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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.04.2022

Pronounced on : 09.06.2022

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.14636 of 2010

A.Suresh Kumar

... Petitioner

Vs.

- 1.The State of Tamil Nadu,
Rep. by its Secretary to Government,
Forest Department,
Secretariat,
Chennai-600 009.
- 2.The Principal Chief Conservator of Forest,
259, Anna Salai,
Chennai.
- 3.The Conservator of Forests,
Wild Life Western Region,
1711, Trichy Road,
Coimbatore-641045.
- 4.The conservator of Forest/ Field Director,
Annamalai Tiger Reserve,
Pollachi,
Coimbatore District.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus to call for the records on the file of the 2nd respondent in his proceedings No.NAB1/37364/2008 dated 20.09.2008 and quash the same and direct the respondents to promote the petitioner retrospectively for the post of Forester by transfer from the post of Assistant Draughtsman in the vacancy with effect from 1994 eligible for Assistant Draughtsman on par with his juniors with all monetary and service benefits.

For Petitioner : Mr.M.Vijayakumar

For Respondents : Mr.P.Anand Kumar
Government Advocate



ORDER

The writ petition is filed challenging the proceedings of the 2nd respondent dated 20.09.2008, rejecting the petitioner's request for appointment as Forester and further to direct the respondents to promote the petitioner retrospectively to the post of Forester by transfer from the post of Assistant Draughtsman in the vacancy with effect from 1994 on par with his juniors with all monetary and service benefits.

2. The petitioner was working as Assistant Draughtsman in the office of the 3rd respondent. The petitioner passed Diploma Civil and Rural Engineering and also participated in walk test for selection as Forester in May 1993. The petitioner walked more than 25 k.ms. in 3 hours and 30 minutes and was declared as selected in the test. It is submitted that the petitioner thus possessed necessary qualifications for appointment to the post of Forester and was ranked as No.II in Seniority among the Assistant Draughtsman in the State list.

3. Before proceeding further, it may be relevant to refer to the legislative history relating to appointment to the post of forester. It appears that appointment to the post of Foresters was originally governed by Rule 5 of the Tamil Nadu Ministerial Services Forest Rules. It provided that appointment to the post of Forester shall be made from direct recruitment and recruitment by transfer from the members of the Tamil Nadu Ministerial Service. There has been a number of amendments made from time to time reference is made to those, relevant for the purpose of the present writ petition.

a) From 1980 onwards, the promotion to the post of Forester was also drawn from Assistant Draughtsman along with Tamil Nadu Ministerial Service.

b) G.O.Ms.No.16, dated 03.08.1988 provided that the appointment to the post of Forester shall be made in the order of rotation in every cycle of 20 vacancies as specified under Rule 2 for the Tamil Nadu Forest Subordinate Service. Importantly, the percentage which was fixed for the appointment to the post of Forester was as under:

1.Direct recruitment	35%
2.Promotion from Forest Guards	50%
3.Transfer from Tamil Nadu Ministerial Service	15%
	- - - - -
Total	100%
	- - - - -



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However, to ensure more equitable promotional opportunities and for getting suitable and adequate number of candidates to be filled up in the posts, the percentage prescribed in Rule 2 of the Special Rules for the Tamil Nadu Forest Subordinate Service was proposed and re-fixed as under:

1.Direct recruitment	40%
2.Promotion from Forest Guards	55%
3.Transfer from Tamil Nadu Ministerial Service	05%
	- - - - -
Total	100%
	- - - - -

The above proposals was accepted by the Government consequent to the above amendment in a cycle of 20 vacancies, 5% were to be filled in by Tamil Nadu Ministerial Service and Assistant Draughtsman.

c) G.O.Ms.No. 204 Environment and Forest (FR II) Department, dated 23.08.1994 provided for mechanism by which 5% vacancies allotted to Ministerial Services/ Assistant Draughtsman was to be filled. It provided that 1% out of 5% shall be reserved/ filled up by Assistant Draughtsman and the remaining 4% was to be filled up from the Ministerial Services. The relevant portion of the said G.O. reads as follows :

