

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.03.2019

PRONOUNCED ON : 20.03.2019

CORAM

THE HON'BLE Mr. JUSTICE M.VENUGOPAL

And

THE HON'BLE Mr. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.15153 of 2016

and

W.M.P.No.13198 of 2016

1. Bharat Sanchar Nigam Limited,
Rep. By its Chairman & Managing Director,
Corporate Office, Bharat Sanchar Bhawan,
New Delhi - 110 001.
2. The Director (Finance)
Bharat Sanchar Nigam Limited,
Corporate Office, Bharat Sanchar Bhawan,
Janpath, New Delhi - 110 001.
3. The Chief General Manager Telecom
BSNL Tamil Nadu Circle,
Chennai - 600 006. ... Petitioners

V.

1. M. Palanivelu
2. The Registrar,
Central Administrative Tribunal,
Madras Bench
City Civil Court Buildings,
Chennai - 104.
3. The Principal Controller of
Communication Accounts Department
of Tele Communications,
DOT Cell - Tamil Nadu Circle,
Ethiraj Salai, Chennai - 600 008.

.. Respondents

[R3 impleaded vide order dt. 27.02.2019
made in WMP.No.38047/2017)

Prayer: Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the second Respondent in OA.No.318/2013 dated 04.12.2014 and quash the same as illegal.

For Petitioner : Mr.M.S.Velusamy

For 1st Respondent : Mr.Karthik Raja
For M/s Menon, Kathik,
Mukudan and Neelakandan

For 2nd Respondent : Tribunal

For 3rd Respondent : Mr.Venkatasamy Babu

O R D E R

M.VENUGOPAL, J.

Heard the Learned Counsel for the Petitioners and the Learned Counsel for Respondents 1 and 3.

2.According to the Petitioners, the 1st Respondent/Applicant in O.A.No.318 of 2013 was holding the post of Chief Accounts Officer (CAO) on Ad hoc basis from 18.10.2007 and he was regularised in the post on 31.12.2009. The next avenue of promotion is to the post of Deputy General Manager (DGM), JAG Grade. As a matter of fact, the benchmark required for promotion as per 'Recruitment Rules' is 'Very Good' with a further condition that there should be no Adverse Remarks and not more than one 'Good' entry in the period of five years prior to the year of promotion.

3.The plea of the Petitioners is that the Corporate Promotion Committee (CPC) met on 30.03.2010 to judge the fitness of 569 STS (Ad hoc) Executives to be regularised as STS (Regular) for promotion to the grade of JAG i.e. DGM on Ad hoc basis. Indeed, the 1st Respondent/Applicant was considered for Promotion and he was given a grading of 'Good' for the years 2004-2005 and 2005-2006 and grading of 'Very Good' for 2006-2007, 2007-2008 and 2008-2009.

4.The Learned Counsel for the Petitioners brings it to the notice of this Court that in regard to the 'Appraisal Reports' for 2004-2005 and 2005-2006 of the 1st Respondent, the Reviewing Officer viz., P.Rethinavelu, DGM (Retd.), Madurai had only agreed to the general remarks of the Reporting Officer in the Appraisal Reports of the 1st Respondent for the years ending 2005

and 2006 and the Corporate Promotion Committee (CPC) members adjudged as 'Good' only. In fact, the Reporting Officer had given 'Good' for all the parameters of performance and the same were agreed by the Reviewing Officer.

5. In this connection, it is represented on behalf of the Petitioners that the grading 'Very Good' given by the Reviewing Officer against Point No.5 for both the years is with regard to aptitude and potentials of the 1st Respondent and it is not with regard to his performance and hence, the overall grading for the years 2004-2005 and 2005-2006 for the purpose of promotion was taken by the Corporate Promotion Committee as 'Good'.

