IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.08.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.32088 of 2005

P.Subramanian ...Petitioner

Vs.

1. Government of Tamil Nadu
   rep. By Secretary to Government,
   Finance (T.&A.I.) Department,
   Fort St. George,
   Chennai – 600 009.

2. The Commissioner of Treasuries and
   Accounts, Chennai-600 015.

3. N.Gopalakrishnan
   Superintendent,
   C/o. Office of the Commissioner of Treasuries and Accounts,
   Chennai-600 015.

4. R.Ananthan
   Superintendent,
   C/o. Office of the Commissioner of Treasuries and Accounts,
   Chennai-600 015.

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorarified Mandamus to call for the records of the 1st Respondent relating to G.O.(D)No.250, Finance (T&AI) Department, dated 24.10.2002, quash the same and issue directions to the Respondents herein, to include the name of the Applicant in the panel for promotion as Sub Treasury Officer/Superintendent for the year 1997-98 approved in Pdl.No.182/97/N1, dated 06.11.1997, of the 2nd Respondent, above the name of the 3rd Respondent and to given retrospective effet to the promotion of the Applicant as such from the date of promotion of his immediate junior, the 3rd Respondent herein, with consequential benefits.

For Petitioner : Mr.M.Ravi,
For Respondents : Mr.C.Selvaraj (for R1 and R2)
Government Advocate
No Appearance (for R3 & R4)

O R D E R

The petitioner challenges proceedings dated 24.10.2002 whereunder his request for seniority qua R3 and R4 has come to be rejected by an order passed by the Secretary to Government, Finance (T.&A. I.) Department.

2. This writ petition was initially filed as an Original Application under Section 19 of the Administrative Tribunals Act, 1985. With the abolition of the Tribunal in 2004, the Original Application has come to be transferred to the file of this Court, re-numbered as WP.No.32088 of 2005.

3. The brief facts necessary to adjudicate this writ petition are that the petitioner was initially appointed as a Junior Assistant in the Treasury and Accounts Department through the Tamil Nadu Public Service Commission. The appointment was on 16.11.1973. On 30.12.1978, the services of the petitioner were regularised in the category of Assistant with retrospective effect from 16.11.1976. The order of regularisation has been passed in regard to five individuals, i.e., the petitioner, the 3rd respondent and three others. The order specifically states in conclusion, that the seniority of Mr.P.Subramanian (petitioner) in the cadre of Assistant is placed above Thiru.N.Gopalakrishnan, setting the notional date of regularisation of services as 16.11.1976. An appeal, if any, as against the aforesaid order has to be preferred within two months from the date of receipt of that order.

4. Though Thiru.N.Gopalakrishnan has been arrayed as R3 and service upon him is complete, his name being printed in the cause list consistently, there is no appearance by or on his behalf. This Court is thus unaware as to whether any appeal was preferred by him as against the seniority fixed under order dated 30.12.1978.

5. The petitioner thereafter applied for appointment as Accountant in the panel of Sub-Treasury Officer/Superintendent in Category-4 of the Tamil Nadu Treasuries and Accounts Subordinate Services for the year 1997-1998. When the panel was released on 06.11.1997, the petitioner found that the name of N.Gopalakrishnan figured at serial No.18, whereas the name of the petitioner did not figure therein at all. Since he was to be accorded seniority as per proceedings dated 30.12.1978, he preferred an appeal on 16.11.1997 to the first respondent.

6. Interestingly the second respondent by proceedings dated 19.04.2000, took note of the fixation of seniority under proceedings dated 30.12.1978 and also recommended the case of the petitioner for inclusion in panel under his proceedings in

Rc.No.102254/97/N1, dated 19.04.2000. Inter alia, he states therein that the petitioner's service was notionally regularised with effect from 16.11.1976 and thus his name may be considered for inclusion in the panel for the year 1997-98.