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Tamil Nadu hereby makes the following amendment to the Special Rules for the Tamil Nadu Forest Subordinate Service (Section 12 of Part III-B in Volume III of the Tamil Nadu Services Manual, 1970):-

2. The amendment hereby made shall be deemed to have come into force on the 23rd August 1994.

AMENDMENT

In the said Special Rules, in rule 2, in Sub-rule(a), in the Table, against the entries "Foresters" in Column(1) in the corresponding entries in Column (2), for the proviso the following proviso shall be substituted, namely:-

"Provided that if the unit of selection for appointment for the purpose of this rule be twenty, 19 shall be reserved for promotion of Forest Guards and 1 shall be reserved for appointment by recruitment by transfer from the members of the Tamil Nadu Ministerial service in Forest Department and for promotion of Assistant Draughtsman, selection for



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appointment under this rule shall be made in the order of rotation specified below:-

100 vacancies of Foresters post will be divided into 5 cycles with a number of 20 in each cycle. Every 13th vacancy in the cycle of 1 to 4 (i.e. 13, 33, 53 and 73) shall be filled up from the members of the Tamil Nadu Ministerial Service and the 13th vacancy in the 5th cycle (i.e. 93) shall be filled up from Assistant Draughtsman.

If qualified and suitable members of the Tamil Nadu Ministerial Service in the Forest Department is not available for appointment in the turn allotted for it in the cycle, the turn shall lapse and the vacancy shall be filled by the appointment of direct recruitment.

If qualified and suitable Forest Guard is not available for appointment as Forester in the turn allotted for the Forest Guards in the cycle, the turn shall lapse and the vacancy shall be filled in by the appointment of direct recruitment.

4. The above G.O also provided that necessary amendments to the Special Rules for the Tamil Nadu Forest Subordinate Services would be issued separately. It may also be relevant to note that the Government vide G.O.Ms.No.172, dated 08.03.1991 introduced one unit system for the promotion of Forest Guard as Forester and for the appointment of members of Tamil Nadu Ministerial Service and Assistant Draughtsman by transfer to the post of Forester from the above G.O and Rules. It would be evident that a combined list was prepared and out of cycle of every 100 vacancies 5 were to be appointed from Tamil Nadu Ministerial Service/ Assistant Draughtsman and out of that 5 one viz., 93rd vacancy out of 100 were to be filled up from the Assistant Draughtsman.

5. Whiles, a combined list was issued by the 1st respondent vide proceedings No.B1/5530/93, dated 10.01.1994 and Additional list was issued by the 2nd respondent in B1/5530/93, dated 08.09.1994. In both the above lists the first 100 vacancies did not have any Assistant Draughtsman being appointed to the post of Forester. Aggrieved by the non-inclusion of the Assistant Draughtsman, the petitioner submitted his representation to appoint him as Forester by transfer. Since no orders were passed, an original application was filed before the Tamil Nadu Administrative Tribunal in O.A. No. 7715 of 1995, which was transferred to the High Court and numbered as W.P.No.20095 of 1996. The High Court by its order dated 12.06.2008 directed the respondents to consider the petitioner's representation dated 23.12.1994. Pursuant to the above direction by this Court the 2nd respondent had passed the impugned order



wherein after admitting that the petitioner's name was recommended by the Regional Committee as however proceeded to state that the petitioner's name was not included in the State list as a combined reservation has been followed in respect of the panel year 1993-94. Moreover, even though two lists have been published, the selection process has been completed much earlier to the date of issue of the above said Government Order.

6. Secondly, G.O.Ms.No.204, dated 23.08.1994 was incorporated by amendment to the Tamil Nadu Forest Subordinate Rules only on 06.06.2002 vide G.O.Ms.No.112 Environmental and Forest Department, dated 06.06.2002. In view of the above reasons, the 2nd respondent rejected the request of the petitioner to be appointed to the post of Forester vide impugned order dated 20.09.2008.

