

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2020

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P NO.24284 OF 2019

AND

W.M.P.NO.24040 OF 2019

R.Thirumalai

... Petitioner

vs.

1. The Secretary to Government,
Home (Police II) Department,
Fort St.George, Chennai-9.

2. The Director General of Police,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 4.

... Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the second respondent in connection with the impugned order passed by him in RC.No.15269/NGBI(1)/2017 at 28.02.2018 and quash para 5 of the impugned order in so far as denial of pay and emoluments to the petitioner notionally from the year 2006-07 till 08.03.2018 as per Ruling 17 of, Sub-Clause 27 and further direct the respondents to draw and disburse the salary at par with his junior based on the notional promotion granted to the petitioner within a reasonable time and grant such other further relief as this Court may deem fit in the circumstances of the case and thus render justice.

For Petitioner : Mr.K.Venkatramani
Senior Counsel
for M/s.M.Muthappan

For Respondents: Mr.A.Zakir Hussain
Government Advocate

O R D E R

The present writ petition has been filed challenging para 5 of the promotion order passed by the second respondent in his proceedings dated 28.2.2018 and for consequential directions to extend all the attendant benefits.

2. The case of the petitioner is that he joined police service as a Grade-II Police Constable in the year 1996. Thereafter, he participated in the selection to the Post of Sub-Inspector of Police and he was appointed as the Sub-Inspector in the year 1997. Departmental action was initiated against the petitioner during the period 2006-07 based on the enquiry report submitted by the Prevention of Anti Corruption wing. Simultaneously, a criminal case was registered against the petitioner. During the date of preparation of the panel for promotion, since the criminal case and departmental proceedings were pending, the petitioner was not considered for promotion.

3. The petitioner was ultimately acquitted from the criminal case by the judgment passed by the Special Judge, Salem dated 20.05.2013, made in CC.No.30/2004. Incidentally, the criminal appeal is pending against the said judgment before this Court.

4. In respect of the departmental proceedings, the petitioner was exonerated from all charges by the proceedings to the Commissioner of Police Tirunelveli District, dated 25.08.2015. In so far as the other departmental proceeding is concerned, the charge memo itself was quashed by order dated 02.12.2016 made in W.P.No.19279 of 2014.

5. Ultimately, the petitioner was considered for promotion and he was granted promotion as Inspector of Police notionally by including his name in the 'C' list in the year 2006-07. While passing this order, it was stated that the petitioner is entitled for fixation of pay notionally from the date of promotion of his immediate junior as per Ruling 17 under FR 27 and this effectively meant that the petitioner will not be paid with the arrears from the date of notional promotion till the date when he actually assumed charge. The petitioner being aggrieved with this clause in the promotion order has filed the present writ petition before this Court.

6. Mr.Venkatramani, learned Senior Counsel appearing on behalf of the petitioner submitted that the respondent in relying upon Ruling 17 in FR 27. The learned counsel submitted that the petitioner was no way responsible for the delay in promotion and the promotion got postponed only because of the criminal case and the departmental proceedings and ultimately the petitioner came out clean in the both the proceedings. The

learned Senior Counsel therefore submitted that the petitioner is entitled for arrears of pay from the date of notional promotion. In order to substantiate his submission, the learned Senior counsel relied upon the Judgment of Supreme Court in Union of India Vs. Janakiraman reported in AIR 1990 SC 2010.

7. The relevant portions in the judgment is extracted here under:-

"7...We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other <http://www.judis.nic.in> W.P.(MD)No.15634 of 2013 benefits from the date on which he would have normally be promoted but for the disciplinary / criminal proceedings. However, there may be cases where the proceedings, whether the disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee, etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated from disciplinary/criminal proceedings, he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said <http://www.judis.nic.in> W.P.(MD)No.15634 of 2013 Memorandum, viz., but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion preceding the date of actual promotion., we direct that in the place of the said sentence the following

sentence be read in the Memorandum:

However, whether the officer concerned will be entitled any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent will be decided by the concerned authorities by taking into consideration of all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

8. Per contra, the learned Government Advocate appearing on behalf of the respondents submitted that, the draft counter has already been vetted by the law officer and sent to the Government for approval as early as in September 2019 and he is yet to receive the counter affidavit.

9. In the present case, there is no dispute on the facts of the case and the promotion order itself brings out the entire facts of the case and what is required to be tested is only Clause 5 of the order and it involves interpretation of the relevant rules. Therefore, this writ petition can be decided even without a formal counter affidavit filed by the respondents.

10. The learned Government Advocate submitted that the petitioner had faced two departmental proceedings and one criminal case and therefore the petitioner can never claim the arrears of pay from the date of his notional promotion. The learned Counsel submitted that the respondent took into consideration the fact that the petitioner was responsible for the delay since he did not have a clean service record and only after the petitioner was acquitted from the criminal case and the departmental proceedings, his name was considered and therefore, the respondent was perfectly right in denying the arrears of pay from the date of notional promotion. The learned counsel submitted that if persons like the petitioner is granted arrears of the pay, it will open up floodgates and many persons who had not actually worked and not granted notional promotion will also approach this Court and seek for a similar relief. The learned counsel concluded his arguments by submitting that if this Court comes to a conclusion that the respondents did not give any reason for denying the arrears of pay to the petitioner, the matter can be remanded to the respondents for that purpose.

