

IN THE HIGH COURT OF BOMBAY AT GOA**CONTEMPT PETITION NO. 9 OF 2020****IN****WRIT PETITION NO. 1089 OF 2016**

Shri Gopal A. Parsekar,
son of Late Anant Parsekar,
aged 54 years, Indian National,
resident of UG-2, D'Sa Residency
Alto Mapusa, Goa.
(Registered Address)

..... Petitioner

V e r s u s

1. State of Goa,
through its Chief Secretary,
Shri Parimal Rai,
having office at Secretariat,
Porvorim, Bardez, Goa.
2. Goa Public Service Commission,
through its Chairman,
Mr Jose Manuel Noronha,
having office at EDC House,
Panaji, Goa.
(Registered Addresses)

..... Respondents

Mr Parikshit S. Sawant, Advocate for Petitioner.

Mr Deep Shiroadkar, Additional Government Advocate for the Respondents.

**Coram:- DAMA SESHADRI NAIDU &
M. S. JAWALKAR, JJ.**

Date: 15th January 2021

ORAL ORDER

The petitioner joined the Government service in February 1993 as a mamlatdar, which is a feeder category. As per the service regulations, he was eligible to the next promotional post, that is Junior Scale Officer, on his

completing five years in the feeder category. And he completed his five years by 1998. That year, a Junior Scale Officer's vacancy arose under the reserved category (SC), to which the petitioner belongs. But, there was no DPC in 1998; there was one in 1999, though.

2. Nevertheless, in 1999 DPC the petitioner's name was not considered for promotion. By then, there was a vacancy, and the petitioner was eligible, too. Instead, in 2001 DPC, the petitioner's name was considered. At any rate, pending this process, on 28.02.2001 he was promoted on *ad hoc* basis.

3. In the above background, the petitioner represented to the Government that he should have been promoted "in the vacancy that arose in 1998". Then, the Goa Public Service Commission held a review DPC in 2012; this review relates to the DPC of 2000. In that review DPC, the authorities gave retrospective effect to the petitioner's promotion: from 17.04.2000.

4. On the petitioner's repeated representations, the Government, in 2011, partly considered the petitioner's demand and is said to have required the Goa Public Service Commission to hold a review DPC for 1999 and give effect to the petitioner's promotion with effect from 1999. As the record reveals, the Goa Public Service Commission, however, negated the Government's recommendations and prevailed with the petitioner's retrospective promotion only from 2000.

5. Again, the petitioner represented to the State Government on 30.01.2013 that his promotion should be effective retrospectively, but that was rejected. Aggrieved, the petitioner filed Writ Petition No. 1089 of 2016.

6. In the Writ Petition, the petitioner has sought these reliefs:

“(A) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature for mandamus or any other appropriate writ, order or direction, commanding the Respondents to consider the case of the petitioner for the 1998 vacancy of Junior Scale Officer reserved for Scheduled Caste Candidate, with all consequential benefits;

(B) Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to direct the Respondents to consider the case of the petitioner for the 1998 vacancy of Junior Scale Officer reserved for Scheduled Caste Candidate.

7. Eventually, this Court disposed of the Writ Petition with these directions:

“5. Upon the hearing of the learned Counsel and on perusal of the records, it cannot be disputed that the recommendation of the respondent no.2 are only to examine the suitability and prepare the select list. The respondent no.1 has to thereafter place the seniority of the concerned officials. In the present case, the post filled up is for the year 1998 and in fact the vacancy was available then and as such the petitioner was entitled to get the seniority as from the year 1998. Merely because such seniority list was prepared in the year 1998. Merely because such seniority list was prepared in the year 1999 it cannot dis-entitle the petitioner from getting such seniority as from the year 1998 when he was found eligible for such post.

6. In view of the above, the following

Order

- i) The impugned recommendation of the respondent no.2 to the extent of the seniority of the petitioner from the year 1999 is quashed and set aside.
- ii) The petitioner shall be given the promotion based on the seniority of the year 1998, in accordance with the law.
- iii) Rule is made absolute in the above terms.”

