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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3504 OF 2015

Ramchand Naraindas Menghani .. Petitioner

Versus

Union of India & Anr. .. Respondents

Dr. Abhinav Chandrachud a/w Ms. Unnati Ghia, Mr. Vishal P. Shirke and Mr. Aditya P. Shire for petitioner.
Mr. Suresh Kumar for respondents.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

DATE: 22nd MARCH, 2024

P.C.:

1. Heard the learned counsel representing the respective parties and perused the records available before us on this writ petition.
2. By instituting these proceedings under Article 226 of the Constitution, the petitioner assails the validity of an order dated 24th November, 2014 passed by the Central Administrative Tribunal, Mumbai Bench, Mumbai (hereinafter referred to as "the Tribunal"), whereby the Original Application bearing No. 169 of 2013 filed by the petitioner has been dismissed on the ground that the prayer made in the said Original Application was barred by principle of

constructive *res-judicata* as the said prayer, though was earlier made by the petitioner while instituting Original Application No. 747 of 1996 but was not granted by the Tribunal while disposing of the said Original Application by means of an order dated 1st September, 2009.

3. Before delving into the respective submissions made by the learned counsel for the parties, certain facts are necessary to be noted for appropriate adjudication of the issues involved in this writ petition.

4. The petitioner was initially appointed in the Indian Railways in the year 1961 and was promoted in the year 1966 to the post of Executive Engineer. While working in the Central Railways at Mumbai, a charge-sheet was issued against the petitioner on 3rd October, 1980 and departmental proceedings were, thus, conducted against him, which resulted in an order of penalty of dismissal from service passed against the petitioner on 19th July, 1985.

5. The said order of dismissal from service, dated 19th July, 1985, was challenged by the petitioner before the Tribunal by instituting an Original Application which was allowed by the Tribunal vide order dated 8th August, 1991. The Tribunal while allowing the said Original Application set aside the order of

dismissal dated 19th July, 1985, however, permitted the respondents to continue with the departmental proceedings from the stage the report of the inquiry officer was furnished to the petitioner. During pendency of the departmental proceedings, pursuant to the order passed by the Tribunal dated 8th August, 1991, the petitioner attained the age of superannuation and accordingly retired on 31st January, 1992. The department proceedings initiated, pursuant to the order of the Tribunal dated 8th August, 1991, resulted in passing of an order dated 14th July, 1995 inflicting major penalty of withholding 100% pension upon the petitioner. The said order dated 14th July, 1995 was subjected to challenge by the petitioner and after various rounds of litigation, the Tribunal by means of an order dated 1st September, 2009 in Original Application No. 747 of 1996 set aside the order of penalty of withholding 100% pension of the petitioner and issued certain directions. The order dated 1st September, 2009 was challenged by the respondents by instituting Writ Petition No. 10899 of 2009, which was dismissed by this Court by means of an order dated 20th January, 2010, whereby the order passed by the Tribunal, dated 1st September, 2009, was affirmed.

6. It is stated on behalf of the petitioners that since the order dated 1st September, 2009 was not being complied with by the respondents in its entirety, a Contempt Petition bearing No. 80 of 2011 was instituted, which, however, was disposed of by the Tribunal by means of an order dated 25th January, 2012 by noticing the submissions made on behalf of the respondents in the said contempt petition that speaking order in regard to the provisions contained in Fundamental Rule 54-B (1) & (3) has not been passed. The petitioner had clearly raised the issue not only in relation to decision in terms of Fundamental Rule 54-B (1) & (3) but also in relation to his claim for promotion as well, which he would have got but for the suspension and the departmental proceedings. The Tribunal, however, disposed of the contempt petition in view of the submissions made by the respondents that a suitable order would be passed as directed by the Tribunal without any further delay.

