

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.NO.21850 OF 2018

AND

WMP.NO.25626 OF 2018

S.Jagannathan

... Petitioner

-Vs-

1. The Government of Tamil Nadu
Represented by the Agricultural
Production Commissioner and Principal Secretary
to the Government of Tamil Nadu,
Agricultural Department, Fort St. George
Chennai 600 009.
2. The Tamil Nadu State Agricultural Marketing Board
Represented by the Chief Executive Officer
Thiru-Vi-Ka Industrial Estate
CIPET Road, Guindy, Chennai 600 032
3. The Assistant Executive Engineer
Tamil Nadu State Agricultural Marketing Board
Vellore Sub Division
No.20, Lakshmi Nivas Nilayam
New Sankaranpalayam Road
Vellore 632 001.

... Respondents

Prayer :

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus or any other appropriate writ, order or direction in the nature of writ, calling for the records relating to the order passed by the first Respondent vide letter No.22113/AM1/2014-24, dated 22.02.2018, quash the same and consequently direct the respondents to promote the petitioner with retrospective effect to the post of Junior Engineer with effect from 01.01.2008 and as Assistant Executive Engineer, with effect from 01.01.2018 and with consequential monetary benefits.

For Petitioners : Mr.S.Sarath Kumar for
Mr.M.L.Ramesh

For Respondents : Mr.V.Jayaprakash Narayanan
State Government Pleader
for R1 to R3.

ORDER

This Writ Petition has been filed challenging the order passed by the first respondent dated 22.02.2018 and for a consequential direction to promote the petitioner to the post of Junior Engineer with effect from 01.01.2008 and as Assistant Executive Engineer with effect from 01.01.2018.

2. The petitioner entered into service as NMR staff in the year 1986. His services were not regularized and therefore, he filed O.A.No.1010 of 1996 before the Administrative Tribunal and the Tribunal allowed the application and directed the respondents to regularize the service of the petitioner. The said order was challenged before this Court in W.P.No.29806 of 2003 by the respondents and the Writ Petition was dismissed and it was confirmed upto the Supreme Court.

3. The petitioner was, thereafter, regularized by virtue of G.O. Ms. No.82 dated 04.05.2012 with effect from 18.11.1993 in the post of Technical Assistant. Since such post was not available, supernumerary post was created by the Department in the year 2014. The post of Technical Assistant was re designated as Supervisor and the petitioner was continuing his service in the said post.

4. The petitioner made a claim for promoting him to the post of Junior Engineer and for a subsequent promotion to the post of Assistant Executive Engineer. The petitioner made a representation to the second respondent in this regard. The second respondent by his proceedings dated 23.06.2015, recommended the claim made by the petitioner for promotion, to the first respondent.

5. In spite of the recommendation, the petitioner was not provided with any promotion and therefore, the petitioner again approached this Court and filed Writ Petition No.2513 of 2017 for a direction to the respondents to promote the petitioner to the post of Junior Engineer and further promote him to the post of Assistant Executive Engineer. This Court by an order dated 02.02.2017, directed the respondents to consider the claim made by the petitioner and also the recommendation made by the second respondent and pass appropriate orders within a period of eight

weeks. The respondents sought for extension of time and this Court, by order dated 07.06.2017, again extended the time period by three months.

6. The second respondent by his proceedings dated 05.01.2018 granted promotion to the petitioner to the post of Assistant Executive Engineer. In the meantime, the second respondent also sought for appropriate orders from the first respondent to either amend the adhoc Rules or to pass a Special order in order to enable the petitioner to be promoted to the post of Junior Engineer / Assistant Executive Engineer, since the post of Supervisor was not the feeder post for the said promotion.

7. The first respondent, by means of impugned order dated 22.02.2018, has considered the request made by the second respondent as well as the petitioner and has found that there is no provision under the Rules to promote the petitioner as a Junior Engineer or as an Assistant Executive Engineer in the Tamil Nadu State Agricultural Marketing Board and therefore, there is no scope for issuing any clarifications. By virtue of this order, the promotion granted to the petitioner by the second respondent was withdrawn. Aggrieved by the same, the present Writ Petition has been filed before this Court.