8. In the light of this Court's judicial directive, the Government through its order, dated 25.11.2008, directed:

"....NOW, THEREFORE, in view of the recommendation of the Review DPC held on 12/07/2019 as conveyed by the Goa Public Service Commission vide its letter No. COM/II/11/42(1)/2018/146 dated 15/07/2019, and in partial modification of the orders read in the preamble at Sr. nos. 3 and 4, the Governor of Goa is pleased to promote and appoint, under Rule 14 of the Goa Civil Service Rules,

1997, read with Rule 5(b) of the said Rules, Shri Gopal Parsekar to the post of Junior Scale of Goa Civil Service, Group 'A' Gazetted on a regular basis in the Pay Band-3, ₹15600-39100 + GP ₹ 5400/- as if he is recommended by the regular DPC held on 14/06/1999 against the SC vacancy carried forward in the year 1998 thereby considering his date of promotion as 22/06/1999 and he shall be placed below Smt. Alda Pinto D' Silva and above Shri U. D. Gaitonde in the seniority list.”

9. As to the above Government's order, the petitioner contends that it breached this Court's directive. So, he has invoked the Court's contempt jurisdiction and filed this petition. Initially, the petitioner arrayed as the respondents only these: “*State of Goa, through its Chief Secretary and Goa Public Service Commission, through its Chairman*”. Then, the Court pointed out that the alleged contemnors must be arrayed *eo nomine*. The petitioner, in response, has brought on record those officials in their individual names. At that juncture, the learned Additional Government Advocate sought the Court's leave for the Government to place its defence on record explaining how neither the Government nor its officials had committed any acts of contempt. According to him, if the Court were not satisfied by that explanation, it would as well proceed with the contempt petition by issuing notice to the respondents arrayed in their individual capacity. Thus, with the Court's leave, the State of Goa has filed a detailed defence. Besides that, today we have heard both the parties at length.

10. Shri P. Sawant, the learned counsel for the petitioner, submitted that a clear vacancy arose in 1998, and by then the petitioner was eligible. In the Writ Petition, the Government filed no counter; instead, it conceded to the

petitioner's demand that he should be promoted in the vacancy that arose in 1998. So, it ought not to have deviated from the judicial directive. That is, the Government, in its proceedings dated 25.11.2019, must have given retrospective effect to the petitioner's promotion from 1998, rather than from 1999. According to him, in 1998, there was no DPC; but that would not disentitle an eligible candidate from getting promoted once twin conditions are met: eligibility and vacancy. In fact, both criteria stood fully met, stresses Shri Sawant.

11. Shri Sawant has further pointed out that the State cannot take advantage of one stray regulation leaving aside the entire scheme of promotion. To elaborate, he has submitted that whenever DPC is held, the promotions must be prospective. That accepted, the same regulations also mandate that there ought to be a DPC annually. In other words, if there is an administrative failure, and that has led to no annual DPC; that should not adversely affect the employee who has no say in the Government's failure to hold the DPC annually. So, Shri Sawant has insisted that the Government has clearly disregarded not only the judicial directives in this Court's judgment, dated 12.04.2017, but also the very recommendations of the review DPC, dated 12.07.2019. To support his contentions, he has relied on *Dr Sahadeva Singh v. UOI*¹, and *P. N. Premachandran v. State of Kerala*².

12. On the other hand, Shri Deep Shirodkar, the learned Additional Government Advocate, has submitted that neither the Government nor its