7. Once the said Contempt Petition was disposed of, an order was passed by the respondents on 23rd March, 2012 treating the period of suspension of the petitioner to be period on duty, however, nothing was said in the said order dated 23rd March, 2012 about the promotion/notional promotion to

which the petitioner was entitled to, once the order of penalty was set aside by the Tribunal. The petitioner is said to have made several representations in this regard to the authorities of the respondents but since no heed was paid to the said prayer made by the petitioner, he instituted Original Application No. 169 of 2013 before the Tribunal which, however, has been dismissed by means of the impugned order dated 24th November, 2014. It is this order passed by the Tribunal which is the subject matter of challenge before us in this writ petition.

8. Drawing our attention to the reasoning given by the Tribunal while passing the impugned order dated 24th November, 2014, learned counsel for the petitioner has stated that the only reason indicated in the impugned order for not acceding to the prayer made by the petitioner for grant of the notional promotion is that such a prayer was made earlier, however, it was not granted by the Tribunal while deciding the earlier Original Application by means of a judgment and order dated 1st September, 2009, and thus the prayer for notional promotion is barred by *res-judicata*. It is the submission of the learned counsel for the petitioner that the Tribunal while allowing the earlier Original Application, namely, Original

Application No. 747 of 1996 by means of the order dated 1st September, 2009, granted the relief to the petitioner not only by quashing the order of penalty dated 14th July, 1995 but also by directing the respondents to pass appropriate orders under the Fundamental Rule 54-B (1) & (3) and further declare that the petitioner shall be entitled to commensurate retirement benefits of pension etc.

9. Thus, in view of the said directions issued by the Tribunal by means of an order dated 1st September, 2009, it has been argued by the learned counsel for the petitioner that the direction contained in the said order passed by the Tribunal is not confined to quashing of the order of penalty but also extends to passing of an order in terms of Fundamental Rule 54-B (1) & (3) and appropriate orders for decision in this regard to commensurate retirement benefits of pension etc. Emphasis has been laid on the occurrence of the word "etc." in the directions contained in para 13 of the judgment and order passed on 1st September, 2009 and has thus been argued that admittedly during the pendency of the departmental proceedings petitioner was considered for promotion, however, on account of pendency of the departmental proceedings, the recommendation of the

Departmental Promotion Committee was kept in a sealed cover and, therefore, once the petitioner was exonerated by the Tribunal, it was incumbent upon the respondents to have opened the sealed cover and acted upon the recommendations.

10. He has however stated that if the petitioner was entitled for promotion to higher posts as well, as a consequence of setting aside of the order of penalty dated 14th July, 1995, the respondents were under obligation to consider the said promotion and if the petitioner would have succeeded, he would have been entitled to grant of notional promotion and thereafter his pension would have been revised accordingly. It is, thus, submitted by the learned counsel for the petitioner that the directions contained in the order passed by the Tribunal dated 1st September, 2009 was not confined to payment of retirement benefits of pension alone. His submission is that the direction would clearly include of other service related benefits for the reasons that the direction given by the Tribunal in the order dated 1st September, 2009 is a consequential direction, that is to say, said directions are consequent to setting aside of the order of penalty dated 14th July, 1995.

11. Mr. Suresh Kumar, learned counsel representing the respondents has, however, submitted that it is not in dispute that in the earlier Original Application, prayer for consequential benefit of promotion was also made, however, the Tribunal while deciding the Original Application No. 747 of 1996 did not grant any specific direction to the respondents for consideration of the claim of the petitioner for promotion to next higher post and hence, once such a prayer was made, which was rejected by the Tribunal, it was not open to the petitioner to file another Original Application for the reason that the prayer made by the petitioner in the subsequent Original Application would be clearly barred by principle of constructive *res-judicata*. It is also stated that thus the reasoning given by the Tribunal in the impugned order does not require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

12. Having regard to the respective submissions made by the learned counsel for the parties and also having gone through the records available before us including the judgment and order dated 1st September, 2009, we are clearly of the opinion that the finding given by the Tribunal while passing impugned order that the prayer for grant of notional

promotion was barred by principle of constructive *res-judicata*, is not tenable.

