

Case relating to Departmental Promotion:

Parties : E. Saravanan Versus The Chairman, Chennai Port Trust, Chennai & Others

Court : High Court of Judicature at Madras

Case No : Writ Appeals No.683 & 843 of 2007 & M.P.No.1 of 2007 in W.A.No.683 of 2007

Judges: THE HONOURABLE MR. JUSTICE ELIPE DHARMA RAO & THE HONOURABLE MR. JUSTICE K.K. SASIDHARAN

Appearing Advocates : For the Appellant: Mrs. Nalini Chidambaram, Senior Counsel for M/s. Gladys Daniel, Advocate. For the Respondent: R1 & R2 - R. Karthikeyan, Advocate, R3 - No appearance.

Date of Judgment : 02-02-2011

Head Note :-

Letters Patent - Clause 15 – service matter, claiming promotion which delaying due to criminal charges framed against petitioner, but contention raised that petitioner acquittal from criminal charges – High court set aside impugned order & also for recovery of monetary benefits for period of his retrospective promotion – writ appeals disposed of.

Cases Referred:

1. BANK OF INDIA vs. DEGALA SURYANARAYANA [(1999) 5 SCC 770];
2. Union of India v. K.V.Jankiraman [(1991) 4 SCC 109].

Comparative Citations:

2011 (2) LLN 565, 2011 (4) MLJ 737

Judgment :-

(Prayer: Writ Appeals preferred under clause 15 of the Letters Patent, as against the orders respectively passed in W.P.No.13394 of 2007, dated 13.4.2007 and in W.P.No.31933 of 2003 by two learned single Judges of this Court.)

ELIPE DHARMA RAO, J.

1. Since both the appeals are inter-connected with each other, in fact off-shoots of one and the same dispute, they are heard together and are being disposed of by this common judgment.

2. The appellant in both the Writ Appeals was first appointed as Clerk on 19.8.1985 in the Chennai Port Trust and later on promoted as Junior Assistant in the year 1990. The next promotional avenue for the appellant was Senior Assistant. While he was working as the Junior Assistant, he was arrested for his alleged involvement in a container theft case in the Container Terminal in the year 1996 and he was also placed under suspension w.e.f. 22.5.1996. The suspension period of the appellant was thereafter revoked by the order of the respondents dated 17.6.1998 and the appellant joined duty on 22.6.1998. The period of suspension was also ordered to be treated as duty for all purposes by the subsequent order dated 29.3.2000. Thereafter, the appellant was acquitted by the criminal court, by giving benefit of doubt. However, departmental proceedings were initiated against the appellant on the following two counts:

i) that he had failed to inform the office about his arrest and

ii)for his alleged involvement in the container theft case in container terminal

3. In the departmental enquiry proceedings, since the appellant himself has accepted the first charge and further considering the fact that he was acquitted by the criminal court in the criminal case under benefit of doubt, the respondents have taken a lenient view and a punishment of stoppage of next increment for a period of one year, without cumulative effect, was inflicted on him by the order dated 29.3.2000 and the period of punishment was from 31.3.2000 to 30.4.2001. By this order, the period of suspension was also ordered to be treated as duty for all purposes.

4. In the meantime, in the year 1997, 87 vacancies in the cadre of Senior Assistant arose, pursuant to Sankaran Committee Award, constituted for creation of posts across all departments in the Port Trust, to prevent stagnation of posts. It seems, as per the Sankaran Committee Award, the benefit of promotion should be extended to the employees of Port Trust as on 31.3.1990 and should be effective with retrospective effect from 1.4.1990. According to the appellant, the DPC convened in the year 1997, for promotion to the post of Senior Assistant (Accounts) from the post of Junior Assistant, had recommended his promotion, but since he was under suspension, his name was kept in the sealed cover and in the subsequent DPC conducted on 11.7.2000, the authorities have opened the sealed cover and found that the previous select committee had selected him for promotion to the post of Senior Assistant (Accounts) and hence they have promoted the appellant from the post of Junior Assistant to the post of Senior Assistant (Accounts) with retrospective effect from 1.8.1996 by proceedings dated 29.12.2000. His pay was accordingly re-fixed and arrears were also drawn and paid to him.

