Port Trust had taken continuous steps to upgrade the post of Physiotherapist. It transpires from the letter dated 04.04.2005 sent by the Secretary of the 3rd respondent that the Chairman has decided that one vacant Class-II post, in the scale of Pay of Rs.8600-14600 may be transferred from any other department to the Medical Department for redesignating the same as Senior Physiotherapist Class-II in the Scale of Pay of Rs.8600-14600. Confirmed minutes of the Board Meeting to that effect has also been forwarded to the 1st respondent, wherein, upgradation of one post of Physiotherapist as Senior Physiotherapist in the Medical Department and the manner of appointment and the sanction of the Government was requested and further to upgrade the existing scale of pay of Rs.5600-11380 (Class III) to Rs.8600-14600 (Class II) is also sought for. In the said communication of the 3rd respondent to the 1st respondent dated 06.12.2007, in paragraph 6, 7, 8, it is stated as under:-

"6. At present, there are 3 Physiotherapists working in this Hospital of which 2 Physiotherapists having more than 20 years of service. Keeping in mind, the size of the Hospital and population catered to and the nature of disease profile, there is adequate justification to upgrade one post of Physiotherapist.

7. It has also been a long standing Union demand to upgrade one post of Physiotherapist (UG) and provide promotional opportunity and this isolated category. After detailed examination of all aspects, it has been decided to upgrade one post of Physiotherapist as Senior Physiotherapist from the existing Scale of Pay of Rs.5500-11380 (Class-III) to Rs.8600-14600 (Class-II). The financial implication on account of Upgradation of one post of

physiotherapist in the Scale of Pay of Rs.5500-11380 as Senior Phsyiotherapist in the Scale of Pay of Rs.8600-14600 comes to Rs.93,492/- per annum.

8. In order to provide adequate matching savings for the above up gradation, Board's approval has been obtained vide B.R.No.44, dated 30.05.2007 (Copy enclosed)."

14. The Board Meeting Agenda of Chennai Port Trust also asked for Board's approval in respect of financial implication. It is pointed out that on account of upgradation of one post of Physiotherapist in the scale of pay of Rs.5500-11380 as Senior Physiotherapist in the scale of pay of Rs.8600-14600 comes to Rs.93,492/- per annum and in order to provide adequate matching savings for the above upgradation, one (1) post of Mazdoor (Shore Labour) in the scale of pay of Rs.3840-6720 in Traffic Department will be abolished. Thus, the 3rd respondent sought for Government's sanction for the said upgradation.

15. In the Meeting of Board of Trustees, the Board's Resolution is resolved as under:-

"Resolution # 44:

Resolved after discussion to approve the Chairman's proposal dated 19.05.2007 to upgrade one post of Physiotherapist (UG) in the scale of pay of Rs.5500-11380 (Class III) as Senior Physiotherapist in the scale of pay of Rs.8600-14600 (Class II) by abolishing one post of Physiotherapist vacated by the incumbent to the post of Senior Physiotherapist and by abolishing one post of Mazdoor (Shore Labour) in Traffic Department, to offset the matching savings. Resolved further to seek Government's sanction for the said upgradation."

16. The 1st respondent in response to the above communications of the 3rd respondent, by letter dated 03.12.2009, has stated as follows:-

"I am directed to refer to your letter No.P1/2137/07/H dated 02.09.2009 on the subject cited above and to say that the proposal on the subject has been considered in the Ministry in consultation with Integrated Finance Wing. But before consideration, the proposal requires to be modified as per the provisions contained in RSP Regulations notified on 07.01.2009. The proposal to be submitted to the Ministry in this regard should have fresh approval of the Board, suitable matching saving and proper justification for upgradation of the post."

17. The Chennai Port Trust/3rd respondent in reply to the Ministry's letter dated 03.12.2009, submitted a letter dated

10.03.2010, stating as follows:-

" 2. In compliance with the instructions issued by the Ministry, the proposal for up-gradation of one of the three posts of Physiotherapist from the Class-III scale of pay of Rs.5000-10850 to the Class-II scale of pay of Rs.8600-14600 with a designation of Senior Physiotherapist was taken up for Board's approval vide Note to Board dated 10.12.2009 wherein it was also suggested to provide one live post of Mazdoor (Shore Labour) in the Traffic Department which will arise consequent on the up-gradation of the existing senior most incumbent of the post. It is also certified that the post of Mazdoor (St.) (Rs.3840-6720) which is detailed for abolition as matching saving has fallen vacant with effect from 30-6-2009 and will not come under the purview of deemed abolition of posts lying vacant for more than one year. It is also brought to the attention of the Ministry to this office earlier letters dated 6.10.2008 and 02.09.2009 that the post of Physiotherapist is a entry level post to be filled in by direct recruitment and as such the abolition of post in any another post in the same line of promotion would not arise.

