

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 10.11.2020

Delivered on: 18.11.2020

CORAM

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.No.7203 of 2020

and

W.M.P.Nos.8606 & 8607 of 2020

A.Jayakumar

S/o T.S.Arthanari,

Assistant Labour Welfare Officer,

(in the rank of Deputy Inspector of Labour)

Directorate of Stationery and Printing,

Chennai - 600 002.

...Petitioner

Vs

1. The State of Tamil Nadu,
rep. by its Additional Chief Secretary
to Government,
Labour and Employment Department,
Secretariat, Fort St.George,
Chennai - 600 009.

2. The Commissioner of Labour,
DMS Campus, Teynampet,
Chennai - 600 006.

... Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying Writ of Mandamus to direct the respondents to prepare the panel for the year 2017-18 by including the name of the petitioner who is eligible as on crucial date as on 01.05.2018 and consequently direct the respondents to promote the petitioner to the post of Assistant Commissioner of Labour based on the panel for the year 2017-18, with all consequential and other attendant benefits.

For Petitioner : Mr.G.Sankaran

For Respondents : Mr.Y.Parthasarathy,
Government Advocate

O R D E R

The matter is taken up through web hearing.

2. This Writ Petition has been filed seeking for issuance of Writ of Mandamus to direct the respondents to prepare the panel for the year 2017-18 by including the name of the petitioner who is eligible as on crucial date as on 01.05.2018 and consequently direct the respondents to promote the petitioner to the post of Assistant Commissioner of Labour based on the panel for the year 2017-18, with all consequential and other attendant benefits.

3. The petitioner was appointed as Assistant Inspector of Labour recruited through Tamil Nadu Public Service Commission, on 29.08.2008. Subsequently, he was promoted to the post of Deputy Inspector of Labour vide proceedings of the 2nd respondent dated 24.07.2015. The next avenue of promotion for the petitioner from the post of Deputy Inspector of Labour is to the post of Assistant Commissioner of Labour.

4. According to the petitioner, on the basis of his seniority and eligibility, he had come within the zone of consideration for inclusion in the panel for the year 2017-18 for promotion to the post of Assistant Commissioner of Labour. The 2nd respondent issued proceedings on 07.05.2019 calling for proforma particulars from eligible officers to be included in the panel of Deputy Inspectors of Labour fit for promotion to the post of Assistant Commissioner of Labour. The petitioner, being eligible on the crucial date of preparation of the panel was included in the panel at Serial No.10 for promotion to the post of Assistant Commissioner of Labour for the year 2017-18.

5. In the meanwhile, the petitioner was issued with a charge memorandum dated 27.02.2019 containing four articles of charges under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules and an enquiry has also been ordered into the charges. According to the petitioner, he has approached this Court earlier in W.P.No.17768 of 2019 seeking a direction to the authorities to conclude the disciplinary proceedings initiated against him pursuant to the charge memo dated 27.02.2019 expeditiously. This Court has disposed of the writ petition vide its order dated 16.08.2019 directing to complete the disciplinary proceedings within the period of three months from the date of receipt of a copy of the order. According to the petitioner, despite the direction of this Court as above, the disciplinary proceedings has been unduly delayed, detrimental to his career prospects.

6. The grievance of the petitioner herein in this writ petition is that on one hand, while the disciplinary proceedings has been kept pending even as on date, despite the time granted by this Court had lapsed long time ago, on the other, the promotion to the next post of Assistant Commissioner of Labour has been withheld citing the pendency of the disciplinary action. In the said circumstances, the petitioner is before this Court.

7. Notice was ordered and Mr.Y.Parthasarathy, learned Government Advocate has entered appearance. A detailed counter affidavit has been filed on behalf of the respondents.

8. Mr.G.Sankaran, learned counsel appearing for the petitioner would submit that the petitioner's name was rightly included in the panel for the year 2017-18 for promotion to the post of Assistant Commissioner of Labour as during the said panel year, the petitioner was not facing any disciplinary proceedings at all. Subsequent initiation of the disciplinary proceedings, after issuance of charge memorandum dated 27.02.2019, cannot be held against the petitioner's promotion which was due to him earlier for the panel year 2017-18.

