IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.03.2020

PRONOUNCED ON : 23.03.2020

Coram

The Hon'ble Mr. Justice V.PARTHIBAN

W.P.No.22866 of 2019

J.Anbutamilarasi ...Petitioner

Vs.

1.The State of Tamil Nadu,
Rep by the Secretary,
Commercial Taxes and Registration Department,
The Secretariat, Fort St.George,
Chennai - 600 009.

2.The Commissioner of Commercial Taxes,
Ezhilgam, Chepauk,
Chennai - 600 005.

3.Tmt.M.Geetha,
Assistant Commissioner,
C/o.the Commissioner of Commercial Taxes,
Ezhilgam, Chepauk,
Chennai - 600 005.

...Respondents

Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified mandamus, calling for the records in connection with the order viz Memo No.P1/17387/2019 dated 25.06.2019 issued by the second respondent and quash the same and direct the 1st and 2nd respondents to fix the petitioner's seniority in the cadre of Commissioner above the 3rd respondent.

For Petitioner .. Mr.V.Prakash
Senior Counsel
for M/s.K.Sudalaikannu

For Respondents .. Mr.M.Hariharan
Additional Government Pleader
(for R.1 and R.2)
No appearance for R.3

ORDER

The petitioner joined the Commercial Taxes Department, State of Tamil Nadu as Deputy Tax Officer in the year 2008. The Deputy Commercial Tax Officer (herein after referred to as DCTO) (formerly known as ACTO). She was appointed by selection through Tamil Nadu Public Service Commission by way of direct recruitment and accommodated against the substantive vacancies for the year 2001-07. At the time of her appointment and subsequent thereto by taking into consideration the appointment of the petitioner against the substantive vacancies, her seniority was fixed and assigned rank No.70 of 2008 in the post of DCTO. The petitioner subsequently completed probation on 03.06.2011 by completing her probation satisfactorily.

2.According to the petitioner, the third respondent herein was ranked at 71 in the inter se seniority in the post of DCTO. The grievance of the petitioner herein is that in the matter of promotion to the post of Commercial Tax Officer, the third respondent was placed above her. This was because the third respondent is stated to have passed all the exams prescribed for declaration of probation before the crucial date for drawing of the panel for promotion to the post of Commercial Tax Officer, the panel date being 01.03.2011. Whereas, the petitioner had passed the exams only on 03.06.2011 after the crucial date i.e., 01.03.2011. Therefore, her promotion was deferred and ultimately promoted only in 2012. In view of the promotion of the third respondent ahead of the petitioner as Commercial Tax Officer, seniority of the third respondent was fixed above the petitioner.

3.The petitioner's claim is that the original seniority assigned to her on the basis of selection of Tamil Nadu Public Service Commission cannot be changed because of the above factors for the reason that her clearance of the exams prescribed for declaration of probation was admittedly within stipulated period i.e., 3 years and therefore as per the relevant Rules i.e., Tamil Nadu State and Subordinate Service Rules, no matter whether she was promoted in 2011 or 2012, her seniority cannot be altered to her disadvantage. In view of the lowering of her seniority in the cadre of Commercial Tax Officer, her further promotion to the post of Assistant Commissioner is delayed and according to her many of her juniors have been promoted, in view of the assignment of wrong seniority to the petitioner. In the above circumstances, the petitioner has submitted number of representations on 15.08.2012, 21.09.2012, 01.02.2014 and 04.04.2016 requesting the appropriate authority to rectify the wrong assignment of seniority to the petitioner vis-a-vis her juniors. Since, no response was forthcoming, she submitted yet another representation recently on 10.05.2019. In response to the last of the representations, by communication dated 25.06.2019, the second respondent rejected the petitioner's claim for fixation of correct seniority. Challenging the said communication, the petitioner is before this Court.

4.Mr.V.Prakash, learned Senior counsel appearing on behalf of the petitioner would reiterate the above narrated facts. He would particularly make a reference to the fact that the original seniority position assigned to the petitioner on the basis of her selection through Tamil Nadu Public Service Commission cannot be altered, in the face of the admitted position that the petitioner herein fulfilled all the criteria within the stipulated time for declaration of her probation. He would in this regard draw the reference to Rule 35(a) & 35(aa) of the erstwhile Tamil Nadu State & Subordinate Service Rules which reads as under;

> "35(a)The seniority of a person in a service, class or category or grade shall unless he has been reduced to a lower rank as a punishment be determined by the rank obtained by him in the list of approved candidates drawn up by the Tamil Nadu Public Service Commission or other Appointing Authority, as the case may be, subject to the rule of reservation where it applies. The date of commencement of his probation shall be the date on which he joins duty irrespective of his seniority.
>
> (aa)The seniority of a person in a service, class, category or grade shall, where the normal method of recruitment to that service, class category or grade is by more than one method of recruitment, unless the individual has been reduced to a lower rank as a punishment, be determined with reference to the date on which he is appointed to the service, class, category or grade;
>
> Provided that where the junior appointed by a particular method of recruitment happens to be appointed to a service, class, category or grade, earlier than the senior appointed by the same method of recruitment, the senior shall be deemed to have been appointed to the service, class, category or grade on the same day on which the junior was so appointed:
>
> Provided further that the benefit of the above proviso shall be available to the senior only for the purpose of fixing inter-se-seniority:
>
> Provided also that where persons appointed by more than one method of recruitment are appointed or deemed to have been appointed to the service, class, category or grade on the same day, their inter-se-seniority shall be decided with reference to their age.