8. The learned counsel for the petitioner submitted that the petitioner has been made to knock the doors of the Court at every stage of his employment and he has been struggling for his rights right from the year 1996 when he approached the Tribunal for the first time seeking for regularization. The learned counsel further submitted that the petitioner is possessing the qualification of Diploma in Engineering and he also has 10 years of technical experience and therefore, he must be considered as a degree holder in Engineering and therefore, he is entitled to be promoted to the post of Assistant Executive Engineer. The learned counsel submitted that the second respondent already recommended the name of the petitioner for promotion and the same has now been taken away by virtue of the impugned order passed by the first respondent. The learned counsel submitted that there were several instances where some of the persons who were working in the Board were given promotion to the post of Assistant Engineer and Assistant Executive Engineer and the petitioner has been discriminated and therefore, the impugned order passed by the first respondent is liable to be interfered by this Court and consequential directions must be given to the respondents to grant promotion to the petitioner.

9. Per contra, the learned Government Pleader appearing on behalf of the respondents submitted that the petitioner can be considered for promotion only if such an avenue is available

under the Rules. The learned counsel by bringing to the notice of this Court the impugned order passed by the first respondent submitted that the post of Technical Assistant / Supervisor is not a feeder category for promoting a person to the post of Assistant Engineer or Assistant Executive Engineer. It is for this purpose, the second respondent had approached the first respondent seeking for amendment to the adhoc rules or for passing special order in order to grant promotion to the petitioner. The learned Government Pleader submitted that the first respondent, on considering the existing rules and the adhoc rules, came to a conclusion that Junior Engineer is a post that is not available in the Board and therefore, there is no avenue to grant promotion to the said post. That apart, the first respondent has also taken into consideration the fact that no educational qualification has been prescribed for the appointment of Assistant Engineer / Assistant Executive Engineer in the Board and in other Departments and particularly, in Public Works Department, it provides for qualification for appointing a person as Assistant Engineer and Assistant Executive Engineer. Those qualifications are not fulfilled by the petitioner and therefore, the petitioner cannot be considered on par with those persons who are working in the Public Works Department in the post of Assistant Engineer / Assistant Executive Engineer. The learned Government Pleader submitted that in view of the peculiar facts of this case, the petitioner has already been granted Selection Grade pay and with the number of years of service, he will also reach the Special Grade pay. Therefore, the learned Government Pleader sought for the dismissal of the Writ Petition.

10. This Court has carefully considered the submissions made on either side and the materials placed on record.

11. The Hon'ble Supreme Court, while interpreting the word "promotion" has held that the said term not only covers advancement to a higher position or rank, but also implies advancement to a higher grade, which can be either to a higher pay scale or to a higher post. This position is made clear by the Hon'ble Supreme Court in the case of Union of India v. Pushpa Rani & Ors. reported in 2008 9 SCC page 242. The Hon'ble Supreme Court has repeatedly held that the chance of promotion is not a condition of service when there is no vacancy or there is no post available for considering a person for promotion. Under such circumstances, an employee can never seek for promotion. Useful reference can be made to the judgment of the Hon'ble Supreme Court in the case of State of Jharkhand vs. Bhadey Munda and another reported in 2014 10 SCC 398. It is a settled position of law that an employee has got a fundamental right to be considered for promotion. This goes with a rider that, there must be scope for promoting a person in an

establishment and promotion post must be available for the employee to be considered for such promotion.

12. Keeping the above said law in mind, if the Court approaches the present case, it is seen that the petitioner, after a long battle, was regularized in the post of Technical Assistant by creating a supernumerary post. This post was subsequently re designated as Supervisor. The grievance of the petitioner is that he should be considered for promotion to the post of Junior Engineer / Assistant Executive Engineer. The Tamil Nadu State Agriculture Marketing Board does not have the post called as Junior Engineer. That apart, the post of Technical Assistant / Supervisor is not a feeder post for considering promotion to the post of Junior Engineer or Assistant Executive Engineer. It is true that a recommendation was made by the second respondent by his proceedings dated 23.06.2015 to grant promotion to the petitioner to the post of Assistant Executive Engineer and the recommendation was also placed before the first respondent. This recommendation was made keeping in mind the rules that are available in the Public Works Department.