7. Aggrieved by the same, the petitioner filed this writ petition inter alia challenging the same on the following grounds:

a) Order dated 20.09.2008 is contrary to the G.O.Ms.No.204 dated 23.08.1994 inasmuch as 1% reservation exclusively for Assistant Draughtsman has not been followed.

b) Petitioner's name having been recommended prior to the formation of the panel for the year 1993-94 for the post of Forester by the Regional committee, non-inclusion of the petitioner's name without assigning any reason is arbitrary.

8. To the contrary, it was submitted by the learned counsel for the respondents that though two lists have been published the selection process was completed prior to the issuance of G.O.Ms.No.204 and thus the name of the petitioner was not included. It was his further submission that though G.O.Ms.No.204 was issued on 23.08.1994 the Tamil Nadu Forest Subordinate Service Rules stood amended only on 06.06.2002 vide G.O.Ms.No.112 Environment and Forest Department, dated 06.06.2002. It is also the submission of the respondent that the petitioner has filed the transfer petition two years after his request to the appointment as Forester was rejected and thus hit by latches.

9. Heard the learned counsel on both sides and perused the entire materials available on record.

10. This Court is of the view that the impugned order suffers from the following infirmities:

a) The impugned order proceeds on the basis that though there is an executive instruction the same would not be complied/ followed unless and until there is a consequential amendment to the rule. The above submission appears to be in conflict with the settled position that appointment/ promotion shall be made either in terms of the rules or in terms of



instructions which are issued by the Government in exercise of its executive power under Article 162 of the Constitution of India. In this regard it may be relevant to refer to the following judgments:

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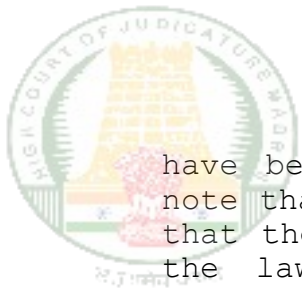
Paluru Ramkrishnaiah v. Union of India, (1989) 2 SCC 541 : 1989 SCC (L&S) 375 : (1989) 10 ATC 378 at page 550

"It is well settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by a law made by the appropriate legislature or by rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued under Article 73 of the Constitution of India in the case of Civil Services under the Union of India and under Article 162 of the Constitution of India in the case of Civil Services under the State Governments."

11. There is no doubt that a Rule would override executive instruction in the event of a conflict. However, in the absence of a conflict the instruction may also be given effect as long as it does not supplant but supplements the Rule. In the present case, it is difficult to see how G.O.Ms.No.204, supplants the Rule as the Assistant Draughtsman is eligible in terms of the Rule. It appears that G.O.Ms.No.204 does not in any manner conflict with or whittle down the Rule. To the contrary, it provides for a mechanism and means to give effect to the Rule by providing that the 93rd place in a cycle of 100 shall be filled from Assistant Draughtsman.

12. Secondly, there appears to be merit in the submissions of the petitioner that the entire 5% had been allotted to the members of the Tamil Nadu Ministerial Service in both the above lists, despite the fact that Assistant Draughtsman were also eligible to be appointed, even assuming the reservation of 1% for Assistant Draughtsman is effective only from 06.06.2002, when the Rules stood amended. The counter is silent as to the reason as to why not a single Assistant Draughtsman finds place in the list of appointees/ promotees to the post of Forester.

13. Thirdly, the submission that both the lists were drawn prior to G.O.Ms.No.204 appears to be factually incorrect inasmuch as the second list/ Additional list dated 08.09.1994 whereas G.O.Ms.No.204, dated 23.08.1994. Having found that the G.O.Ms.No.204 would be binding and ought to be given effect in the matter of appointment to the post of Forester from the Tamil Nadu Ministerial Service/ Assistant Draughtsman, the Additional List having been issued subsequent to G.O.Ms.No.204 ought to



have been issued in compliance thereof. It may be relevant to note that the Supreme Court in the case of Y.V.Rangaiah had held that the transfer of promotion ought to be made on the basis of the law or the position which obtained when the vacancies occurred. It is not clear as to when the vacancies occurred, pursuant to which the Additional List was prepared. In view of the same G.O.Ms.No.204 being prior to the second list which was prepared, the benefit of the above G.O would be available if the vacancy arose prior to G.O.Ms.No.204 dated 23.08.1994 which is not the case of the respondents.