9. According to the learned counsel, the issue as to whether subsequent disciplinary action against an employee/officer after the date of due promotion can be a valid reason for withholding of promotion is no more res integra and has been settled by the Honourable Supreme Court as early as in 1991 in K.V.Jankiraman's case, in favour of the employee/officer and followed by number of decisions of the Honourable Supreme Court and also this Court over the years.

10. Learned counsel for the petitioner, in support of his legal contentions as above, has relied on the following decisions.

- (i) 1991 (4) SCC 109 (Union of India v. K.V.Jankiraman)
- (ii) 1999 (5) SCC 762 (Bank of India v. Degala Suryanarayana)
- (iii) 2000 (7) SCC 210 (Delhi Jal Board v. Mahinder Singh)
- (iv) 2010 SCC Online MAD 3183 (N.Ganesan v. The Chairman-cum Managing Director, Tamil Nadu Civil Corporation Ltd.)
- (v) 2013 (7) MLJ 161 (P.Stanley Paulraj v. State of Tamilnadu)
- (vi) W.P.No.10402 of 2011 dated 15.02.2019
- (vii) W.P.No.3536 of 2013 dated 14.10.2019

11. All the above decisions, according to the learned counsel, are directly on the point in issue in this writ petition, holding that promotion cannot be denied on the ground of initiation of disciplinary action, subsequently after the due

date.

12. On behalf of the respondents, counter affidavit has been filed. The pendency of disciplinary action against the petitioner has been highlighted in the counter affidavit. The only reason stated in the entire affidavit as to the non-consideration of the promotion of the petitioner, is the pendency of the disciplinary action initiated, pursuant to the charge memorandum dated 27.02.2019. In the counter affidavit, the petitioner's eligibility as on the date of preparation of the panel for the year 2017-18 has not been disputed.

13. In the counter affidavit, it is elaborately stated that disciplinary enquiry is in progress and therefore, the petitioner could not be considered for the promotion. In regard to the legal issue raised in support of the claim of the petitioner, the same has not been addressed in the counter affidavit at all, not any arguments advanced on that aspect.

14. Mr.Y.Parthasarathy, learned Government Advocate appearing for the respondents reiterated the above facts as contained in the counter affidavit and submitted that the petitioner has been facing serious allegations of demanding illegal gratification and therefore, he could not be considered for the subject promotion, pending conclusion of the disciplinary proceedings.

15. This Court has considered the submission of the learned counsels appearing for the petitioner and Mr.Y.Parthasarathy, learned Government Advocate.

16. No doubt, the petitioner herein is facing serious allegations made against him in discharge of his duties as revealed in the counter affidavit and reiterated by the learned counsel for the respondents, yet such allegations which are the subject matter of subsequent disciplinary action initiated after the due date of the panel year is the fulcrum of consideration in this writ petition.

17. Admittedly, at the time when the proceedings was issued by the 2nd respondent on 07.05.2019 for inclusion of names in the panel for the subject promotion, the petitioner had already come under a cloud on being charge sheeted vide charge memorandum dated 27.02.2019, notwithstanding the same, in the face of settled legal position, the benefit of the legal principle as laid down by Courts consistently has to be extended to the petitioner.

18. The judgments rendered in the above referred citations have more or less premised on similar facts and ultimately, rather unequivocally the Courts have held that subsequent disciplinary proceedings/ charge memo initiated against an employee/ officer cannot be a legal impediment towards consideration of promotion of the employee/ officer at the time of the relevant panel year. The following ratio laid down by the Honourable Supreme Court followed by this Court are useful references in order to clinch the issue in favour of the petitioner herein.

(i) 1991 (4) SCC 109 (Union of India v. K.V.Jankiraman).

16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a chargesheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities

have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2) ...

(3)

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before .