5.According to the learned Senior counsel, the above Rule position is very clear wherein the seniority assigned by the Service Commission is to remain intact as per the Rules extracted above.

6.The learned Senior counsel would further submit that once the petitioner has cleared all the exams within the time stipulated, the question of losing her seniority did not arise at all. In this regard, the learned Senior counsel would rely on the following decisions;

In the case of N.Iyyanar Vs. Secretary to Government reported in 2008 (7) CTCOL509 (Mad) in W.P.No.44093 of 2002 etc., batch wherein the learned Senior counsel would draw reference to paragraph 11 of the order which is extracted hereunder;

> "11.In the present case, even though the respondents had not passed the examination within a period of four years, on their subsequent passing of the examination, they have been allowed to continue in service as such and subsequently promoted. It is not disputed that the Government has power to relax a condition relating to probation. In the facts and circumstances of the present case it must be taken that respondents 3 to 6 became part of the regular service after passing of the examination. Since Rule 31 is the subject to Rule 35, which is the specific provision relating to fixation of seniority, in our considered opinion, the contention of the petitioner that he should be treated as senior to respondents 3 to 6 cannot be accepted. The fact that respondents 3 to 6 were appointed in December, 1993, whereas the petitioner was appointed only in December, 1994 cannot be lost sight of. As soon as the employee passed the qualifying examination, it must be taken that they had become part of the service on regular basis and thereafter by virtue of Rule 35(a), their seniority is to be counted on the basis of the placement by Public Service Commission.

The learned Senior counsel would submit that the Division Bench of this Court has correctly applied Rule 35(a) and protected the seniority of the employee thereby, under similar circumstances.

7.The learned Senior counsel would rely on yet another Division Bench of this Court in the case of M.Rajinikanth Vs. S.Jagadeesan in W.A.(MD).Nos.221 of 2018 etc., batch dated 04.09.2018 wherein the Hon'ble Division Bench has held as under;

> "11.To be noted, we are dealing with a case where mode of recruitment is direct and, therefore, even on that score, what is applicable is only Rule 35(a), since Rule 35(aa) deals with different modes of

recruitment.

12.In such view of the matter, we are of the view that Rule 35(aa) does not have any application. The proviso makes it clear that even in a case where a junior is appointed to a promoted post thereafter followed by a senior, the inter se seniority in the promoted post will have to be fixed with the senior in the erstwhile cadre as a senior to the junior who is promoted earlier.”

The learned Senior counsel would submit that the Division Bench has held that as per Rule 35(a), the inter se seniority between the junior and the senior has to be fixed on the basis of the original ranking. The learned Senior counsel would also rely on a decision passed by the learned Single Judge (as he then was) of this Court in the case of Kaliappan Vs. The State of Tamil Nadu, rep by the Secretary to Government in W.P.No.19589 of 2006 dated 21.11.2007. However, as far as this case relied on by the learned Senior counsel, this Court is of the view that the same cannot be applied to the facts of this case as that case dealt with the fixation of pay between the junior and the senior and not with reference to seniority.

8.The learned Senior counsel would submit that in view of the settled legal position, the petitioner is entitled to proper assignment of seniority over and above the third respondent and in consequence of re-fixation of seniority, the petitioner is also entitled to the attendant benefits of promotion to the next higher cadre.

9.In response to the notice issued by this Court Mr.M.Hariharan, learned Additional Government Pleader entered appearance for respondents 1 & 2 and a counter affidavit has been filed. The principle contention of the official respondents disclosed in the counter affidavit is that the petitioner having not cleared the examination for declaration of probation before the cut off date for promotion to the post of Commercial Tax Officer i.e., 01.03.2011, she cannot claim parity with the promotees of 2011, since her promotion came only in the subsequent year, as admittedly she cleared the examination in June 2011 after the cutoff date. Therefore, her claim for application of Section 40 of the Tamil Nadu Government Servants (Conditions of Service) Act 2016, is unsustainable. Section 40 is a replacement provision of Section 35 of erstwhile Tamil Nadu State and Subordinate Service Rules. The expression found in Section 40(1) & (2) with provisos are the same as found in Section 35(a) and 35(aa). For the sake of clarity, Section 40 (1) & (2) is also extracted hereunder;

“40 (1) The seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as a punishment, be determined in the order of his placement in the list prepared by the recruitment agency or appointing authority, as the case may be, in accordance with the rule of reservation and the order of rotation specified in Schedule-V, where it applies. The date of commencement of his probation shall be the date on which he joins duty irrespective of his seniority.