14. The case of the respondent on the ground of laches cannot be justified on the facts of the present case inasmuch as the petitioner has made a representation as early as on 23.12.1994 and again after the impugned order came to be passed, pursuant to the orders of this Court the petitioner had filed the writ petition in W.P.No.20095 of 1996, within a period of one and half years thereon. While it is settled that any challenge to promotion ought to be made at the earliest, it is equally true that the Courts would not shut the doors for an aggrieved party to approach the Court within a reasonable time. The Supreme Court in the case of Shiba Shankar Mohapatra v. State of Orissa held that though what would constitute reasonable time may depend on the facts of each case, however suggested normally 3 to 4 years may possibly be considered as a reasonable time for challenging the seniority. In view of the same the submissions of the respondents on the basis of laches may not be justifiable. It may be relevant to refer to the following observations of the Supreme Court in the above judgments.

Shiba Shankar Mohapatra v. State of Orissa,
(2010) 12 SCC 471 : (2011) 1 SCC (L&S) 229 : 2009 SCC
OnLine SC 1801 at page 483

30. Thus, in view of the above, the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained. In K.R. Mudgal, this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation.

Kuldip Chand v. Union of India, (1995) 5 SCC
680 : 1995 SCC (L&S) 1318 : (1995) 31 ATC 435 at page
681



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4. It is next contended by Mr M.M. Kashyap, learned counsel for the appellant, that Ashok Kumar disputed the correctness of the seniority list made on 23-12-1982 in his representations dated 10-1-1983 and 1-8-1983 which were duly considered and rejected. He allowed it to become final as he did not challenge the same till post of accountant became vacant. When it was rejected, he filed the writ petition in the High Court. There is a considerable delay in claiming his seniority over the appellant. It is true that the seniority list was prepared as early as on 23-12-1982 but no vacancy had arisen thereafter and, therefore, the mere rejection of the claim for seniority does not disentitle him to claim his seniority over the appellant for consideration by the respondent-Union.

5. When the aforesaid facts are taken into consideration, it would be obvious that the preparation of seniority list per se was illegal. Therefore, the mere fact that he did not challenge the seniority list, which was illegally prepared, till he was aggrieved for non-consideration of the claim to the post of accountant, his legitimate right to be considered cannot be denied. Under these circumstances, the delay is of no consequence for considering the claims of Ashok Kumar for the post of accountant.

(emphasis supplied)

15. In these circumstances, it is directed that the petitioner's case for promotion be considered in terms of G.O.Ms.No.204, if the vacancy had arisen after the above G.O.Ms.No.204 was issued on 23.08.1994. If the petitioner is found eligible for promotion, since the petitioner would have attained superannuation notional promotion shall be granted to the petitioner along with consequential enhancement of terminal benefits but not arrears of salary on that score.

16. With the above direction, this writ petition stands disposed of. No costs.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

Psa



To

1.The Secretary to Government,
Forest Department,
Secretariat,
Chennai-600 009.

2.The Principal Chief Conservator of Forest,
259, Anna Salai,
Chennai.

3.The Conservator of Forests,
Wild Life Western Region,
1711, Trichy Road,
Coimbatore-641045.

4.The conservator of Forest/ Field Director,
Annamalai Tiger Reserve,
Pollachi,
Coimbatore District.

+1cc to Mr.M.Vijayakumar, Advocate, S.R.No.34089

+1cc to the Government Pleader, S.R.No.22683, 22812 & 35517

+1cc to the Special Government Pleader(Forest), S.R.No.22867,
34133.

W.P. No.14636 of 2010

PL(CO)
SB(06/07/2022)