6. The Learned Counsel for the Petitioners comes out with a plea that since the 1st Respondent/Applicant had benchmark below 'Very Good' and graded as 'Good' for two years in his Annual Confidential Reports, was adjudged by the Corporate Promotion Committee members as 'Unfit' for promotion to the grade JAG (Ad hoc). Further, the 1st Respondent/Applicant, through his letter dated 23.11.2010, had appealed for upgradation of overall grading of Confidential Reports for the years 2004-2005 and 2005-2006 respectively. On the side of the Respondent's Representation, the Appellate Authority passed the following order:

"By taking all the aspects of the case into consideration and after thorough examination of the case, I, M.Ashraf Khan, Chief General Manager, BSNL, Tamil Nadu Circle, Chennai - 2 hereby agree with the rating given by the Reviewing Officer in the ACR in respect of Shri M.Palanivelu, CAO, Office of the General Manager, BSNL, Madurai for the year 2004-2005 and 2005-06 and accordingly award the grading as "Very Good" and the same was conveyed to the Applicant vide Letter No.TSA [F]/APAR Appeal/2009-10 dated 08.12.2010."

7. The Learned Counsel for the Petitioners brings it to the notice of this Court that based on the upgradation of overall grading as 'Very Good', the 1st Respondent's case was considered for promotion by a Review Corporate Promotion Committee in its meeting that took place on 23.06.2011 and 10.08.2011 together with similarly placed officers and the Committee adjudged the 1st Respondent as 'Fit' for promotion. Accordingly, the 1st Respondent was to be promoted to the post of Deputy General Manager following the O.M.No.22011/5/86-Estt. (D) dated 10.04.1989 of the Department of Personnel and Training, New Delhi and Part VI of the aforesaid Official Memorandum deals with 'Review DPC'.

8.The Learned Counsel for the Petitioners contends that although the Review Corporate Promotion Committee had declared the 1st Respondent as 'Fit' for promotion, he could not be given promotions due to the directions given by National Commission for Scheduled Castes on 12.09.2011 not to release promotion orders to the grade of JAG and further, it was directed by the National Commission for Scheduled Castes, Lucknow Unit not to release any promotion orders to the grade of JAG till disposal of the case of an Executive viz., A.P.Kanaujia working as CAO (Regular) in U.P. (E) Telecom Circle. Because of the fact that the said direction is binding on Bharat Sanchar Nigam Limited, the promotion order of the 1st Respondent could not be released and as such, the non-promotion of the 1st Respondent is neither wilful nor wanton but due to the instructions given by the National Commission for Scheduled Castes, Lucknow Unit.

9.The Learned Counsel for the Petitioners draws the attention of this Court to the Official Memorandum No.22011/5/86-Estt. (D) dated 10.04.1989 of the Department of Personnel and Training, New Delhi in and by which a person whose Adverse Remarks in the 'Confidential Records' were toned-down will be considered as if no Adverse Remarks existing in the 'Appraisal Report'. Furthermore, in terms of Clause 18.4.2 of the said Official Memorandum, a person found to be fit for promotion will be placed in the relevant select list and his confirmation will be regulated accordingly. Apart from this, Clause 18.4.3 of the said Memorandum enjoins that if any of the juniors of the Officer is promoted, he should also be promoted immediately and further that, if there is no vacancy, the junior most person officiating in the higher grade should be reverted and the senior should be accommodated. Moreover, the pay of the individual shall be fixed under F.R.27 at the stage it would have reached had he been promoted on par with his immediate juniors and 'it is very important to note that that no arrears would be admissible'. In other words, it is the stand of the Petitioners that an individual who was promoted by a Review DPC will be appointed on notional basis and will not be entitled to any arrears of pay.

10.The Learned Counsel for the Petitioners vehemently projects an argument that the Official Memorandum dated 10.04.1989 clearly confers seniority, pay fixation, counting of service for further promotion, promotion from the date of original DPC and all consequential service benefits except the arrears from the date of appointment of his immediate junior as he was not holding the post. In reality, the 1st Respondent was issued with the Promotion Order by BSNL Headquarters vide Order dated 30.03.2015 and Order dated 31.03.2016 from 29.09.2010 by which his pay was to be fixed on par with his immediate junior under relevant FR and his services were to be reckoned from

29.09.2010 on notional basis. Besides this, according to the Petitioners, the pensionary benefits are being calculated on part with his juniors and being disbursed.

