

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
19.11.2020	27.11.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO. 30413 OF 2013

S.Viswanathan

..Petitioner

- Vs -

1. The Chairman
Chennai Port Trust
Chennai - 01.

2. The Deputy Chairman
Chennai Port Trust
Chennai - 01.

3. The Secretary
Chennai Port Trust
Chennai - 01.

4. The Chief Mechanical Engineer
Chennai Port Trust
Chennai - 01.

5. K.Mahalingam

(R-5 impleaded vide order of
Court dated 3.12.14 in MP
Nos. 1 & 2 of 2014)

..Respondents

Writ petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records pertaining to the impugned order passed by the 1st respondent in his proceedings CME/A1/1020/12/MEE dated 24.06.2013 and quash the same and consequently direct the respondents herein to promote the petitioner to the post of Deputy Chief Mechanical Engineer (Mechanical) with effect from 24.6.13 with all monetary and other attendant benefits.(Prayer amended as per order dated 03.12.2014 by MMSJ in Mp. 1 & 2 of 2014 in WP.30413 of 2013.

For Petitioner : Mr. K.Raja

For Respondents: Mr. P.M.Subramaniam for RR-1 to 4
Mr.Radhakrishnan for R-5

ORDER

The present petition has been filed for quashment of the impugned order of the 1st respondent and for a consequential to direct the 1st respondent to promote the petitioner to the post of Deputy Chief Mechanical Engineer (Mechanical) from 26.4.13 with all monetary and other attendant benefits.

2. This court, vide order dated 10.07.20, had quashed the order and issued direction to carry out the whole selection process in strict compliance of the rules of the Port Trust. However, there was no representation for the 5th respondent on that day. Later, Review Application in R.A. No.57/2020 was filed by the 5th respondent submitting that he was not served with the notice in the writ petition and was not heard before passing the order and after arguments and verification of documents, as it transpired the 5th respondent was not served with the notice, this Court had allowed the review application by recalling the order dated 10.7.20 and restored the writ petition back to file. However, as the 5th respondent had appeared before this Court by filing the review application, notice on the 5th respondent was deemed completed in view of the appearance of the 5th respondent before this Court and this Court had directed listing of the case for hearing and, accordingly, the matter is taken up for hearing on merits.

3. It is the case of the petitioner that he is currently employed as Superintending Engineer (Mechanical) in the respondent Port Trust. The next avenue of promotion through selection for the petitioner is to the post of Deputy Chief Mechanical Engineer (Mechanical) (for short 'DCME'). The said post of DCME fell vacant in the month of April, 2012. One Mr.Leelaprasath, who was due to retire in the month of April, 2012, was selected to the said post and he joined the said post and retired from service in end April, 2012. The 4th respondent called for application from eligible employees for the post of DCME from all Major Ports under the Ministry of Shipping by fixing due date of May, 2012 under composite method. Though ten persons were eligible, however, four officers, including the petitioner and the 5th respondent were shortlisted for consideration. Subsequently, one of the four candidates, viz., Mr.Saroj Kumar Dass, Dy. Chief Mechanical Engineer (Mechanical) from Kandla Port withdrew his application due to personal reasons.

4. It is the case of the petitioner that promotion to the post of DCME is purely on the basis of selection, the criteria being on the basis of merit and ability and seniority to be reckoned only when merit and ability are almost equal. The scrutiny of the candidates and their records was done by the Department Promotion Committee, which comprises of the Annual Confidential Reports as well as clearance from the Vigilance Department and conduct and work done by the candidates.

5. It is the further case of the petitioner that the Department Promotion Committee, though met several times, did not take a decision, but out of the blue, the Department Promotion Committee selected the 5th respondent for the post of DCME. It is the case of the petitioner that since the 5th respondent belonged to Scheduled Tribe Community, his community certificate was referred to the State Level Scrutiny Committee, which had cancelled his certificate and for the said purpose, the Vigilance Cell of Port Trust did not give clearance and that departmental enquiry has been taken up. It is the further case of the petitioner that consequent upon the Special Voluntary Retirement Scheme floated by the Port Trust, the 5th respondent along with few other persons, applied for the same, though at the specific point of time, the respondent was left with eight years of service, but the application of the 5th respondent was rejected. The petitioner, though is having good service record in the form of Annual Confidential Report as well as clearance from the Vigilance Department was not considered for the post but the 5th respondent was selected and appointed for the said post, which is against the service rules of the Port Trust. Though the petitioner sought for information under the Right to Information Act, as proper and true statements have not been provided to the petitioner, the petitioner is constrained to file the present petition challenging the said selection.