17. There' is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

(ii) 1999 (5) SCC 762 (Bank of India v. Degala Suryanarayana)

14. However, the matter as to promotion stands on a different footing and the judgments of the High Court have to be sustained. The sealed cover procedure is now a well established concept in service jurisprudence. The procedure is adopted when an employee is due for promotion, increment etc. but disciplinary/ criminal proceedings

are pending against him and hence the findings as to his entitlement to the service benefit of promotion, increment etc. are kept in a sealed cover to be opened after the proceedings in question are over (see Union of India etc. etc. v. K.V. Jankiraman etc.etc, AIR (1991) SC 2010, 2113. As on 1.1.1986 the only proceedings pending against the respondent were the criminal proceedings which ended into acquittal of the respondent wiping out with retrospective effect the adverse consequences, if any, flowing from the pendency thereof. The departmental enquiry proceedings were initiated with the delivery of the charge-sheet on 3.12.1991. In the year 1986-87 when the respondent became due for promotion and when the promotion committee held its proceedings, there were no departmental enquiry proceedings pending against the respondent. The sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 withheld for the D.E. proceedings initiated at the fag end of the year 1991. The High Court was therefore right in directing the promotion to be given effect to which the respondent was found entitled as on 1.1.1986. In the facts and circumstances of the case, the order of punishment made in the year 1995 cannot deprive the respondent of the benefit of the promotion earned on 1.1.1986.

- (iii) 2000 (7) SCC 210 (Delhi Jal Board v. Mahinder Singh)
The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the Disciplinary Enquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any Disciplinary Enquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in

favour of such an officer. if he had been found fit for promotion and it he was later exonerated in the disciplinary inquiry which was pending at the time when the DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection. There is, therefore, no question of referring the matter to a larger Bench.

(iv) 2010 SCC Online MAD 3183 (N.Ganesan v. The Chairman-cum Managing Director, Tamil Nadu Civil Corporation Ltd.)

5. The crucial date for preparing the promotional panel of Quality Inspector for the year 1992 is 1st Oct., 1992 as evidenced by Regulation 27 of the Tamil Nadu Civil Supplies Corporation Employees Service Regulations, 1989. When there was no charge pending against the petitioner as on the crucial date for drawing the panel for promotion, the contention of the petitioner that his name should be included in the panel of Quality Inspector for the year 1992, as on that date he was fully qualified and eligible and entitled for promotion, needs to be accepted. Though the petitioner suffered minor penalty of stoppage of increment for two months without cumulative effect, for the charges framed subsequently, which admittedly took place after the crucial date, namely, 1st Oct., 1992, the same cannot have any bearing for not including his name in the panel for promotion in the year 1992. Even if it is presumed that the petitioner has suffered minor penalty and, therefore, as per the circular dated 5th July, 1988, if charges framed subsequent to the crucial date and pending disposal of charges before the panel is drawn, then the case of those employees cannot be considered for inclusion in the panel irrespective of the nature of charge also, will not disentitle the petitioner from getting his name included in the promotion panel, since he has not suffered any major penalty, but only a minor penalty of stoppage of increment for two months without cumulative effect.

(v) 2013 (7) MLJ 161 (P.Stanley Paulraj v. State of Tamilnadu)

13. The crucial date in this case has to be taken as 14 December 2011, the date on which Thiru Krishnamoorthy Sugumar, junior to the petitioner in the Engineering service was given promotion as Superintending Engineer. There was no charge memo pending against the petitioner as on the date on which his junior was given promotion. The representation given by the petitioner on 21 December 2011 to consider him for further promotion was kept in cold storage. It was only when this Court directed the first respondent to consider the case of the petitioner vide order dated 13 June 2012 in W.P.No.10828 of 2012 the representation was taken up for consideration. It is a matter of record that only after this Court directed consideration of the case of the petitioner for promotion, the second respondent has issued the charge memo on 24 August 2012. Therefore it is evident that either on the date of promotion of the junior of petitioner on 14 December 2011 or on the date on which representation was made for promotion and the direction issued by this Court for consideration of his case, there was no charge memo pending so as to deny him promotion. The charge memo issued long after the crucial date cannot be the reason to deny legitimate promotion.

14. The Supreme Court in Union of India & Ors. v. Sangram Keshari Nayak (2007) 4 Supreme 246 held that the right to be considered for promotion is a fundamental right and such a right brings within its purview, an effective, purposeful and meaningful consideration. The Supreme Court in Sangram Keshari Nayak found that on the day on which the Departmental Promotion Committee held its meeting, no vigilance enquiry was pending against the employee. The charge sheet was issued only after the Departmental Promotion Committee meeting. The Supreme Court upheld the order passed by the High Court directing the Government to promote the employee to the higher post from the date when his junior was promoted, notwithstanding the subsequent initiation of vigilance proceedings.

