

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.04.2022

PRONOUNCED ON : 30.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.NO.7648 OF 2010

Dayanithi

... Petitioner

.Vs.

1. The Tamil Nadu State Transport
Corporation (Villupuram) Ltd.
Vellore Region,
Rep. by its General Manager,
Rangapuram, Vellore - 600 009.

2. The General Manager,
The Tamil Nadu State Transport
Corporation (Villupuram) Ltd.,
Thiruvannamalai Region,
Thiruvannamalai.

... Respondents

PRAYER:- Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records pertaining to the order dated 26.03.2008 issued by the 1st respondent in Memo No.13539/Pa.Pi.2/TNSTC (Villupuram)/Vellore/2007 quash the same and consequently direct the respondents to promote the Petitioner as Junior Engineer on par with his Junior Thiru.Kotti and from the date on which he was given promotion with all monetary and consequential benefits together with interest.

For Petitioner : Mr.V.Ajay Khose

For Respondents : Mr.G.Saravana Kumar

ORDER

The writ petition is filed challenging the order dated 26.03.2008 of the first respondent whereby the petitioner's request for promotion to the post of Junior Engineer was rejected. The writ petition is filed primarily on the premise

that the impugned order is made in gross disregard to the direction of the Labour Tribunal in I.D. No.78 of 2004 dated 14.02.2007.

2. Before proceeding to examine the contentions, it may be relevant to set out briefly the history of this litigation leading up to the present writ petition:-

(a) The petitioner joined the services of Thanthai Periyar Transport Corporation which was renamed as 'Tamil Nadu State Transport Corporation (Villupuram) Ltd' (for the sake of brevity 'TNSCL').., as an electrical helper in 1979.

(b) The petitioner was absorbed into the services of the new Corporation viz., TNSCL, Villupuram the 1st Respondent herein as a Junior Tradesman with continuity of service on the same conditions of service.

(c) While the petitioner was working at Krishna Nagar Depot of the 1st Respondent, he was dismissed from services by an order dated 30.07.1984. There was an I.D.No.82 of 1982 pending on the file of the Industrial Tribunal, Chennai regarding bonus for the year 1981-82, in which the petitioner was also an interested workman.

(d) The petitioner in the meanwhile completed Diploma Course in Electrical Engineering in April 1985 with First Class and secured 78.1%. In terms of the Rules governing promotion those who were working as Junior Tradesman/Tradesman in the Corporation and who have completed diploma were eligible for promotion to the post of Junior Engineer in the 1st Respondent Corporation.

(e) The 1st Respondent filed an Approval Petition No.209 of 1984 seeking approval for the the dismissal of the petitioner which was rejected by the Tribunal holding that the charges levelled against the petitioner was not proved. Thereafter a settlement was entered into between the petitioner and the 1st Respondent under Section 18 (1) of the 'Industrial Disputes Act, 1947' (for the sake of brevity 'I.D.Act, 1947) on 18.10.1985, wherein it was agreed that the petitioner would be reinstated with continuity of service but without backwages.

(f) The petitioner made an application on 18.12.1985 to the 1st Respondent requesting promotion to the post of Junior Engineer. This was followed by another application, however no orders were passed on either of the two applications submitted by the petitioner.

(g) While so the 1st Respondent issued a Circular dated 20.11.1986 stating that representation could be made to the

management in case they had grievance and the same would be redressed. Pursuant thereto the petitioner submitted his applications requesting grant of promotion to the post of Junior Engineer. The petitioner was called for an interview on 14.11.1987.

(h) By an order dated 28.11.1987, the petitioner's request for promotion to the post of Junior Engineer was rejected on the ground that the petitioner's job knowledge, initiative skills and supervisory abilities were found to be inadequate during the interview conducted on 14.11.1987.

(i) It may be relevant to note that eight workmen were promoted to the post of Junior Engineer by an order dated 31.03.1987 out of which three had completed Diploma only in 1986 i.e., after the petitioner had completed Diploma course. Further on the very same day i.e on 28.11.1987, when the petitioner's claim for promotion was rejected it is submitted by the petitioner that there was another order which granted promotion to three other workmen viz., Panneerselvam, Kotti and Nithyanandham out of which two were Junior to the petitioner. Importantly, Kotti was not even called for interview and had completed the diploma only in 1987.

(j) Aggrieved, the petitioner submitted a representation to the Respondent. In response vide communication dated 20.03.1989 the Respondent apart from the reasons set out in order dated 28.11.1987, set out two other reasons viz., the petitioner was dismissed from services on the grounds of misconduct of theft and was reinstated only on humanitarian grounds. Secondly the Junior Engineers working in the Corporation were in excess than the required number when the order dated 28.11.1987 came to be passed.