7. Notwithstanding the aforesaid recommendation made by R2, the appeal filed by the petitioner before R1 came to be rejected by way of the impugned order. The rejection is on the ground that the proceedings fixing seniority had in fact come to be cancelled by a subsequent proceedings dated 14.05.1993 and hence the request was not liable to be acceded to. It is for the first time upon receipt of the impugned proceedings that the petitioner came to be aware of the cancellation of the proceedings dated 30.12.1978 and that too nearly after 15 years from issuance of the same. Admittedly, there has been no prior notice issued to the petitioner. A copy of proceedings dated 14.05.1993 is not made available to the Court.

8. The counter filed by the respondents reiterates the reasoning set out in the impugned order to the effect that the proceedings dated 30.12.1978 had not taken note of the date of regularisation of the services of R3, which was 29.05.1976 and hence the date of regularisation of R3 should have been 29.05.1976 prior to the date of regularisation of the petitioner herein. The case of the respondents thus seems to be that there was an error in the fixation of seniority under proceedings dated 30.12.1978 and it was in fact R3, who was senior in service to the petitioner herein. It is for the aforesaid purpose, the respondents state, that proceedings dated 14.05.1993 have come to be issued cancelling the proceedings dated 30.12.1978.

9. Be that as it may, the question that now arises is whether the first respondent was correct in having revised the seniority fixed on 30.12.1978 after nearly 15 years and without extending any opportunity for rebutting the said proposal for re-fixation to the petitioner.

10. In this context, Rule 35 of the Tamil Nadu State and Subordinate Services Rules, particularly Section 35(f) of the Rule reads as follows:

> '35.Seniority.- (a) .....
>
> (b) ....
>
> (c) ....
>
> (d) ....

(e) ...

(f)Application for revision of seniority of a person in a service, class, category or grade shall be submitted to the appointing authority within a period of three years from the date of appointment to such service, class, category or grade or within a period of three years from the date of order fixing the seniority, as the case may be. Any application received after the said period of three years shall be summarily rejected. This shall not however be applicable to cases of rectifying orders, resulting from mistake of facts.'

11. Rule 35(f) deals with the fixation of seniority and the procedure to be followed in that regard. Sub Rule (f) states that an application for revision of seniority shall be submitted to the appointing authority within a period of three years from the date of appointment to such service, class, category or grade or within a period of three years from the date of order fixing seniority, as the case may be. The only exclusion for the limitation of three years is, in a case where, what is sought to be done, is to rectify a mistake of fact.

12. In the present case, what is sought to be done after 15 years is to upset the seniority fixed in 1978 without putting the petitioner to notice of the same. Thus, the re-fixation cannot be justified merely by stating that it seeks to rectify an error of fact. That apart, proceedings dated 30.12.1978 provides for an appeal to be filed within a period of two months from the date of receipt of those proceedings and it is not the case of either the official respondents before me or R3, who is unrepresented that an appeal had been preferred by R3, challenging the placement of the petitioner above him in seniority. If at all such appeal had been filed by R3, the official respondents would definitely have brought the same to the notice of this Court.

13. In the light of the discussion as above, I am of the view that the proceedings dated 14.05.1993 seeking to revise the fixation fixed on 30.12.1978 and admittedly issued without affording any opportunity to the petitioner cannot be held to have revised proceeding dated 30.12.1978. Thus, the impugned order dated 24.10.2002 is set aside. Seniority fixed as on 30.12.1978 shall hold the field. It is made clear that while the petitioner shall be entitled to all consequential benefits by virtue of this order, status quo in regard to R3 shall not be disturbed in light of the direction in the judgment of the Hon'ble Supreme Court in the case of State of Punjab and others

v. Rafiq Masih (White Washer) and others (2015 4 SCC 334) to the effect that in the case of a superannuated employee in whose case payments have been made, there should be no recovery effected pursuant to superannuation. The relevant portion reads thus:-

> '18.It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
>
> (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.'

14. This writ petition is allowed. Let consequential benefits be paid to the petitioner within a period of six (6) weeks from today. No costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

vs

To
1. The Secretary to Government,
Government of Tamil Nadu,
Finance (T.&A.I.) Department,
Fort St. George,
Chennai - 600 009.

2. The Commissioner of Treasuries and
Accounts, Chennai-600 015.

+1CC to Government Pleader, Sr.No.43021

W.P. No.32088 of 2005

PL (CO)
K.RK. (23.09.2021)