13. The second respondent also proceeded to grant promotion to the petitioner to the post of Assistant Executive Engineer by his proceedings dated 05.01.2018. Even for this purpose, the second respondent had taken note of the adhoc rules and the rules available in the Public Works Department. In the said order, the second respondent came to a conclusion that there are some unfilled vacancies available in the post of Assistant Executive Engineer at Madurai and the petitioner can be transferred to the said post considering his experience and the long period of service.

14. It is at this juncture that this Court has to consider the impugned order passed by the first respondent. The first respondent has taken note of the entire Rule position and he has taken note of the clarifications sought for by the second respondent and has passed this order. The first respondent has categorically found that there are only three modes prescribed in the adhoc rules dated 26.02.1988 for the appointment of an Assistant Engineer in the Board and it does not include the promotion of a Technical Assistant / Supervisor as an Assistant Engineer. In view of the same, the first respondent has held that the second respondent is not empowered to promote a Technical Assistant / Supervisor as an Assistant Engineer. The first respondent has also considered as to whether any amendment can be made to the adhoc rules or any special order can be passed in this regard. The first respondent took note of the adhoc rules issued in G.O. Ms. No.218 of 26.02.1988 and found that Junior Engineer is not a post that is available in the

Board and as such, there is no provision to promote any individual as Junior Engineer. That apart, there is also no mention in the adhoc rules about the educational qualification with regard to the appointment of Assistant Engineer / Assistant Executive Engineer in the Board. The first respondent also took into consideration the rules that are prevailing in the Public Works Department and found that the petitioner does not have the required qualification for being appointed as a Junior Engineer or as an Assistant Executive Engineer.

15. In view of the above, the first respondent has come to a conclusion that there is no provision to promote the petitioner as Junior Engineer and Assistant Executive Engineer in the Board. Therefore, considering the promotion of the petitioner by amending the special rules, cannot be done in the present case.

16. This Court does not find any illegality in the order passed by the first respondent. The complaint made by the petitioner to the effect that some Government orders were passed on an earlier occasion by granting promotions to certain persons and therefore, the petitioner must also be treated in a similar manner sounds impressive, but it lacks legal conviction. Unfortunately, in many cases, promotions happen through Government Orders passed in order to tide over a situation. This typically happens where contempt petitions are pending in the Courts and the concerned authority wants to wriggle out of the situation and therefore, some Government order is passed and appointments and promotions are granted. This becomes a cause of action for the others to claim for a similar relief which results in numerous writ petitions being filed before this Court seeking for a similar relief on the ground that those employees are also similarly placed. This Court, therefore, must be careful while considering such requests and this Court must satisfy itself that the concerned person is entitled for appointment / regularization or promotion only if the rules so provide. A Government order issued under Article 162 of the Constitution of India can never have a over riding effect upon the statutory rules. Therefore, the claim made by the petitioner on the ground that some promotions were given in the Board by passing Government Orders, cannot be taken as a precedent and cannot be applied in the facts of the present case. As repeatedly held by the Hon'ble Supreme Court, post must be available to consider a person for promotion. That is the reason why, in order to ensure that an employee does not stagnate in a post, selection grade pay and special grade pay are being made to atleast ensure that the scale of pay is increased. The Hon'ble Supreme Court has stated that such increase in the scale of pay can also come within the term "promotion".

17. This Court does not find any legal right for the petitioner to be granted any promotion in the absence of any post that is available for the petitioner to be considered for promotion. The first respondent has applied his mind to the facts of the case and also the prevailing rules and has categorically held that the rule position is such that there is no provision for considering the promotion of the petitioner as Junior Engineer or Assistant Executive Engineer. This Court is not in a position to interfere with the said impugned order passed by the first respondent.

18. In the result, this Writ Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS I)

//True Copy//

Sub Assistant Registrar

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To

1. The Government of Tamil Nadu
Represented by the Agricultural
Production Commissioner and Principal Secretary
to the Government of Tamil Nadu,
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Chennai 600 009.
2. The Tamil Nadu State Agricultural Marketing Board
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3. The Assistant Executive Engineer
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Vellore Sub Division, No.20, Lakshmi Nivas Nilayam
New Sankaranpalayam Road
Vellore 632 001.

+2cc to Mr.M.L.Ramesh, Advocate, S.R.No.4876

W.P.NO21850 of 2018

NR(CO)
CS/02/03/2020