6. Learned counsel appearing for the petitioner submits that though the rules prescribe that appointment to the post of DCME is by way of selection on the basis of merit and ability and seniority to be taken into account only when merit and ability are almost equal, however, the respondents, giving a go-by to the rules, had selected the 5th respondent, more so, when the 5th respondent is facing departmental action for submission of bogus community certificate. The vigilance clearance for the 5th respondent having not been given, appointing the 5th respondent to the post of DCME could only be termed to be a selection on the basis of seniority than on the basis of merit and ability as by no means, the 5th respondent could be termed to be more meritorious than the petitioner. Further, there being a pending departmental proceeding against the 5th respondent, selecting the 5th respondent for the post of DCME is against the well established legal precedents. The Department Promotion

Committee having not followed the rules and selected the meritorious candidate, the selection of the 5th respondent deserves to be set aside and the petitioner ought to be selected and appointed to the said post.

7. It is the further submission of the learned counsel for the petitioner that though the rules prescribe a qualifying service of three years, inspite of the fact that the petitioner had put in only 1 year and 8 months, the Government had granted relaxation based on which his candidature was included for consideration, which itself shows the meritorious candidature of the petitioner. Therefore, he prays for allowing the present writ petition.

8. Per contra, learned counsel appearing for the contesting 5th respondent, while refuted the stand of the petitioner that the post of DCME is a selection post, took the Court through the rules and submitted that the modes through which the post could be filled up having been categorically defined under the regulations, the said regulations prescribe promotion as one of the means of filling up the post, the 5th respondent was selected by the DPC. It is the further submission of the learned counsel for the 5th respondent that the DPC, after looking into the ACRs and other reports, which have a bearing on considering the name of a person for promotion, recommended the name of the 5th respondent for promotion, as he stood second in the seniority and the 1st person in the panel, having withdrawn his candidature. It is the further submission of the learned counsel for the 5th respondent that when the regulations do not have a provision for grant of relaxation, the relaxation granted to the petitioner cannot have any sanctity in the eye of law and once the relaxation goes, the petitioner would not even fall within the zone of consideration and, therefore, the writ petition at the behest of the petitioner, who is an ineligible candidate, is not maintainable. Therefore, he prays for dismissing the writ petition as not maintainable. Learned counsel for the 5th respondent, in support of his contentions, placed reliance on the following decisions :-

- i) D.Jagannathan - Vs - The Chairman, Chennai Port Trust & Ors. (W.P. No.18164/2013 - Dated 30.9.13).
- ii) J & K Public Service Commission & Ors. - Vs - Dr. Narinder Mohan & Ors. (1994 (2) SCC 630)

9. Learned standing counsel appearing for the Port Trust, while reiterating the stand taken by the respondents in the counter and additional counter, submitted that though 10 applications were received, only three persons were found eligible, having all the requisite qualifications for

appointment of which the petitioner was not one, as he was not having the requisite qualifying service. However, later his name was included in the the panel for consideration in view of the relaxation of qualifying service granted by the Government. It is the further submission of the learned standing counsel that though initially one Saroj Kumar Das was selected for appointment, however, due to some personal reasons, the said person did not join the post and the next in the panel, viz., the 5th respondent was appointed on promotion.

10. It is the further submission of the learned standing counsel for the official respondents that though relaxation was granted to the petitioner, however, the 5th respondent having the eligible qualifying service and as his service records and annual confidential reports were found satisfactory and there being no vigilance case pending against the 5th respondent and his work and conduct report was also good, the 5th respondent, by virtue of his overall qualification, merit, experience and seniority, was selected. It is the submission of the learned standing counsel that nowhere the rules were given a go-by in the selection and appointment of the 5th respondent and the petitioner, being junior to the 5th respondent and though is equally placed, on the basis of merit and ability but considering the seniority, the 5th respondent was placed above the petitioner and, accordingly, he was promoted and appointed. In such a backdrop, it is submitted that there being no ulterior motive nor there being any non-consideration of records, the prayer as couched in the petition cannot be granted and, accordingly, it is prayed for dismissing the petition.

11. This Court paid its undivided attention to the submissions advanced by the learned counsel appearing for the parties and also perused the materials available on record and also adverted to the regulations to which this Court's attention was drawn as also the decisions relied on by the learned counsel for the parties.

12. While it is the contention of the petitioner that the post of DCME is a selection post, however, it is countered by the 5th respondent contending that the post is a promotion post. To adjudicate whether the said post is a selection post or a promotion post, it is but necessary to advert to the Chennai Port Trust (Recruitment, Seniority & Promotion) Regulations, 2008.