(k) The petitioner submitted that the rejection was illegal and the reasons for rejection were erroneous and non-existent. It was also clarified that the charge of theft was rejected by Industrial Tribunal and the reinstatement was not on humanitarian grounds. With regard to the second reason viz., excess number of engineers being already employed, the petitioner submitted that a number of appointments were made to the post of Junior Engineer vide orders dated 07.02.1989 and 12.02.1989 which is indicative that the above reason were manufactured/imaginary and does not reflect the real state of affairs.

(l) The petitioner submitted yet another application on 07.07.1989 and the same was responded by the Respondent vide communication dated 16.11.89 by reiterating that the number of Junior Engineers were already in excess.

(m) The petitioner explained as to how the reason of excess number of engineers were contrary and was far from truth as would be evident from the series of appointments made to the post of Junior Engineer.

3. Aggrieved by the denial of promotion to the post of Junior Engineer while his juniors were being promoted in an arbitrary and illegal manner, the petitioner approached Labour Court in I.D.No.78 of 2004 to decide the legality of the petitioner's claim for the promotion to the post of Junior Engineer and the Labour Court vide order dated 14.02.2007 has directed the Respondent to consider the case of the petitioner for promotion afresh as Junior Engineer on par with Thiru Kotti who was promoted as Junior Engineer from 28.11.1987 on the same criteria on which the juniors were promoted and if found fit for promotion to grant the petitioner all consequential benefits in the manner known to law. The following findings of the Tribunal are relevant:-

(a) With reference to the allegation that the petitioner had committed theft and his reinstatement was only on humanitarian grounds, the Tribunal referred to the earlier round of litigation in A.P.No.209 of 1984, wherein the Industrial Tribunal had held that it is impossible to accept the delinquency i.e., the petitioner herein has committed theft of bulbs. The relevant portion is extracted below:-

"It is impossible to accept that in law, this delinquent has committed theft of the bulbs, if I may repeat the initial possession of the bulbe was obtained by him by giving a valid requisition and the purpose of obtaining bulbe was also valid. The non-production of the requisition book and log book called for by the delinquent will completely strengthen the case of the delinquent. Therefore, the findings of the Enquiry Officer that the delinquent had committed theft of bulbs has got to be rejected as invalid and illegal. On this grounds, the approval has got to be refused."

(b) The reason that the junior engineer were in excess was also rejected by the Tribunal as being a ruse to deny the petitioner's promotion the following extract is relevant in this regard:-

"It is the contention of the Petitioner's counsel that if really the Junior engineers are in excess, beyond the ratio fixed by the Government then there would not be any necessity or reason for appointing two persons as junior engineers as per

Ex.W12 proceedings dated 07.02.1989 of the respondent/management and similarly there was no rhyme or reason to appoint five more persons as junior engineer as per proceedings Ex.W13 dt.12.02.1989 of the respondent. There is considerable force in the said contention of the petitioner's counsel and therefore the reason assigned in Ex.W15 reply dated 25.03.1989 of the respondent that the junior engineers are in excess of ratio fixed by the Government is only a ruse, in the considered opinion of this Tribunal."

(c) It was found by the Tribunal that the petitioner was not being promoted on account of legal malafide and victimisation and malice in law. The following extract is relevant in this regard:-

"The workman Thiru V. Dayanidhi was not given promotion on account of legal malafide and victimisation and malice in law and effectual victimisation are quite obvious in the case on hand before us. Suffice it to state that the evidence of WW1 workman V.Dayanidhi is unassailable and the same is not controverted."

On the basis of the above finding a direction was issued by the Tribunal that the petitioner's case for promotion should be considered afresh on par and on the same criteria on which the juniors were promoted. If the petitioner is found fit for promotion to grant him the same and extend all consequential benefits. The following portion of the order which makes the above position clear is extracted below:-

"to consider the case of WW1 Thiru V. Dayanidhi for promotion afresh as Junior Engineer on par with Thiru Kotti who was promoted as Junior Engineer from 28.11.1987 on the same criteria on which the juniors were promoted and if found fit from promotion, to grant him all the consequential benefits in the manner known to law."

Pursuant thereto the petitioner was called for an interview on 22.02.2008. The petitioner attended the interview and made a representation to the Managing Director on 13.03.2008. On 26.03.2008 the impugned order was passed rejecting the petitioner's claim for promotion to the post of Junior Engineer on the premise that the interview committee had given a report that the petitioner do not possess the "performance" required for promotion to the post of Junior Engineer.

