

G. Muthuraj

v.

State of Tamil Nadu & Another

(Supreme Court Of India)

HON'BLE MR. JUSTICE G.S. SINGHVI HON'BLE MR. JUSTICE DIPAK MISRA

Civil Appeal No. 1115 Of 2013 (Special Leave Petition (Civil) No. 2118 Of 2011) With Civil Appeal No. 1116 Of 2013 (Special Leave Petition (Civil) No. 15190 Of 2011) | 08-02-2013

Leave granted.

The questions which arise for consideration in these appeals are whether as a sequel to quashing of the order of punishment by the learned Single Judge, the appellant became entitled to be promoted to the higher post from the date persons junior to him were promoted and whether the Division Bench of the High Court was justified in declaring that he shall not be entitled to claim notional promotion or promotional benefits.

The appellant joined service as Assistant Engineer in the Public Works Department of the Government of Tamil Nadu in 1982. A departmental inquiry was initiated against him vide Memo dated 6.7.1993 on the charge that he was responsible for shortage of material. At the conclusion of the inquiry, the Disciplinary Authority passed order dated 3.10.1994 and directed that Rs.1,52,941/- be recovered from the appellant. That order was set aside by the Tamil Nadu Administrative Tribunal (for short, 'the Tribunal') vide order dated 27.10.1994 but gave liberty to the competent authority to pass appropriate order in accordance with law. After about six years, the appellant was served with Memo dated 31.7.2000 for holding an inquiry on the same charge under Rule 17(b) of the Tamil Nadu Civil Services (Disciplinary and Appeal) Rules. After considering the inquiry report, the Disciplinary Authority passed order dated 11.6.2004 for recovery of Rs.1,52,941/- in 74 monthly installments and also imposed the penalty of stoppage of an increment for six months without cumulative effect.

During the pendency of the departmental proceedings, the State Government promoted 59 Assistant Engineers, including those who were junior to the appellant, to the posts of Executive Engineers.

The appellant was denied promotion on account of pendency of the departmental proceedings. The representation made by him for promotion to the next higher post was rejected vide letter dated 21.2.2005 on the ground that the punishment imposed vide order dated 11.6.2004 would remain operative till 31.7.2010, i.e., the date of his superannuation.

Writ Petition Nos.10600 and 10601 of 2005 filed by the appellant questioning the order of punishment and rejection of his representation were allowed by the learned Single Judge primarily on the ground of unexplained delay of about six years in re-initiation of the departmental inquiry.

The respondents did not challenge the annulment of communication dated 21.2.2005 vide which the appellant's representation for promotion to the post of Executive Engineer was rejected, but filed Writ Appeal No.1204/2010 and questioned that part of the order of the learned Single Judge whereby he quashed the order of punishment. The Division Bench of the High Court took cognizance of the fact that the second charge memo was issued after long delay of almost 7 years and on account of pendency of the departmental proceedings, the appellant had been deprived of promotion to the next higher post and dismissed the appeal subject to the rider that the appellant shall not be entitled to claim notional promotion or promotional benefits.

This is evinced from the operative portion of order dated 7.7.2010 of the Division Bench, which reads as under:

"Taking into consideration all these facts, we are of the view that the learned Single Judge rightly quashed the order of punishment in a departmental proceedings, which was concluded in about 15 years. The impugned order passed by the learned Single Judge, therefore, needs no interference by this court. However, it is made clear that since the order of punishment has been

quashed only on the ground of delay, the respondent shall not be entitled to claim any notional promotion or promotional benefits, save and except his claim of retiral benefits on attaining the age of superannuation. It is also made clear that if any part of the amount has already been recovered, no further amount shall be recovered from the respondent."

The appellant sought review of the aforesaid order by contending that once the Division Bench approved the declaration of invalidity granted by the learned Single Judge qua the order of punishment, there was no justification to deprive him of his legitimate right to be promoted to the higher post. The Division Bench referred to Order 41 Rule 33 of the Code of Civil Procedure, judgments of this Court in *Mahant Dhangir v. Madan Mohan* (1987) Supp. SCC 528, *K. Muthuswami Gounder v. N. Palaniappa Gounder* (1998) 7 SCC 327 and *State of Punjab v. Bakshish Singh* (1998) 8 SCC 222 and held that the direction contained in order dated 7.7.2010 does not suffer from any error apparent warranting its review.

Ms. Anitha Shenoy, learned counsel for the appellant argued that with the quashing of the order of punishment, the appellant became entitled to be considered for promotion with effect from the date persons junior to him were promoted as Executive Engineers and the Division Bench of the High Court was not at all justified in declaring that he shall not be entitled to notional promotion or promotional benefits. Learned counsel emphasized that the appellant had been denied promotion to the post of Executive Engineer solely on the ground of pendency of the departmental proceedings and argued that once those proceedings and the final order were declared illegal and quashed, there remains no impediment in the appellant's promotion with effect from the date his junior(s) were promoted because his service record is otherwise unblemished.