13. To address the above issue, the Regulations, more especially the Schedule to the said Regulations, which codifies the way in which selection has to be made for granting promotion/appointment requires consideration. A perusal of the said Regulation reveals that the post of Dy. Chief Mechanical

Engineer is found at S. No.4 of the said Regulation relating to Class-I category and in that the criteria for the said post, whether it is a selection post or a non-selection post, it is shown as 'Selection'. Further, in the column method of recruitment, whether it is by direct recruitment/promotion/transfer/absorption/deputation, the various requirements for the same have been codified. A harmonious reading of the above clearly reveals that while the post is a promotional post, which can be filled up by way of direct recruitment/promotion/transfer/absorption/deputation, however, the said filling up is on the basis of selection, meaning thereby, that promotion to the said post is by way of selection and that the yardstick, 'merit-cum-ability' is the driving factor, 'seniority' only to be considered when merit and ability are almost equal.

14. Once this Court has come to the categorical conclusion that the post of DCME is a selection post, it goes without saying that the prescription for selection to the said post, the criteria prescribed is merit and ability and seniority to be reckoned only when merit and ability are almost equal. The law on selection and appointment to a post for which the rules prescribe merit and ability as the basic criteria has been dealt with by the Constitution Bench of the Hon'ble Supreme Court way back in the case of Sant Ram Sharma v. State of Rajasthan (1968 (1) SCR 111 : AIR 1967 SC 1910 : (1968) 2 LLJ 830), wherein the Hon'ble Supreme Court held as under :-

"9. The problem therefore is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy. In this connection Leonard D. White has stated as follows:

"The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organisation. The main interest to be served is the public interest, not the personal interest of members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur, and when selection for promotion is made on the

sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment... Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true."

(Introduction to the Study of Public Administration, 4th Edn., pp. 380-83).

As a matter of long administrative practice promotion to selection grade posts in the Indian Police Service has been based on merit and seniority has been taken into consideration only when merit of the candidates is otherwise equal"

15. The Hon'ble Supreme Court has, time and again, in a catena of decisions, distinguished between selection on the basis of 'seniority-cum-merit' and 'merit-cum-seniority'. In 'seniority-cum-merit', seniority takes precedence, while in 'merit-cum-seniority', merit is the guiding factor in the selection of candidates to the next higher post. It is not in dispute that in the present case the rules prescribe selection to the post of DCME to be made on the basis of 'merit-cum-seniority', which clearly speaks that merit is the guiding factor. In such a backdrop, the Department Promotion Committee is required to strictly adhere to evaluate the candidates on the basis of merit on the basis of the ACR and Vigilance Records and other criteria, if any, prescribed under the rules and only when the merit is almost equal between two candidates, the Department Promotion Committee can resort to selecting the candidate on the basis of seniority, which is an additive factor at that point of time.

16. In the case on hand, the Services Selection Committee, which is an analogous body to the DPC, had selected the candidates and had drawn a panel in which the 5th respondent is placed at S. No.2 and the petitioner is placed at S. No.3. The person at S. No.1 having not shown willingness to opt for the said promotion, the promotion had been given to the 5th respondent.

17. While on the one hand it is the stand of the petitioner that though he had put in only 1 year and 8 months qualifying service rather than the qualifying service prescribed in the rules, however, by virtue of the relaxation granted to him by the Government, he was deemed to have fallen within the zone of consideration and for all purposes, he should be deemed to have been considered as qualified and eligible for consideration; on the other hand, the 5th respondent contends that there being no provision under the Regulation conferring power on any authority to relax the eligibility conditions, the relaxation granted to the petitioner is non-est in law and, therefore, for all intent and purposes, the petitioner should be considered only as an ineligible candidate and, therefore, he has no locus standi to challenge the present selection. In this regard, the 5th respondent presses into service Regulation 28, which is extracted hereunder for reference :-

"ADHOC APPOINTMENTS

28. In case of immediate necessity when a panel recommended by the Departmental Promotion Committee has been used up, the appointing authority may make a purely adhoc appointment to a post, by appointing the senior most eligible and suitable employee in the feeder grade or post upto a period of six months at a time and not exceeding one year or till a new panel is recommended by the Departmental Promotion committee whichever is earlier. The adhoc appointment, where unavoidable, should be made only strictly subject to fulfilling the qualifications, experience provided in the RRs."

18. The contention on behalf of the 5th respondent is that even for the purpose of adhoc appointment, only eligible and suitable employees in the feeder category have to be considered, and there being no relaxation granted, for full-fledged appointment, relaxing of the eligibility qualifications is per se impermissible and the relaxation granted in total non-adherence to the Regulations is liable to be struck down.