5. The next level of promotion from that of Senior Assistant (Accounts) is Assistant Superintendent (Accounts). Since in the meantime, his juniors were promoted to the cadre of Assistant Superintendent, the appellant represented before the respondents that he be granted promotion from the date of his immediate juniors i.e. from 9.5.1997. The said request of the appellant was rejected by the respondents by the order dated 19.7.2003 on the ground that he will be eligible for promotion to the post of Assistant Superintendent only when he completes the required five years of active service in the post of Senior Assistant (Accounts) from 11.7.2000 and not from the date of promotion of his junior i.e. w.e.f. 9.5.1997 under the Sankaran Committee Award.

6. This rejection order was challenged by the appellant by filing W.P.No.31933 of 2003, praying to quash the same and direct the respondents to promote him from the post of Senior Assistant (Accounts) to the post of the Assistant Superintendent (Accounts), reckoning his date of promotion to the post of Senior Assistant (Accounts) as 1.8.1996 or from the date of promotion of his junior. It is seen from the materials placed on record that during the pendency of this writ petition, the appellant was promoted as Assistant Superintendent (Accounts) by the proceedings of the official respondents dated 1.7.2006.

7. This writ petition was disposed of by a learned single Judge of this Court (Justice M.E.N.Patrudu, as he then was). Since the observations of the learned single Judge paved way for the initiation of the subsequent writ proceedings, we consider it appropriate to extract the same hereunder:

"11. When the order of punishment is in force, surprisingly the petitioner was given an order of promotion and it is through the proceedings dated 29.12.2000. The further defect noticed by this Court is when the petitioner was facing disciplinary enquiry and later found guilty, the order of promotion is given with retrospective effect. How this is permissible is known only to the officer who has issued this order. 12. Therefore, the respondents more particularly the

Chairman of the Chennai Port Trust has to verify this fact. It is stated before this Court that it is the usual practice of the Chennai Port Trust to give orders of promotion with retrospective effect and to pay all arrears, though the employees are not working in the promotional post.

13. The respondents are under the control of Union of India and it is a public department and I do not know how this illegal practice is permissible. Therefore, it is for the first respondent to look into the matter and find out whether the petitioner has received the punishment of withholding the next increment for period of one year and if so why he is promoted with retrospective effect and paid all backwages.

14. The petitioner is contending that he is entitled to claim seniority from 1.8.1996, because he was promoted with retrospective effect and the arrears was also paid.

15. Once if the petitioner is promoted with retrospective effect, he is entitled to claim the same date as date of promotion. But whether such an order of promotion with retrospective effect, more particularly when the petitioner has received punishment in a departmental proceedings on a charge of theft can be given from 1.8.1996 is a serious question and this can be decided by a competent authority. If an illegality has been brought to the notice of the writ court, the writ court has every right under Article 226 of the Constitution to give directions to the concerned to examine and pass necessary legal orders.

16. Considering the same, I am of the opinion that the first respondent has to examine the entire episode and pass necessary orders.

17. With regard to the rejection of request of the petitioner under the Sankaran Committee Award, this court is of the opinion that the officer who has issued the order has not applied his mind properly. I have perused the Sankaran Committee Award and nowhere it is stated that the promotion of the petitioner can be rejected under the award. Without quoting the relevant provision and without quoting relevant rule under the award. It is nothing but a non speaking order. Therefore the impugned order is liable to be set aside and accordingly the same is set aside.

18. In the above circumstances, the writ petition is disposed of and the impugned order is set aside. However the first respondent is directed to examine the entire issue as directed in the Order and pass necessary orders with reasons within two months from the date of receipt of a copy of this order. No costs."