Shri S.Guru Krishna Kumar supported the direction given by the Division Bench of the High Court and argued that the appellant is not entitled to be promoted to the post of Executive Engineer because the departmental proceedings were quashed only on the ground of delay and not on merits. He further argued that even if the direction given by the Division Bench for non-consideration of the appellant's case for notional promotion is found to be legally untenable, this Court may not direct his promotion to the higher post because the criteria for promotion is seniority-cum-merit. He argued that after

exoneration in the departmental proceedings or acquittal in a criminal case the concerned government servant can at the best seek consideration of his case for promotion but the Court cannot issue direction for promotion of such an employee. In support of this argument, Shri S.Guru Krishna Kumar relied upon the judgment of this Court in *State of Mysore v. C.R.Sheshadri* (1974) 4 SCC 308. He, however, did not controvert the statement of Ms. Shenoy that the service record of the appellant is otherwise unblemished.

We have considered the respective submissions and scrutinized the record. It is not in dispute that the departmental proceedings were re-initiated against the appellant after more than 6 years of the Tribunal's order vide which liberty was given to the respondents to pass fresh order in accordance with law. Therefore, the learned Single Judge of the High Court rightly quashed the order of punishment passed on 11.6.2004. The respondents did file appeal but could not convince the Division Bench to overturn the order of the learned Single Judge.

The pleadings of the parties show that the appellant had been denied promotion to the post of Executive Engineer only on account of pendency of the departmental proceedings. Indeed, it is neither the pleaded case of the respondents nor any material has been placed before this Court to show that he was passed over/superseded on account of adverse remarks recorded in the annual confidential records or any other adversity in the service record. Therefore, once the order of punishment was quashed by the learned Single Judge, the appellant automatically became entitled to be considered for promotion with effect from the date persons junior to him were promoted to the post of Executive Engineer. However, that right of the appellant has been stultified by the direction contained in the impugned judgment which, in our view, is legally unsustainable because the Division Bench has not assigned any reason for directing that the appellant shall not be entitled to notional promotion or promotional benefits.

In *Sulekh Chand and Salek Chand v. Commissioner of Police* 1994 Supp (3) 674, this Court held that after his acquittal in the criminal case filed under the Prevention of Corruption Act the employee was entitled to be promoted with effect from the date his juniors were promoted because the factor which was responsible for his non-promotion had become non-existent.

In *State of Mysore v. C.R. Sheshadri* (1974) 4 SCC 308, this Court did not approve of the direction given by the High Court for promotion of the respondent from the post of Assistant Secretary to that of Deputy Secretary but refused to interfere with the High Court's order by making the following observations:

"The length of this litigation has really disappointed the petitioner by denying him the enjoyment of likely promotion. He retired the day before the judgment of the High Court. No one in service would be affected by the allowance of the petitioner's claim and what was a service issue has now been reduced to one of money payment. A retired government official is sensitive to delay in drawing monetary benefits. And to avoid posthumous satisfaction of the pecuniary expectation of the superannuated public servant- not unusual in government - we direct the appellant to consider promptly the claim of the petitioner in the light of our directions and make payment of what is his due - if so found - on or before April 15, 1974. The government's inexplicable indifference in not placing before the Court the relevant rule regarding promotion to the post of Deputy Secretary merits the order that the appellant pay the costs of the petitioner/first respondent, for the wages of winner's sloth is denial of costs, and something more."

In *B.V. Sivaiah v. K.Addanki Babu* (1998) 6 SCC 720, the three Judge Bench explained the criteria of 'seniority-cum-merit' in the following words:

"While applying the principle of seniority-cum-merit for the purpose of promotion, what is required to be considered is the inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. Such determination of seniority confers certain rights and the principle of seniority-cum-merit gives effect to such rights flowing from seniority. It cannot, therefore, be said that in the matter of promotion on the basis of seniority-cum-merit, seniority has no role where the employees eligible for promotion were appointed on the same date and have the same length of service."

In view of the propositions laid down in the aforementioned judgments, we hold that the Division Bench of the High Court committed an error by directing that the appellant shall not be entitled to notional promotion or promotional benefits.

The dismissal of the review petition filed by the appellant is also unsustainable because the Division Bench had erroneously invoked Order 41 Rule 33 CPC to justify the direction given by it on the issue of the appellant's right to be considered for promotion to the next higher post.

In the result, the appeals are allowed, the impugned orders are set aside and the respondents are directed to consider the appellant's case for promotion to the post of Executive Engineer from the date his juniors were promoted. This exercise shall be completed by the concerned authorities within three months from today. If the appellant is found suitable for promotion as per the criteria applied in the cases of his juniors, then he shall be given promotion from the date his juniors were promoted as Executive Engineers and be given all consequential benefits including retiral benefits.