13. The operative portion recorded in the judgment and order dated 1st September, 2009 passed in the Original Application No. 747 of 1996 reads as follows: -

"13. Considering the facts and circumstances of the case, the submissions made and the law applicable, we are of the considered opinion that the impugned order is vitiated by arbitrariness as discussed in the foregoing and therefore, is not sustainable. The impugned order of penalty dated 14.7.1995 is quashed and set aside. In the interest of justice, the respondents are directed to pass suitable order under FR 54-B (1) and while doing so the provisions of sub-rule (3) of FR 54-B may be kept in view. The applicant shall be entitled to commensurate retirement benefits of pension etc. in full. Effect shall be given to this order with three months of receipt of the order."

14. When we closely peruse the afore-quoted operative portion of the judgment of the Tribunal, dated 1st September, 2009, what we find is that the Tribunal had granted three prayers to the petitioner, namely, (i) the order of penalty dated 14th July, 1995 was quashed and set aside, (ii) the respondents were directed to pass suitable order under Fundamental Rule 54-B (1)(& (3) and (iii) the petitioner was declared to be entitled to commensurate retirement benefits of pension etc. in full.

15. We are, thus, concerned with the three prayers granted

by the Tribunal while passing the order dated 1st September, 2009. Apparently, the direction was issued for grant of retirement benefits of pension to the petitioner, however, we may note that the direction was issued as a consequence of quashing of order of penalty dated 14th July, 1995. Pension of an employee, admittedly, is fixed on the basis of last pay drawn at the time such an employee attains the age of superannuation or retires. It is not in dispute that during the pendency of the departmental proceedings the petitioner was considered for promotion to the next higher post, however, on account of pendency of the departmental proceedings, the recommendation of the Departmental Promotion Committee was kept in sealed cover. It is needless to say that once the departmental proceedings initiated against any employee results in his exoneration either on account of order passed by the disciplinary authority or statutory appellate authority or on account of order passed by any Court or Tribunal, the claim of promotion, which stood kept in a sealed cover, needs to be considered by the employer.

16. In the instant case, admittedly, the sealed cover procedure adopted in the matter of promotion of the petitioner was not taken to its logical end once the order of

penalty dated 14th July, 1995 was quashed. Had the petitioner been considered for promotion and he would have been successful, his retirement benefits such as pension would have been fixed accordingly. Thus, fixation of pension was dependent on consideration of the claim of the petitioner for promotion as well. We are, thus, of the opinion that once the Tribunal had directed that the petitioner shall be entitled to benefits of pension etc., that would mean that his pension shall be calculated taking into account all relevant factors including the petitioner's notional promotion if he was entitled to the same.

17. As a matter of fact, the petitioner in this case has unnecessarily been dragged to litigation by the respondents. The direction contained in paragraph 13 of the judgment of the Tribunal dated 1st September, 2009 is clear in itself. The Contempt Petition filed by the petitioner was disposed of in view of the statement made by the respondents for passing a speaking order and it is at that time itself that the question of consideration of the claim of the petitioner for notional promotion ought to have been considered by the respondents. We, thus, have no hesitation to conclude that the prayer for grant of promotion as a consequence of setting aside the

order of penalty was not refused by the Tribunal while passing the order dated 1st September, 2009 in Original Application No. 747 of 2009. In this view, the finding recorded by the Tribunal in the impugned order that the subsequent Original Application was barred by principle of res judicata, in our opinion, is not tenable.

18. For the reasons given above, the writ petition is allowed and the impugned order passed by the Tribunal, dated 24th November, 2014 in Original Application No. 169 of 2013 is hereby set aside. The respondents are directed to consider the claim of the petitioner for promotion to the next higher post(s) and if he is found eligible, entitled and suitable for promotion, he shall be granted notional promotion and accordingly his pension shall be re-fixed. He will, however, not be entitled to any difference of salary if he is granted notional promotion.

19. The aforesaid exercise under this order shall be completed by the respondents within a period of three months from the date a certified copy of this order is produced before the authority concerned.

20. We hope and expect that the authorities shall comply with this order within the time stipulated herein-above,

specially for the reasons that the petitioner is an old citizen aged about 91 years.

21. There shall be no order as to costs.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)

Digitally
signed by
PRAVIN
DASHARATH
PANDIT
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