3. The Board, in the light of the accompanying the copy of the note to the Board dated 10.12.2009 referred to above, considered the subject and approved of the same subject to sanction of the Government vide B.R.No.264, dated 11.12.2009.

4. A copy each of the Note to Board dated 10.12.2009 and B.R.No.264, dated 11.12.2009 together with the Check List and the details of matching savings provided for this purpose is enclosed.

5. It is therefore, requested that the sanction of the Government may kindly be obtained and communicated for the proposed up-gradation of one of the post of Physiotherapist as Senior Physiotherapist early."

18. Thereafter, the 1st respondent by letter dated 28.10.2010 directed the 3rd respondent to furnish the revised working sheet for matching saving as per the new pay scale for processing the case further. In response to the above letter dated 28.10.2010, the 3rd respondent furnished the particulars of working sheet for matching saving as per the new pay scale and requested the Ministry for upgradation of one post of Physiotherapist (Class-III) as Senior Physiotherapist (Class-II) in Medical department of Chennai Port Trust. The particulars of Matching Saving in the Revised Pay Scale is given in short form as under:-

Senior Physiotherapist (Rs.16400-40500)

Total 61737.00

Expenditure per month Rs.61737.00

Expenditure per annum Rs.61737 x 12 =Rs.740844.00 (A)

Physiotherapist (Rs.11000-29400)

Total Rs.42088.00

Expenditure per month Rs.42088.00

Expenditure per annum Rs.42088 x 12 = Rs.505056.00 (B)

Mazdoor (Shore Labour) Rs.8100-18200

Total 27636.00

Expenditure per month Rs.27636.00

Expenditure per annum Rs.27636 x 12 = Rs.331632.00 (C)

B + C - A = Rs.505056 + 331632 - 740844 = Rs.95844.00

An amount of Rs.95844.00 p.a. will be saved by up-grading the one post of Pysiotherapist (Class III) as Senior Physiotherapist (Class II) by abolishing one post of Physiotherapist and one post of Mazdoor (Shore Labour).

The 1st respondent reviewed the cadre structuring to harmonise the functional needs of the organisation and career progression of employees. The first respondent given various details and illustrations about the modified assured career progression scheme (MACPS) for the Central Government civilian employees. Nevertheless, by the impugned order, the first respondent pointed out that the proposal lacks functional justification and the posts are not upgraded to give promotional prospects to the incumbents. It is further indicated that the instant proposal may attract similar demands from other posts as well.

19. This court, is of the considered opinion that when the financial implications had been dealt with by giving a proposal along with the particulars of working sheet for matching saving as per the new Pay Scale and further taking into account the fact that two posts viz., Physiotherapist and Mazdoor (Shore Labour) had been surrendered, there is no justification on the part of the 1st respondent, in rejecting the proposal of upgradation and depriving the said benefit to the Petitioner.

20. This court makes it very clear that as the petitioner had rendered three decades of service as Physiotherapist is of Class 3 category and there was no promotional avenue in the said Post, the relief sought for by the petitioner has to be granted and the impugned order is to be interfered with. This court would

make it very clear that by quoting the observation indicated above, no other employee is entitled to claim similar relief, as this court has taken into account all the facts and circumstances involved in this writ petition, more particularly, the proposal which had been forwarded by the third respondent for approval to the 1st respondent along with details of surrendering two existing posts and the matching savings and that the petitioner had no promotional avenue in the Chennai Port Trust.

21. For the risk of repetition, it is stated that two posts had been surrendered for the purpose of upgradation which fact has to be known to other employees before making any request to the department to consider either for financial upgradation or for promotion.

22. With the above observation, the Writ petition is allowed. Monetary benefits, if any, due to the petitioner, shall be paid within two months from the date of receipt of a copy of this order. The petitioner is entitled to upgradation with effect from the date of rejection of proposal. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (CS VIII)

//True Copy//

Sub Assistant Registrar

nvsri

To

1. The Secretary,
The Union of India
Ministry of Shipping,
No.1, Parliamentary Street,
New Delhi 110 001.
2. The Secretary,
The Union of India,
Ministry of Finance, Department of Expenditure,
North Block,
New Delhi 110 001.
3. The Chairman,
Chennai Port Trust,
Chennai- 600 001.

4.The Chief Medical Officer,
Chennai Port Trust Hospital,
Chennai - 600 001.

+1cc to Mr.K.Gunasekar, Advocate, S.R.No.50827
+4ccs to Mr.C.Mahendran, Advocate, S.R.Nos.50882 & 49893
+1cc to Mr.J.Sathya Narayana Prasad, S.R.No.49784

W.P.No.1750 of 2015

RSI (CO)

RRS (22/08/2019)



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