19. Though contentions and counter contentions have been advanced on behalf of the parties to buttress their side of their case, however, it is to be pointed out that the 5th

respondent has not challenged the relaxation granted to the petitioner. Contentions have been raised on behalf of either side only before this Court and there being no challenge to the said relaxation, this Court is not inclined to dwell deep into the said issue as the pivotal issue for consideration before this Court is to the correctness of the panel prepared by the respondent Port Trust based on the criteria fixed for considering the candidature of the persons for selection and appointment on promotion.

20. The crucial issue that requires the attention and consideration of this Court is whether the procedure contemplated for selection and preparation of panel for the post of DCME has been done in accordance with law and based on the criteria governing merit and ability being adjudged in a proper manner.

21. The counter as well as the additional counter of the official respondents/Port Trust reveal that the candidature of various persons were considered and based on their merit and ability, annual confidential reports and other service records, the names of the persons were placed in the order of their individual merit in which the 5th respondent's name found place above the petitioner. However, the counter of the official respondents is silent as to the manner in which the merit and ability of the candidates have been adjudged. The drawal of panel for the post of DCME on the basis of Regulations as drawn by the Services Selection Committee has been placed before the Court. However, a perusal of the same does not reveal the gradations awarded to the candidates and the marks awarded to them under the relevant heads of consideration so as to grade them to arrive at their subjective merit and ability. The minutes drawn by the Services Selection Committee is bereft of details and the marks awarded to each of the candidates under various heads to cumulatively arrive at their merit does not find place in the minutes or annexures of the meeting of the Services Selection Committee. The merit list, alleged to have been drawn by the Committee, reveals a very sorry state of affairs, as it merely lists the name of the persons in the order of seniority, barring the one individual, who stood first in the list and who later withdrew his willingness for the said post.

22. Further, the statement showing the sequential listing of the candidates on the basis of the respective merit, who fell within the zone of consideration with regard to their annual confidential reports, vigilance cases and other charges returns a blank, as no marks have been awarded. In fact, certain facts relating to the community certificate verification of the 5th respondent, which were well within the knowledge of the official respondents does not find place in the statistical statement

relating to the candidates provided to the Services Selection Committee.

23. It is the stand of the petitioner, which is not disputed by the learned counsel for the official respondents, that pursuant to the reference made by the Port Trust with regard to the genuineness of the Scheduled Tribe certificate issued to the 5th respondent, the competent authority, viz., the State Level Scrutiny Committee has cancelled the certificate issued to the 5th respondent as not being genuine against which the 5th respondent preferred W.P. No.3518 of 2020 and this Court has ordered the parties to maintain status quo. It is to be pointed out that the said fact does not find place in the statement showing the details of the officers with regard to their service particulars and other particulars relating to their candidature. Though in the minutes drawn for selection of DCME, a recording is made as to the community certificate verification of the 5th respondent, however, a further finding has been recorded that the said verification is in the initial stage. However, the check list placed before the committee as also the details of the individual officers does relating to their ACRs work and conduct and vigilance particulars does not disclose the fact about the pending verification of the community certificate of the 5th respondent. This Court is at a loss to understand from where such a detail has been carved out by the Services Selection Committee to be incorporated in the minutes. However, the fact of there being a verification carried out with regard to the community certificate of the 5th respondent has not been disputed by the official respondents. It is to be pointed out that it is the duty of the official respondents to have tabled all the details, including the details about the verification of the community certificate of the 5th respondent before the Services Selection Committee, but for reasons best known, no such detail has been provided and no reason whatsoever has been placed before this Court to show as to why the said detail was not placed. Also it is curious to see that without such a material being available on record, minutes has been drawn by the Selection Committee, advertng to the community certificate verification against the 5th respondent, in which a finding is given that the same is in the initial stage of verification. This Court is also at a loss to understand as to wherefrom the said finding has been culled out by the Selection Committee. On an overall conspectus of the case, this Court is left with no other alternative to state that all is not well with the selection process undertaken by the official respondents.