8. Pursuant to this order of the learned single Judge (which is under challenge before us now by way of Writ Appeal No.843 of 2007), the official respondents have passed an order dated 24.3.2007, revising the date of promotion of the appellant to the cadre of Senior Assistant as 1.5.2001 (instead of from 1.8.1996), since the period of punishment of one year ended only on 30.4.2001. Consequently, the promotion of the appellant to the post of Assistant Superintendent (Accounts) was also revised as 1.5.2006 under the Scheme of Grouped Posts i.e. on completion of five years of service in the post of Senior Assistant. Accordingly, his pay in the post of Senior Assistant (Accounts) and Assistant Superintendent (Accounts) was ordered to be re-fixed w.e.f. 1.5.2001 and 1.5.2006 respectively and the financial benefits availed by him due to his promotion during the currency of suspension, disciplinary proceedings and punishment thereon were also ordered to be recovered. It has further been ordered that his seniority would also be re-fixed as per rule taking into consideration the actual date of promotion to the post of Senior Assistant.

9. Challenging this order, the appellant has filed W.P.No.13394 of 2007 before this Court and the said Writ Petition was dismissed by a learned single Judge of this Court (Justice K.Chandru) on 13.4.2007. It is to be pointed out that while dismissing the writ petition, the learned brother Judge has observed that

"It is very unfortunate that when a person files a writ petition and gets an adverse order, without challenging the same in a manner known to law, attacking the proceedings, by way of filing a collateral petition, cannot be sustained...."

10. The learned Judge made the above observation in view of the fact that by the time the said Writ Petition No.13394 of 2007 was being dismissed by him, the earlier order passed in W.P.No.31933 of 2003, dated 5.1.2007 was remained unchallenged.

11. Only subsequent to the dismissal of W.P.No.13394 of 2007 on 13.4.2007, the appellant chose to challenge the earlier order passed in W.P.No.31933 of 2003 by filing Writ Appeal No.843 of 2007, which was presented in the Registry of this Court on 16.4.2007. Though the delay of 54 days in filing this appeal was condoned by the order of the Court dated 15.6.2007, the glaring fact is that this appeal came to be filed only after the dismissal of the subsequent Writ Petition in W.P.No.13394 of 2007. In view of this factual position, we are not able to appreciate the contention of the appellant that the learned Judge has failed to see that in the affidavit filed in support of this writ petition, he has already mentioned that will be filing the writ appeal against the order of the learned Judge passed in W.P.No.31933 of 2003.

12. Simultaneously, the appellant also filed Writ Appeal No.683 of 2007, challenging the order passed by the learned single Judge in W.P.No.13394 of 2007, which was presented in the Registry of this Court on 23.4.2007. Along with the said writ appeal, he has filed M.P.No.1 of 2007 praying to stay the operation of the impugned order dated 24.3.2007 and while admitting this appeal, interim stay was granted by the First Bench of this Court on 21.8.2007.

13. During the pendency of these writ appeals, the appellant has filed M.P.No.2 of 2007 in W.A.No.683 of 2007, praying to implead one R.Jayanthimala as party respondent on the ground that the proposed party was his junior and only because of the impugned order dated 24.3.2007, the proposed party was proposed to the next cadre of Office Superintendent, bypassing the appellant. He has also filed M.P.No.3 of 2007 in W.A.No.683 of 2007, praying to issue an interim direction to the official respondents to appoint him as Office Superintendent in the Chennai Port Trust in the place of the proposed party R.Jayanthimala. He has contend that the next vacancy to the post of Office Superintendent will arise only after four years and since the impugned order dated 24.3.2007 was already stayed, the appellant can be appointed as Office Superintendent in the place of the proposed respondent R.Jayanthimala. A Division Bench of this Court, by the orders dated 8.4.2008, while allowing M.P.No.2 of 2007, thus ordering to bring on record the proposed respondent, has declined to grant any interim direction as has been prayed for on the part of the appellant in M.P.No.3 of 2007, further making it clear that this order passed in M.P.No.3 of 2007 shall not stand in the way of the appellant in getting the relief in the main appeal.

14. It is further seen from the materials placed on record that the second respondent, by order dated 24.7.2009, promoted the appellant to the post of Office Superintendent on adhoc basis, on condition that his promotion is subject to the outcome of these writ appeals.

15. On 12.11.2009, when both these writ appeals were taken up for consideration, since there was no representation for the appellant, both these appeals were dismissed for non-prosecution. It seems, pursuant to this dismissal order, the appellant was reverted to the post of Assistant Superintendent (Accounts) by the order dated 6.2.2010. Thereafter, these two appeals were restored to file, by the order of this Court in M.P.No.1 of 2010 in W.A.No.683 of 2007 and M.P.No.1 of 2010 in W.A.No.843 of 2007.