4. Thereafter, the petitioner applied under the RTI to secure the minutes of the interview meeting, raising the following queries:-

(i). The names of the members of the interview committee who conducted the interview for me on 05.03.2008 and the appointment order issued to them.

(ii). The minutes or register in which the questions put by the members during interview and the answers given by me to those questions.

(iii). The document containing the details of test and assessment of my performance during the interview other than the question put to me regarding the auto electrical work which I have been doing and

(iv). The report given by the interview committee regarding my performance.

4.1 With regard to the third question the 1st respondent informed they do not have any record, with regard to the test and assessment of the petitioner's performance, with regard to the report of the interview committee a Typed Copy of the report was furnished.

4.2 Before proceeding further it may be relevant to note that while the impugned order only states that the reason for rejecting the petitioner's request for promotion was that he did not possess the requisite performance, to the contrary it was submitted by the 1st respondent in its counter that the reasons for not promoting the petitioner was that the petitioner was involved in a theft case and the petitioner was reinstated with continuity of service without back wages based on a settlement under Section 18 (1) of the I.D.Act, 1947. That the petitioner was undergoing punishment for various charges and was suspended and increments have also been postponed on a number of occasions. That the petitioners past punishment and conduct weighed in the mind of the authorities while rejecting the petitioner's request for promotion as Junior Engineer.

5. It is well settled that counter cannot improve public orders. Validity of a public order must be tested on the basis of what is stated in the order and not on the basis of the reasons set out in the counter for otherwise an order invalid initially/originally would by virtue of the reasons set out in the counter become valid, which has been consistently held to be impermissible. In this regard, it may be relevant to refer to

the decision of the Hon'ble Supreme Court in Mohinder Singh Gill and another vs. the Chief Election Commissioner, New Delhi and others reported in AIR 1978 SC 851.

6. Now bearing the above aspect in mind and if one contrasts the reasons set out in the impugned order with those set out in the counter, it would be evident that the reasons in the counter were wholly different from that set out in the impugned order. Further the averment of theft by the petitioner and his reinstatement as being based on the settlement under Section 18 (1) of the I.D.Act, 1947 is only meant to cause prejudice for it is clearly contrary to the order of the Tribunal, wherein it has been recorded that the allegation of theft has not been proved. The above order of the Tribunal remaining unchallenged has attained finality and it is thus may be not permissible to the Respondent to plead the contrary. Further the various charges of misconduct which is set out in Para 5 of the counter are completely vague without any details, there is no details furnished during the hearing as well. It is not clear whether those charges were prior to the date of the petitioner's claim of being entitled to promotion or subsequent. In any view it may not be permissible to make good an order by raising fresh grounds in the counter. The submissions in the counter filed on 27.04.2022 i.e., 12 years after the filing of Writ Petition and 7 to 10 years after the petitioner had attained superannuation being vague appears to be an afterthought especially when one examines it in the background of the finding of malice by the Tribunal which remains unchallenged.

7. In normal circumstances, this Court would have remitted back the matter for fresh consideration, however, taking into account the following factors.

(i) The petitioner has attained superannuation more than seven to ten years back.

(ii) The Tribunal had found that the denial of the petitioner's promotion was vitiated by malice.

(iii) Interview appears to be a mere formality.

(iv) Rejection appears to be predetermined.

(v) Counter set outs reasons which are completely different from the reasons set out in the impugned order for denying the petitioner's promotion and thus cannot be relied upon as held in Mohinder Singh Gill and another vs. the Chief Election Commissioner, New Delhi and others reported in AIR 1978 SC 851.

(vi) A number of juniors to the petitioners has been promoted.

8. This Court is of the view that the ends of justice would be met if the petitioner is granted notional promotion with continuity of service only for the purpose of terminal benefits without back wages from the date on which his juniors were promoted.

9. This writ petition stands disposed with the above directions made. Connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

nst/smn

To

1. The General Manager,
The Tamil Nadu State Transport
Corporation (Villupuram) Ltd.,
Vellore Region, Rangapuram,
Vellore - 600 009.
2. The General Manager,
The Tamil Nadu State Transport
Corporation (Villupuram) Ltd.,
Thiruvannamalai Region,
Thiruvannamalai.

+1cc to Mr.V.Ajay Khose, Advocate, S.R.No.41658

W.P.NO.7648 OF 2010 &
M.P.NO.1 OF 2010

CA(CO)
PBS/13/07/2022