(2)The seniority of a person in service, class, category or grade shall, where the normal method of recruitment, unless the individual has been reduced to a lower rank as a punishment, be determined with reference to the date on which he is appointed to the services, class, category or grade:

Provided that where the junior appointed by a particular method of recruitment happens to be appointed to a service, class, category or grade, earlier than the senior appointed by same method of recruitment, the senior shall be deemed to have been appointed to the service, class, category or grade on the same day on which the junior was so appointed:

Provided further that the benefit of the above proviso shall be available to the senior only for the purpose of fixing inter-se-seniority:

Provided also that where persons appointed by more than one method of recruitment are appointed or deemed to have been appointed to the service, class, category or grade on the same day, their inter-se-seniority shall be decided with reference to their age.

10.The learned Special Government Pleader would reiterate the above contention as found in the counter affidavit. He would submit that once the probation was declared subsequent to the third respondent and others and she was not entitled to be promoted along with others in the panel year drawn as on 01.03.2011, she cannot claim seniority above the third respondent and others. Admittedly, the petitioner has completed the exams successfully only on 03.06.2011 after the cut off date and thereafter qualified for promotion as Commercial Tax Officer only on 01.03.2012.

11.Therefore, the claim of the petitioner for re-fixation of her seniority and consequential benefits cannot be countenanced both in law and on facts.

12.Considered the submissions of the learned Senior counsel appearing on behalf of the petitioner and learned Special Government Pleader appearing on behalf of the Official respondents. Although the notice has been served and acknowledged, there is no appearance on behalf of the third respondent, notwithstanding the fact that the name of the third respondent has also been printed in the cause list.

13.The point in issue, in the case on hand is whether the petitioner is entitled to retain her rank in the face of her promotion being delayed in view of her probation being not declared as on 01.03.2011 or not. It is an admitted fact that she had cleared the examination for declaration of probation within 3 years of stipulated period. When the petitioner has admittedly cleared the examination within the stipulated period, this Court is unable to appreciate as to how she can be denied her due seniority as assigned to her originally at the time of her appointment vis-a-vis the third respondent and others.

14.The learned Senior counsel reliance on Rule 35(a) or 35 (aa) of the erstwhile Tamil Nadu State & Subordinate Service Rules, as the case may be or present Section 40 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, would undoubtedly bolster the claim of the petitioner that her seniority cannot be altered to her disadvantage. The import of the above Rule 35(a), 35(aa) or Section 40 40(1) or 40(2) is very clear that a senior employee cannot be denied due seniority merely by virtue of the fact that her junior is promoted ahead of the senior. Ofcourse there is an exception given in the Rule or Section, but however that exception is not the case here. When a inter se seniority has been fixed, such seniority will continue to be maintained even in promotion to the next higher cadres unless a senior person suffers from any disqualification during his or her career.

15.In the case on hand, the facts disclose no such disqualification suffered by the petitioner and no such disqualification was pointed out by the Official respondents. The fact that petitioner successfully cleared the examination within stipulated period is also admitted by the official respondent. In the said circumstances, the lowering the seniority of the petitioner vis-a-vis third respondent and others in cadre of Commercial Tax Officer cannot be countenanced either in law or on facts. The reasons as stated by the official respondents for altering the seniority of the petitioner to her detriment and to the advantage of her juniors are legally unacceptable and the same are to be discarded as being contrary to the Rules.

16.In such circumstances, this Court has no hesitation in allowing the writ petition. The second respondent communication in memo No.P1/17387/2019 dated 25.06.2019 is hereby set aside and the respondents 1 & 2 are directed to fix the petitioner's seniority in the cadre of Commercial Tax Officer also in the next higher cadre of Assistant Commissioner on the basis of her original ranking assigned to her at the time of her appointment as DCTO.

17.The respondents 1 & 2 are directed to pass appropriate orders as indicated above within a period of 6 weeks from the date of receipt of copy of this order. With the above observations, the writ petition stands allowed. No costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

mrm/nsd

To

1.The Secretary,
State of Tamil Nadu,
Commercial Taxes and Registration Department,
The Secretariat, Fort St.George,
Chennai - 600 009.

2.The Commissioner of Commercial Taxes,
Ezhilgam, Chepauk, Chennai - 600 005.

3. Assistant Commissioner,
C/o.the Commissioner of Commercial Taxes,
Ezhilgam, Chepauk, Chennai - 600 005.

+1cc to Mr.K.Sudalaikannu, Advocate, S.R.No. 24612
+2cc to the Special Government Pleader(Taxes), S.R.No. 24599

W.P.No.22866 of 2019

PVS(CO)
GN(16/07/2020)