16. The learned senior counsel appearing for the appellant in both the appeals would strenuously argue that the sealed cover procedure is not new and since the criminal case

ended in acquittal, the respondents have rightly awarded the promotion to the appellant retrospectively wherein no illegality could be found and hence the observed made by the learned Judge in the earlier writ petition in W.P.No.31933 of 2003, which is the subject matter in W.A.No.843 of 2007, are liable to be set aside. The learned senior counsel for the appellant would further argue that when retrospective promotion has been granted to the appellant to the cadre of Senior Assistant, the respondents have committed an illegality in not counting the date of seniority of the appellant in the cadre of Senior Assistant to promote him to the next cadre of Assistant Superintendent (Accounts). In support of her arguments, the learned senior counsel for the appellant would rely on a judgment of the Honourable Apex Court in BANK OF INDIA vs. DEGALA SURYANARAYANA [(1999) 5 SCC 770], wherein the Honourable Apex Court has held as follows:

"However, the matter as to promotion stands on a different footing and the judgments of the High Court have to be sustained. The sealed cover procedure is now a well-established concept in service jurisprudence. The procedure is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him and hence the findings as to his entitlement to the service benefit of promotion, increment etc. are kept in a sealed cover to be opened after the proceedings in question are over (see Union of India v. K.V.Jankiraman [(1991) 4 SCC 109]). As on 1.1.1986 the only proceedings pending against the respondent were the criminal proceedings which ended in acquittal of the respondent wiping out with retrospective effect the adverse consequences, if any flowing from the pendency thereof. The departmental enquiry proceedings were initiated with the delivery of the charge sheet on 3.12.1991. In the year 1986-87, when the respondent became due for promotion and when the Promotion Committee held its proceedings, there were no departmental enquiry proceedings pending against the respondent. The sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 be withheld for the DE proceedings initiated at the fag end of the year 1991. The High Court was therefore right in directing the promotion to be given effect to to which the respondent was found entitled as on 1.1.1986. In the facts and circumstances of the case, the order of punishment made in the year 1995 cannot deprive the respondent of the benefit of the promotion earned on 1.1.1986."

17. The sum and substance of the findings of the Honourable Apex Court in the above extracted paragraph is that when promotion was already recommended to the employee and was kept in sealed cover because of pendency of criminal/departmental proceedings by the DPC, the subsequent initiation of the departmental proceedings and inflicting punishment thereon by the department would not bar the employee from claiming promotion as has been recommended by the DPC earlier, since at that point of time of DPC recommending promotion, there were no departmental enquiry proceedings pending against the employee.

18. In the cases on hand also, a similar situation, as that of before the Honourable Apex Court, prevails. The appellant's name was recommended for promotion by the DPC in the year 1997, but in view of the pendency of the criminal proceedings at that point of time, the said proposal of the DPC could not given effect to, but was kept in sealed cover, so as to be opened after completion of the criminal proceedings. Subsequently, the appellant was acquitted of the criminal charges and in the departmental enquiry proceedings initiated against him subsequently on the ground that he failed to inform his arrest to the department and for his involvement in the criminal case, he was awarded with the punishment of withholding of increment for one year, without cumulative effect, and the period of punishment was from 31.3.2000 till 30.4.2001. During this currency of punishment, the sealed cover was opened and the DPC, having found that the earlier DPC has recommended the promotion of the appellant, has ordered his promotion, with retrospective effect. This has been found fault with by the learned single Judge in the first writ petition filed in W.P.No.31933 of 2003, holding that during the currency of punishment, no such promotion could have been given to the appellant, paving way for the official respondents to pass consequential orders of reversion and recovery on

24.3.2007, which was upheld by another learned single Judge in W.P.No.13394 of 2007, dated 13.4.2007.