11.The core contention advanced on behalf of the Petitioners is that the 2nd Respondent/Tribunal had failed to consider that the individual had retired from service even before assuming the office of the DGM on 'Ad hoc Basis'. Further, it is the stand of the Petitioners that unless an individual actually assumes office, he cannot be given the arrears of pay as his appointment can only be considered on 'notional basis'. But, his pension was fixed as per the Rules and in that event, 'Interest' shall not be awarded for no fault of the Petitioners. To put it succinctly, it is the stand of the Petitioners that since the 1st Respondent is not eligible for any arrears of pay during the intervening period as per DoPT instructions dated 10.04.1989, the award of 8% interest on the differential amount payable to him is an illegal and arbitrary one.

12.The Learned Counsel for the Petitioners refers to the Order of the Hon'ble Supreme Court dated 22.10.2008 in Petition (s) for Special Leave to Appeal (Civil) No(s).26556/ 2004 [between Abhijit Ghosh Dastidar V. Union of India] wherein at paragraph 4 and 5, it is observed as under:

"4.It is not in dispute that the CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22.09.1997 and the order of adverse remarks dated 09.06.1998. In view of the said order, one obstacle relating to his promotion goes. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of "good" should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant.

Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

5.Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. Therefore, the appellant also deemed to have been given promotion from 28.08.2000. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retiral benefits as per rules."

13.The Learned Counsel for the Petitioners cites the Order of the Central Administrative Tribunal, Ernakulam Bench dated 17.08.2010 in O.A.Nos.359, 360 and 410 of 2010 [between N.O.Sali V. Union of India represented by the Secretary Department of Telecommunicatoins, Ministry of Communications, Sanchar Bhavan, New Delhi] wherein the Tribunal while allowing the Original Applications had directed the Respondents therein to convene a Review DPC and consider the cases of the Applicants afresh ignoring their below benchmark gradings. If they are found otherwise suitable, they shall deemed to have been promoted from the date their immediate juniors have been promoted on the recommendation of the CPC held on 30.03.2010. Further, the Tribunal had proceeded to observe that 'As held by the Hon'ble Supreme Court in its order in Abhijith Ghosh Dastidar V. Union of India and others Civil Appeal No.6227 of 2008 arising out of SLP(C) No.26666 of 2004 dated 22.10.2008 they will not be entitled for any pay or allowances for the period for which they had not worked in the Junior Administrative Grade but their retrospective promotion shall be considered for the benefit of fixation of their pay etc.

14.The Learned Counsel for the Petitioners refers to the Order of the Kerala High Court dated 13.12.2010 in O.P.(CAT) No.599/2010 (S) [between Union of India V. D.Pushparaj and others] wherein it is inter alia observed as under:

".... However, since atleast two of the respondents are retired and since others are

on the verge of retirement, we feel an interim order can be passed directing the Review DPC to consider their case for promotion in terms of the Tribunal's order impugned in these case, but with a rider that even though DPC should not reckon the adverse remark in the form of "good" written in the Confidential Report of any of the respondents, they will be free to appraise the performance of those Respondents from the data available in the service records revealing the performance of the respondents during the relevant year while considering promotion. In other words, DPC can make their own rating in the place of "good" recorded in the service record and based on the assessment, they can proceed to decide eligibility for promotion. Consequential orders should be issued within a period of three months from now and such orders will be subject to the result of these Original Petitions."

15.The Learned Counsel for the Petitioners seeks in aid of the Order of the Division Bench of this Court in W.P.Nos.33792 & 33829 of 2013 dated 16.12.2013 [between Bharat Sanchar Nigam Limited and others V. The Registrar, Central Administrative Tribunal, Madras Bench and others], wherein at paragraph 15, it is observed as under:

"15.Accordingly, while dismissing the writ petitions, filed by the petitioners/ BSNL, there will be a direction to the petitioners, to convene a review Corporate Promotion Committee and consider the case of the second respondent, in each of the above petitions, (R.Pandian and N.Viswanathan), ignoring the non-communicated entries in the ACR, which have been referred to by the petitioners, in their counter affidavit, filed before the Central Administrative Tribunal, and on consideration of the entries in the ACR for the anterior periods, if the second respondent, in each of the above Petitions are found suitable, they shall deemed to have been promoted, based on the recommendations of the CPC held on 30.03.2010, for notional promotion. It is made clear that, if any of the ACR entries are found qualified for promotion, that may be taken into consideration. It is needless

to say that, if the second respondent, in each of the above petitions, are found to be eligible for promotion, they are entitled for revision of pension."