24. On a holistic consideration of the case as is reflected in the affidavit of the petitioner, the counter of respondents 1 to 5 as also the materials available on record,

respondents 1 to 4 have not averred anywhere in the counter that the selection was based on merit and ability and that the candidates, whose candidature were placed before the Services Selection Committee, were assessed on their merit on the basis of ACR and Vigilance Records and only on arriving at a subjective finding that the merit of the candidates were almost equal, the 5th respondent was selected and recommended for promotion. In fact, to put it more bluntly, there is not even a whisper in the counter of respondents to 1 to 4 to even remotely suggest that the selection was based on merit and ability following the prescription made in the rules and which is the legal prescription as adumbrated by the Courts in a catena of decisions . In such a backdrop, this Court is led to the irrefutable inference that all is not well with the selection process and the said selection leaves a lot to be said, which this Court refrains from expanding any further. The contentions and counter contentions raised by the petitioner and the 5th respondent cannot be brushed aside as mere apprehensions, but there may be some semblance of truth in it cannot be ignored. Therefore, the selection of panel drawn by the Services Selection Committee definitely warrants interference at the hands of this Court as the same has not be done in accordance with law.

25. For the reasons aforesaid, this Court is of the considered view that the whole selection process, including the selection and posting of the 5th respondent as DCME deserves to be quashed and the respondents ought to be directed to carry out the whole selection process once over in strict compliance of the rules of the Port Trust.

26. Accordingly, this writ petition is allowed to the extent of setting aside the selection of the 5th respondent by the Services Selection Committee and his consequent appointment as DCME by the respondent Port Trust. The respondents 1 to 4 are directed to carry out the whole selection process once over and assess the merit and ability of the candidates based on the relevant service records and other records, as mandated under the rules/regulations and select the most meritorious candidate based on their merit and ability in accordance with law by recording reasons and assessing their merit and ability in a manner known to law. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Chairman
Chennai Port Trust
Chennai - 01.
2. The Deputy Chairman
Chennai Port Trust
Chennai - 01.
3. The Secretary
Chennai Port Trust
Chennai - 01.
4. The Chief Mechanical Engineer
Chennai Port Trust
Chennai - 01.

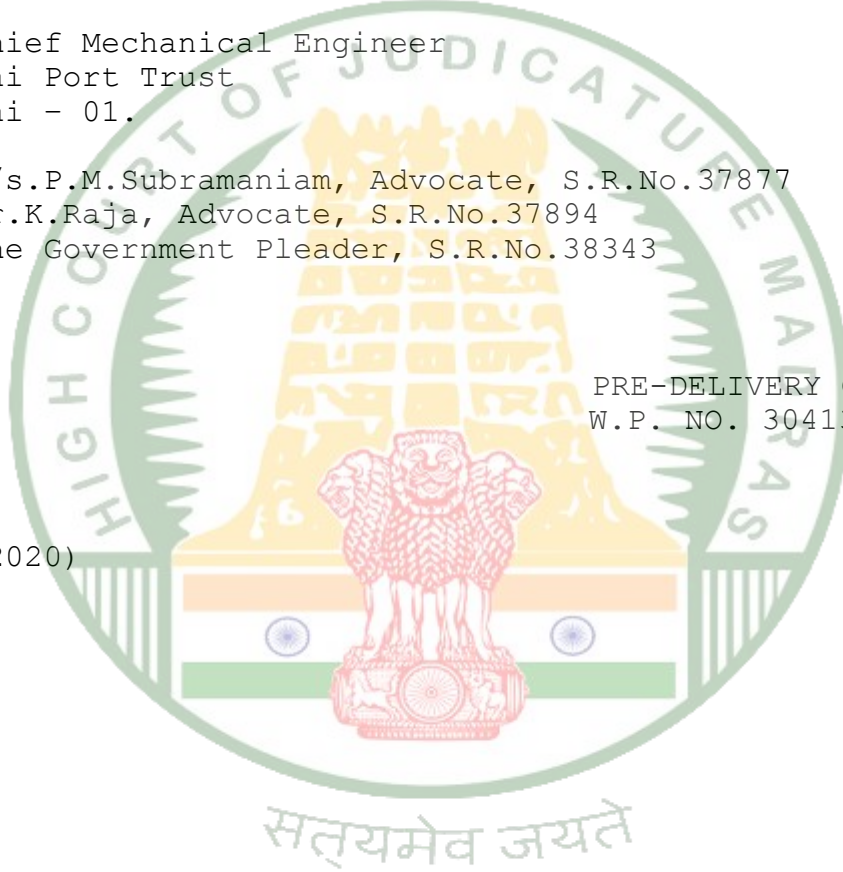
+1cc to M/s.P.M.Subramaniam, Advocate, S.R.No.37877

+1cc to Mr.K.Raja, Advocate, S.R.No.37894

+1cc to the Government Pleader, S.R.No.38343

PRE-DELIVERY ORDER IN
W.P. NO. 30413 OF 2013

RSV(CO)
RV(19/12/2020)



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