¹Dt.28.02.2012, High Court of Delhi

²(2004) 1 SCC 245

officials have committed any acts of contempt; they displayed no willful and deliberate disobedience to any judicial directive. To elaborate, he has submitted that earlier the petitioner himself has tried to persuade the Government to promote him at least under the DPC held in 1999. And even in the Writ Petition, the petitioner has sought no retroactive effect to his promotion, that is from the date of the actual vacancy. Instead, the petitioner wanted the Government to promote him in the vacancy arose in 1998, but under the DPC of 1999. In other words, there was no plea or prayer that the petitioner should be promoted with effect from 1998. Then, Shri Deep Shiroadkar has taken us through the regulations that govern the DPC and also the recommendations made by the DPC. According to him, since the petitioner was found eligible in 1999, the DPC held in that year ought to have considered his case for promotion. Since there was a lapse on that count, the Government rectified that and complied with this Court's judgment, dated 12.04.2017. To support this contention, Shri Deep Shiroadkar has relied on *Union of India v. N. C. Murali*.³

13. Heard Shri P. Sawant, the learned counsel for the petitioner; and Mr Deep Shiroadkar, the learned Additional Government Advocate for the respondent-State.

14. The contempt proceedings are quasi-criminal and are not for the mere asking. Before putting the alleged contemnor on notice, the Court needs to satisfy itself that there is a *prima facie* case for the respondents to be

answered. In that context, before issuing notice to the respondents *eo nomine*, the Court wanted to hear the petitioner as to whether there has been any clear act of contempt committed by the respondents. So, we have also allowed the State of Goa, which originally was a party to the contempt proceedings, to place on record its defence. Of course, in the contempt petition, though the State has no role to play, the Court wanted the Government's version on record for its *prima facie* consideration,

15. To begin with, in one of his numerous representations, dated 27.12.2019, the petitioner contended thus:

“[A]lthough there was no DPC which was conveyed in the year 1998, which otherwise, ought to have been conveyed in view of the Office Memorandum dated 26.09.1990 issued by the Government of Goa, Department of Personnel, *the least that was expected* from your Hon'ble Office was to consider my client for the purpose of promotion *as against the reserved vacancy of the year 1998, in the subsequent Departmental Promotion Committee, which was held in the year 1999.*”

(italics supplied)

16. In the same backdrop, we may also look at the relief the petitioner sought. As extracted above, the writ relief requires the respondents to consider the petitioner for the promotion in the vacancy that arose in 1998. That one should be promoted with effect from 1998 conveys a different meaning from that one should be promoted in the vacancy arose in 1998. Here, the latter was the petitioner's plea. The vacancy is year-specific, but not the promotion. Mere vacancy does not compel the employer to fill up the post the moment the vacancy arose.

17. Let us see what this Court's direction was in the judgment, dated 12.04.2017: "to promote the petitioner based on the seniority of the year 1998, in accordance with the law."

18. It is well established that if there is contempt committed by any official at all, it ought to be a willful and deliberate one. Any genuine ambiguity in the judicial directive or a *bona fide* misreading of the judgment does not give rise to contempt proceedings. Granted, the judgment's misreading may give rise to an erroneous order, falling foul of the judicial directive. But if that reading is demonstrably *bona fide*, no contempt comes into the picture. The subsequent order may be open to judicial review, though.

19. Here, in the first place, the petitioner wanted his case considered for the vacancy that arose in 1998. And that has been considered. Nowhere has he insisted that the promotion must be retrospective from the date the vacancy arose. Even otherwise, if there were to be any such insistence, we are afraid that would not deserve judicial approval.

20. For innumerable reasons, the employer, be the State or any other entity, may not desire to fill a particular vacancy for a certain period. The reason, for example, could be either administrative or financial. That said, once the employer chooses to fill up the vacancy, he must follow the procedure and honour the seniority.

21. Here, the vacancy arose in 1998; the DPC took place in 1999. The Regulations provide for prospective promotions based on the DPC recommendation. As conceded by the State, the DPC in 1999 did not consider

the petitioner's claim for promotion; instead, it promoted him with effect from 2000. That gave rise to the writ petition. Even the Court wanted the State to promote the petitioner in the 1998-vacancy, but that filling up of the post was “in accordance with law”. Any other interpretation of the judgment would give rise to a proposition that the date of the vacancy is the determining factor rather than the date of the promotion.