15. The first respondent was therefore not justified in denying promotion to the petitioner on the ground of initiation of disciplinary

proceedings after the crucial date.

(vi) W.P.No.10402 of 2011 dated 15.02.2019

5.The above facts have not been disputed by the respondents. The only point of resistance put forth by the respondents is that there was a vigilance enquiry pending against the petitioner during the relevant period and therefore, his name was not considered for inclusion.

6.The contention which is put forth on behalf of the respondents is unacceptable for the simple reason that admittedly there was no disciplinary action pending against the petitioner when the panel was prepared in October 2009 for the year 2007-08. Even the vigilance enquiry, which was initiated during the relevant period, was withdrawn and the Government itself had passed orders dropping further proceedings against the petitioner. When that being the position, this Court is unable to appreciate as to how the petitioner's name was omitted to be included for the panel year 2007-08.

7.It also appears that for the same incident, a charge memo was issued only on 02.12.2009, much after the panel was prepared in October 2009. It means the petitioner was unjustly and illegally over looked in the matter of promotion to the post of 'Assistant Executive Engineer' for the panel year 2007-08. As already stated, the facts as narrated by the petitioner have not been disputed and no other explanation has been given on behalf of the respondents as to how the petitioner's name was not included for the panel year 2007-08.

8.In view of the above admitted position, this Court finds that the non-inclusion of the name of the petitioner for the panel year 2007-08, for the purpose of promotion to the post of 'Assistant Executive Engineer', is legally unsustainable and the same is liable to be interfered with.

9.In the light of the above conclusion, the writ petition is allowed and the respondents are directed to include the petitioner's name for the panel year 2007-08 for promotion to the post of 'Assistant Executive Engineer' and thereafter promote him notionally with effect from the date when other similarly placed Assistant Executive Engineers were promoted from the said panel year

to the said post by giving all attendant and consequential benefits on such promotion, as made applicable to the Juniors of the petitioner. However, it is made clear that the petitioner is not entitled to the arrears of the higher salary as applicable to the post of 'Assistant Executive Engineer' for the period in question, since he had not shouldered the higher responsibility. The respondents are directed to implement the direction within a period of eight weeks from the date of receipt of a copy of this order. No costs.

(vii) W.P.No.3536 of 2013 dated 14.10.2019.

Therefore on the date when the Panel was drawn on 07.03.2007, there was no impediment to consider the name of the petitioner and re-include the petitioner. The short issue is whether the subsequent charge memo issued to the petitioner would dis-entitle him from being considered for promotion to the post of Commercial Tax officer. The learned counsel for the petitioner relies on the judgments of this Court in G.Anburaj .Vs. Government of Tamilnadu and Another reported in (2013) 6 MLJ 305 , wherein, this Court while considering an identical issue has observed as under :

"15. I have considered the submissions made on either side. 16. The name of the petitioner was not included in the panel of District Registrar for the year 2010-2011 on the sole ground that disciplinary proceedings relating to the charge memo, dated 8.4.2010 was pending. Subsequently, charges were dropped by the Government vide (G.O.(D).No.260, Commercial Taxes and Registration Department, dated 19.9.2011. The Government also included the name of the petitioner in the panel, by issuing G.O.(D).501, Commercial Taxes and Registration Department, dated 16.11.2012. At this juncture, the second respondent passed an order, dated 23.03.2013 stating that the petitioner cannot be given promotion on the ground that subsequent charge memo dt.7.3.2013 was issued to the petitioner.

17. In

my view, subsequent charge memo cannot be put against the petitioner for promotion for the year 2010-2011. As rightly contended by the learned counsel for the petitioner, the only impediment is charge memo, dated 08.04.2010. When the same was dropped, he has to be promoted pursuant to inclusion of his name in the panel for promotion to the post of Asst. Inspector General of Registration for the year 2011-2011. Subsequent charge memo, dated 7.3.2013 cannot be put against the petitioner, particularly when the juniors included in the panel for the year 2010-2011 were promoted on 22.06.2010. Hence, the impugned letter dated 23.3.2013 is quashed and a direction is issued to the respondents to promote the petitioner as Asst. Inspector General of Registration, from the date on which his immediate juniors were promoted on notional basis, since G.O(D).No.501, Commercial Taxes and Registration Department made it clear that promotion shall be on notional basis. The respondents are directed to complete the aforesaid exercise, within a period of six weeks from the date of receipt of copy of this order".