19. On a complete analysis of the facts and circumstances of the case and the above quoted judgment of the Honourable Apex Court, we have no hesitation to observe that the learned single Judge in the first writ petition in W.P.No.31933 of 2003, has applied the general principle of law in the service jurisprudence and not the law covering the matters wherein the sealed cover procedure has been followed. Since the promotional recommendation of the DPC was kept in sealed cover at a time when there was no departmental enquiry proceeding initiated or punishment inflicted against the appellant, following the ratio laid down by the Honourable Apex Court in the above quoted judgment, we find no illegality in the official respondents granting retrospective promotion to the appellant to the cadre of Senior Assistant (Accounts) by the proceedings dated 29.12.2000 w.e.f. 1.8.1996. The order passed and the observations made by the learned single Judge in W.P.No.31933 of 2003 contra are set aside to this extent.

20. However, we are unable to appreciate the contention urged on the part of the appellant that since he was granted retrospective promotion to the cadre of Senior Assistant (Accounts) w.e.f. 1.8.1996, such date of retrospective promotion shall alone be taken into count while counting the required five years of service in that cadre for being promoted to the next cadre of Assistant Superintendent (Accounts). The official respondents by their unassailed proceedings dated 10.12.1990, have made it very clear that 'though retrospective promotions have been given to the employees against the posts created as per the Arbitration Award and monetary benefits have also been extended, this service cannot be construed as an active service since the employees have not actually carried out the duties of higher posts during that period.' It has also been made clear in those proceedings that 'the service for the purpose of promotion to higher post under the Scheme of Grouped Posts will count only from the date on which the employee was actually promoted.'

21. Therefore, though retrospective promotion of the appellant to the cadre of Senior Assistant (Accounts) was ordered from 1.8.1996, he cannot be allowed to contend that the said date alone should be taken into count for counting the five years of required active service in that cadre, to claim the next promotion, since the condition of five years active service in the feeder cadre has been insisted for the employees to have actual active performance of the duties in that cadre so as to have necessary experience to deal with the higher responsibilities attached to the next promotional post of Assistant Superintendent (Accounts) and not otherwise. Therefore, we upheld the impugned order dated 19.7.2003 (concerned with W.P.No.31933 of 2003, which is the subject matter in W.A.No.843 of 2007) passed by the official respondents and therefore, on this ground, the prayer made by the appellant in W.P.No.31933 of 2003 is rejected.

22. In view of the above observations and findings, the impugned order dated 24.3.2007 passed by the official respondents (concerned with W.P.No.13394 of 2007, which is the subject matter in W.A.No.683 of 2007) is set aside to the extent of ordering recovery of monetary benefits already granted to the appellant for the period of his retrospective promotion to the cadre of Senior Assistant (Accounts) from 1.8.1996.

23. At the cost of repetition and for clarity, we make it clear that the appellant is entitled for retrospective promotion to the cadre of Senior Assistant (Accounts) w.e.f. 1.8.1996, as has been recommended by the earlier DPC, whose findings are kept in sealed cover with all monetary benefits attached thereto. But, he will be eligible for next promotion to the post of Assistant Superintendent only after he completes the required five years of active service in the post of Senior Assistant (Accounts) and not from the date of promotion of his junior i.e. w.e.f. 9.5.1997, as has been claimed on the part of the appellant. Since it is the well established principle of law that during the currency of punishment, the name of the delinquent officer

cannot be considered for promotion to the next cadre and further since the sealed cover system has not been adopted for the promotion to the post of Assistant Superintendent (Accounts) so as to say that the said general and well established principle of law has no application to such cases of sealed cover matters, the active service of the appellant in the cadre of Senior Assistant (Accounts) shall be counted only from 1.5.2001 (i.e. after completion of the currency of punishment from 31.3.2000 till 30.4.2001) and not either from 11.7.2000, the date when he actually joined in the post of Senior Assistant (Accounts) or from 9.5.1997, the date on which his junior was promoted to the cadre of Senior Assistant (Accounts). In these circumstances, it goes without saying that there is no illegality in promoting the third respondent to the cadre of Office Superintendent bypassing the appellant.

With these observations, both these Writ Appeals are disposed of. The respondents 1 and 2 are directed to issue necessary consequential orders, refixing the pay, eligibility dates of promotion to the next higher levels of the appellant and modifying the orders of recovery, within twelve weeks from the date of receipt of a copy of this judgment. No costs. Consequently, connected Miscellaneous Petition is closed.