16. In response, it is the submission of the Learned Counsel for the 1st Respondent that the denial of 1st Respondent's promotion at the relevant point of time was purely due to the fault of the Petitioners and as such, the Petitioners cannot deprive any benefit which the 1st Respondent is entitled in Law.

17. The Learned Counsel for the 1st Respondent brings it to the notice of this Court that the 1st Respondent retired from service on 30.11.2012 and was subjected to immense hardship for nearly seven years and he is drawing lesser pension than what he is entitled to. Therefore, with a view to give a quietus to the instant Litigation, the Learned Counsel for the 1st Respondent informs this Court that the 1st Respondent is giving up his claim for arrears of pay in the post of DGM with effect from 29.09.2010 till 30.11.2012 (date of superannuation). However, the Learned Counsel for the 1st Respondent prays for fixing the pay of the 1st Respondent in the post of DGM be notionally fixed with effect from 29.09.2010 on par with his juniors and on that basis, his terminal benefits including pension may be worked out and the arrears of such revised pensionary benefits may be disbursed with 8% per annum interest, as ordered by the 2nd Respondent/Tribunal.

18. The Learned Counsel for the 1st Respondent relies on the decision in Amir Raza Zaidi V. Municipal Corporation of Delhi and another, 2013 SCC OnLine Del 249 wherein at paragraphs 15 & 16, it is observed and held as under:

"15. The respondents would do the needful. The arrears would be calculated and paid to the petitioner after adjusting the pension which he has received.

16. We make it clear that if the arrears are not paid to the petitioner within six weeks from today, the same would be paid along with interest (simple) @ 12% per annum reckoned six weeks from today till when the payment is made. Future pension would be made as per the directions passed. Needless to say, the family pension payable if at all upon the death of the petitioner shall be computed accordingly."

19.The Learned Counsel for the 1st Respondent cites the Order of this Court dated 20.03.2013 in W.P.No.28255 of 2012 [between Union of India, represented by its Secretary to Government, Ministry of Finance, New Delhi V. A.Muralidharan] wherein at paragraph 36, it is observed as follows:

"36.In view of the fact that the 1st Respondent/Applicant has received the gratuity amount and interest on delayed payment of gratuity and further has received the commuted value of pension as stated in earlier paragraph of this order, this Court, based on Equitable Considerations, directs the Petitioners/ Respondents (a) to pay interest at 6% per annum for the belated payment of commuted pension already paid [relating to the period from 28.2.2006 to 7.7.2010]; (b) to pay interest at 6% per annum towards the belated payment of leave salary [for the period from 28.2.2006 to 17.8.2010]; (c) to disburse the arrears of difference in pay pursuant to the implementation of the 6th Pay Commission's recommendations, additional gratuity and additional commuted value of pension with interest at 6% per annum from 01.01.2006 till date of payment, within a period of Eight weeks from the date of receipt of copy of this order. Consequently, the Writ Petition fails."

20.Earlier, the 2nd Respondent/Tribunal came to the conclusion that for no fault of the 1st Respondent/Applicant, he was denied the legitimate promotion due for him especially when his juniors were promoted with effect from 29.9.2010 and consequently, the inaction of the Respondents therein had resulted in loss of Status, Emoluments and Retiral Benefits etc. Viewed in that perspective, the 2nd Respondent/Tribunal had allowed the Original Application with direction to the Respondents to promote him as Deputy General Manager (JAG) on Ad hoc basis with effect from 29.9.2010 on par with his juniors with all consequential monetary benefits including arrears of pay and allowances and accordingly recompute the retirement benefits payable to him and interest for the differential amounts payable to the 1st Respondent/Applicant will carry 8% interest for the date of superannuation till the date of actual payment.

21. In Law, a Court of Law has a very wide discretion in ordering 'Interest' on the amount adjudged and further it may order interest at such rate it deems reasonable to be paid on the said amount from the date of filing of the Original Application till the date of payment. In short, it is purely a discretionary domain of the Court to award 'Interest'.