22. Let us examine the DPC Guidelines. Regulation 4.1 says if there is any delay in the State’s holding the DPCs for a year or more, the vacancies should be indicated year-wise separately. According to Regulation 6.4.1, for the reasons beyond control, the State may not hold the DPC for a year or two, despite the vacancies existing. Then, the first DPC that meets thereafter should follow a prescribed procedure. Eventually, Regulation 6.4.4. clarifies that “while promotions will be made in the order of the consolidated select list, such promotions will have only prospective effect even in cases where the vacancies relate to earlier year(s).”

23. Before we look at the Government's order, dated 25.11.2019, and also the Minutes of the review DPC meeting, it is evident that the Government has strictly complied with the DPC guidelines and promoted the petitioner with effect from 22.06.1999 because that year DPC erroneously refused to consider the petitioner's claim.

24. Thus, the whole issue boils down to this: Should the petitioner be promoted from the date the vacancy arose or from the date the DPC considered the vacancy for filling up? We reckon the latter matters.

25. In this context, we may examine the precedents cited at the bar. In *Dr. Sahadeva Singh*, the High Court of Delhi has held that delay in convening DPC does not defeat the employee's rights to promotion. It has not, however, held that in cases of delayed DPCs, retrospectivity is the norm.

26. In *P. N. Premachandran* (supra), the post of Assistant Director (Soil Survey) is a promotional post. DPC was not held from 1964 to 1980. So the respondents were temporarily promoted to that post. In 1984 DPC was convened and those temporary promotions, made from the year 1964 to 1980, were regularised retrospectively. The decision so taken was a conscious one. When questioned, the Supreme Court has held that the governing Regulations permitted such a course of action and that it could not be found fault with. In this factual background, the Apex Court has wondered “how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein”. Indeed, it is not a case of the Court directing retrospective promotion; rather, it is a case of the Court's refusing to interfere with the employer's legitimate action.

27. As we may appreciate, in the first place, we are dealing with the contempt petition. Here, the issue lies in a narrow compass: Has there been any violation of a judicial directive? In other words, Has the Court directed the authorities to effect retrospective promotion, and has that direction remained violated, willfully? Contempt jurisdiction is not remedial; it is retributive. Let us assume that a judicial directive is expressly erroneous, but that does not rob the order of its effectiveness so long as it has not been tested on the higher

adjudicatory anvil. Thus, the order remaining effective, has it been violated willfully and deliberately? In *P. N. Premachandran* (supra), the Court has held that if there is no DPC held annually, the employee has an indefeasible right to insist that it should be held annually. For that purpose, he may seek judicial redress, too. But it does not endorse the proposition that every vacancy should be filled or deemed to have been filled the moment the vacancy arose or that however belatedly a DPC is held, the promotion must always be retrospective.

28. But while interpreting a statutory scheme identical to what we have before us, the Supreme Court in *N. C. Murali* has held thus:

“8. From the materials brought on the record it is clear that there are no statutory rules governing the promotion at the relevant time. It is although desirable that the DPC should be convened at regular intervals to draw panels which could be utilized for making promotions against the vacancies. But neither any rules nor any circular have been referred to by which it can be held that the promotions whenever to be effected should be effected w.e.f. the date of the vacancy. The Circular dated 10.4.1989, paragraphs 3.1 and 6.4.1 as reproduced above also do not indicate that in case DPC is not held by any reason in a year, promotions on the basis of subsequent DPC has to be retrospectively.”

29. Indeed, *N. C. Murali* squarely answers the issue here. According to this decision, it is desirable that the DPC should be convened regularly “to draw panels” which the employer could use to effect promotions against the vacancies. But it cannot be said that whenever promotions are effected, they should be retrospective, with effect from the date of the vacancy.

30. Under these circumstances, we fail to hold that there is any contempt committed by the respondent-officials, much less willful and deliberate disobedience to the judicial directive. We, therefore, close this contempt case.

31. Nevertheless, if the petitioner is aggrieved by the order dated 25.11.2019, he may seek any appropriate legal remedy against that order.

M. S. JAWALKAR, J.

DAMA SESHADRI NAIDU, J.

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