Similarly, in A.Kalaiselvan .Vs. The State of Tamil Nadu, and Another reported in [2016 writ L.R.679], once again this Court observed as under:

7. In Bank of India and others v. V.Degala Suryanarayana ((1999) 5 SCC 762), the Hon'ble Apex Court, while dealing with the same issue, held thus:

"14. However, the matter as to promotion stands on a different footing and the judgments of the High Court have to be sustained. The sealed cover procedure is now a well established concept in service jurisprudence. The procedure is adopted when an employee is due for promotion , increment etc. but disciplinary/criminal proceedings are pending against him and hence the findings as to his entitlement to the service benefit of promotion, increment etc. are kept in a sealed cover to be opened after the proceedings in question are over (see Union of India etc. etc.

v. K.V.Jankiraman etc.etc, AIR (1991) SC 2010, 2113. As on 1.1.1986 the only proceedings pending against the respondent were the criminal proceedings which ended into acquittal of the respondent wiping out with retrospective effect the adverse consequences, if any, flowing from the pendency thereof. The departmental enquiry proceedings were initiated with the delivery of the charge-sheet on 3.12.1991. In the year 1986-87 when the respondent became due for promotion and when the promotion committee held its proceedings, there were no departmental enquiry proceedings pending against the respondent. The sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 withheld for the D.E. proceedings initiated at the far end of the year 1991. The High Court was therefore right in directing the promotion to be given effect to which the respondent was found entitled as on 1.1.1986. In the facts and circumstances of the case, the order of punishment made in the year 1995 cannot deprive the respondent of the benefit of the promotion earned on 1.1.1986".

1. A mere reading of the above said judgment clearly depicts that when there is no currency of punishment on the crucial date, the subsequent charge memo cannot be a bar for promotion. Therefore, in the case on hand, as stated above, the subsequent charge memo issued against the petitioner after the crucial date cannot stand as a bar for promotion to him. Thus,

2.

the impugned proceedings of the respondent in denying to consider his case for promotion citing pendency of a charge memo is unsustainable in law. However, it is also made clear that the petitioner will have to cooperate with the authorities to complete the disciplinary proceedings pending against him in accordance with law.

19. The above principles enunciated by the courts have uniformly held that on the crucial date of consideration of promotion, if an employee/ officer who was not facing any disciplinary action i.e., no charge was pending, no matter

whether any subsequent charge memo was issued against him, his name had to be necessarily included. In such view of the matter, this Court has no hesitation in allowing the writ petition. The petitioner, though facing serious charges of demanding illegal gratification, which fact is a cause for concern, yet in view of the clear ratio laid down by the Courts on the subject matter, the settled legal principles need to be applied across the Board, as uniformity in dispensation of justice is one of the hallmarks of the justice delivery system.

20. In the circumstances, the Writ Petition is allowed. The respondents are directed to consider the name of the petitioner for promotion to the post of Assistant Commissioner of Labour for the panel year 2017-18 and in case, the petitioner satisfied all the norms for the promotion, he may be granted promotion with all admissible benefits.

21. The respondents are directed to pass appropriate orders in this regard within a period of six weeks from the date of receipt of a copy of this order. It is made clear that since the petitioner is facing serious allegations of demanding illegal gratification, any promotion given to him in pursuance of the direction of this Court, he shall be posted to a non-sensitive post until his name is cleared of the charges.

22. The Writ Petition is allowed as above. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

vsi
To

1. The Additional Chief Secretary
to Government,
Labour and Employment Department,
Secretariat, Fort St. George,
Chennai - 600 009.
2. The Commissioner of Labour,
DMS Campus, Teynampet,
Chennai - 600 006.

+1 cc to Mr.G.Sankaran Advocate sr36870

W.P.No.7203 of 2020

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