22. It is to be pointed out that the word 'Good' means Commendable worthy, satisfactory, morally excellent and possessing the right qualities. The discretion regarding Award of Interest is to be exercised by a Court of Law in a judicious manner, which of course, would depend upon the facts and circumstances of a given case and conduct of parties, as opined by this Court.

23. On a careful consideration of respective contentions and also this Court, on a rumination of the entire conspectus of the present case in a holistic fashion, is of the considered view that the impugned order of the Tribunal dated 04.12.2014 in allowing the O.A.No.318 of 2013 filed by the 1st Respondent/Applicant with reasons stated thereunder, is free from any Legal infirmities. However, taking note of the submission advanced on behalf of the 1st Respondent/Applicant that the 1st Respondent is giving up his claim for arrears of pay in the post of DGM with effect from 29.09.2010 till 31.11.2012 (date of superannuation), this Court, to prevent an aberration of Justice and in furtherance of substantial cause of Justice, directs the Petitioners to determine the 1st Respondent/Applicant's pay in the post of DGM notionally with effect from 29.09.2010 on par with his juniors and to workout his terminal benefits by arriving at the arrears of such revised benefits with 6% interest per annum [leaving the period from 29.09.2010 till 30.11.2012 as given up by the 1st Respondent], till date of realisation/payment. The said exercise shall be carried out by the Petitioners within a period of six weeks from the date of receipt of copy of this order. Accordingly, the order of the Tribunal dated 04.12.2014 in O.A.No.318 of 2013 stands modified.

24. With the aforesaid observations and directions, the Writ Petition stands disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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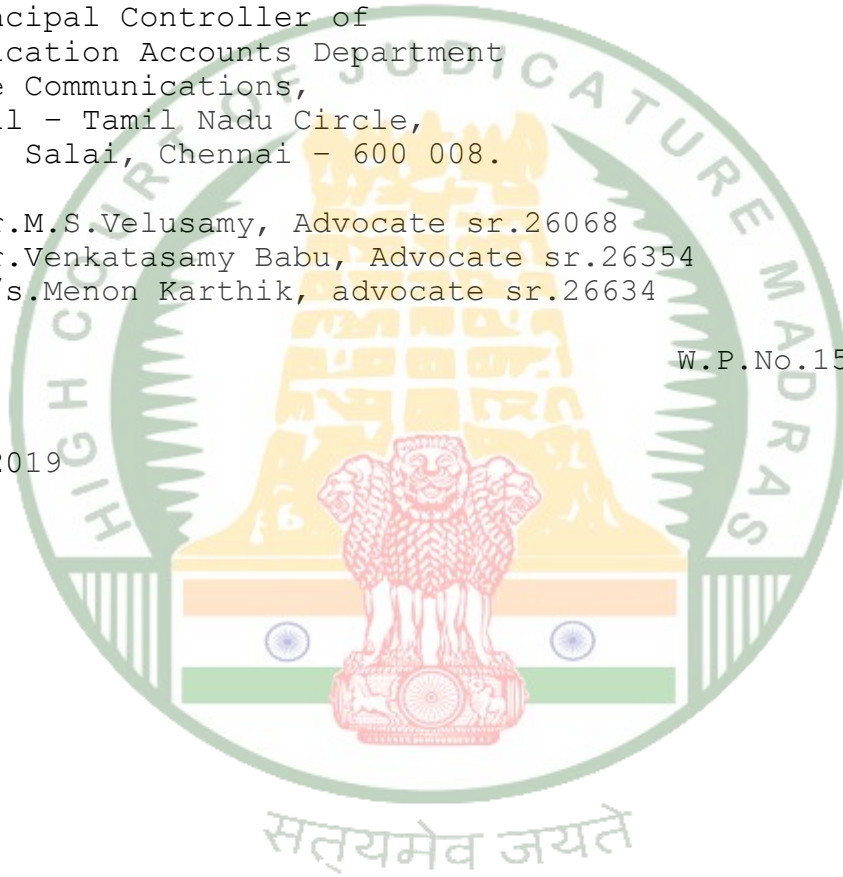
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