11. This Court has carefully considered the submissions made on either side and also the materials available on record.

12. It is clear from the promotion and posting order issued

on 28.02.2018 that the petitioner was facing Criminal case under the Prevention of Corruption Act from the year 2002. That apart two charge memos were served on the petitioner in the year 2004 and 2005 and disciplinary proceedings were also pending against the petitioner. Even though, the petitioner was eligible to be considered for promotion to the post of Inspector of Police in the year 2006-07, since there was a pending Criminal case and pending departmental proceedings, the name of the petitioner was not considered. Ultimately, the petitioner was acquitted from the criminal case and in one of the disciplinary proceeding, the charges were dropped and in the other disciplinary proceeding, the charge memo was quashed by this Court. It is true that the Criminal Appeal has been filed against the acquittal of the petitioner in the criminal case.

13. In view of the above facts, it becomes important for this Court to consider as to whether the petitioner can be denied arrears of pay from the date of his notional promotion. At this juncture, it will be relevant to take note of Ruling 17 Under FR 27. The same is extracted here under:-

"17. In case where a Government servant has been overlooked for promotion/appointment to the next higher post but subsequently promoted/appointed to that higher post after restoration of his original seniority on appeal, his pay shall be fixed on the date of assumption of charge in the higher post on par with the pay of his junior provided he has drawn the same rate of pay as his junior in the lower post from time to time. If he has not drawn the same rate of pay as his junior in the lower post, his pay shall be fixed, on the date of assumption of charge, at the stage at which he would have drawn pay on that date had he been promoted/appointed to the higher post along with his junior. In cases where seniority has been restored on or after 19th September 1981, arrears of pay and allowance consequent of fixation of pay shall be admissible with effect from the date of assumption of charge in the higher post; in cases where seniority has been restored prior to 19th September 1981, arrears shall be admissible only with effect from the above date."

14. A reading of the above Rule shows that the same deals with a Government servant being overlooked for promotion to the next higher post and subsequently getting promoted after restoration of the original seniority. In such a case, what should be done is being dealt with by this Rule. It is not known as to how this Rule is applicable to the facts of the present case. The facts of the present case do not fall under Ruling

17 in FR 27.

15. The learned Government Advocate relied upon FR 17 which states that the Government servant shall begin to draw the pay and allowances attached to his tenure of post only with effect from the date when he assumes the duties in the post. By placing reliance upon this Rule the learned Government Advocate seems to justify the impugned order passed by the respondent and submitted that the petitioner is entitled for the actual pay only from the date he actually assumed charge in the post of Inspector.

16. In the considered view of this Court, FR 17 will not have any application to the facts of the case. It will be more relevant to rely upon the Judgment which has been cited by the learned Senior Counsel appearing on behalf of the petitioner. The Supreme Court in the said judgment made it very clear that where an employee has been exonerated from the criminal case / departmental proceedings and he has been given the benefit of salary of a higher post, he must be given all the benefits and the same cannot be denied. However, the Hon'ble Supreme Court stated that it cannot be taken as an absolute Rule. There are always cases where the disciplinary proceedings and the criminal case gets delayed at the instance of the employee or the employee gets acquitted only on the benefit of doubt and not on the merits of the case. The Hon'ble Supreme Court has specifically ruled that in such cases, it is always open to the employer to deny the arrears of pay from the date of notional promotion.

17. The above caution that has been given by the Hon'ble Supreme Court must be kept in mind in cases of this nature. It is clear from the above judgment that there are cases where the arrears of pay can be denied provided that the reason for such denial is clearly stated in the order. The concerned authority can categorically state as to why the concerned employee is not entitled for arrears of pay and assign the reasons for the same. Only if it is done, the said order when it is taken up on challenge, the concerned Court can satisfy itself with regard to reasons assigned in the order and come to a conclusion.

18. In the present case the respondent has not assigned any reason for denying the arrears of pay to the petitioner. The respondent has only relied upon Ruling 17 of FR 27. This Court has already held that this Rule will not apply to the facts of the present case.

19. In view of the above reasoning, Clause-5 of the order passed by the second respondent requires interference and accordingly, the same is quashed.

20. It is made clear that it is open to the second respondent to assign reasons if in case the respondent chooses not to pay the arrears of salary from the date of notional promotion. However, if the second respondent decides otherwise, then the petitioner will be entitled for arrears of salary in line with the Judgment of the Hon'ble Supreme Court that has been referred supra.

21. In the result, this writ petition is allowed in the above terms. Consequently, connected miscellaneous petition is closed. No Costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government,
Home (Police II) Department,
Fort St.George, Chennai-9.
2. The Director General of Police,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 4.
3. The Public Prosecutor,
High Court, Madras.

+1cc to M/s.M.Muthappan, Advocate, S.R.No.4823

+1cc to the Government Pleader, S.R.No.4784

W.P.No.24284 of 2019
and W.M.P.No.24040 of 2019

VBA(CO)
CS/20/02/2020

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