
(2013) 01 RAJ CK 0096
In the Rajasthan High Court
Case No : Civil Writ Petition No. 10978 of 2010

Dr. Ashok Singhvi

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 — Rule 16
Rajasthan Medical and Health Service Rules, 1963 — Rule 24

Citation : (2013) 2 CDR 799 : (2013) 4 RLW 3218 : (2014) 3 SCT 600 : (2013) 1 WLN 619

Hon'ble Judges : Govind Mathur, J

Bench : Single Bench

Advocate : M.S. Singhvi, assisted by Mr. Hemant Dutt, for the Appellant; Y.P. Khileree, Deputy Government Counsel and Mr. M.A. Siddique, for the Respondent

Final Decision : Allowed

Judgement

Govind Mathur, J.—The petitioner is a member of the Rajasthan Medical & Health Services created under the Rajasthan Medical & Health Services Rules, 1963 (hereinafter referred to as "the Rules of 1963"). He is holding the post of Medical Officer, having an avenue for promotion to the post of Junior Specialist under the Rules of 1963. The criteria for promotion to the post of Junior Specialist, as per the Rules of 1963, is seniority-cum-merit. The grievance of the petitioner is that the respondents in view of the Government of Rajasthan circular dt. 26.07.2006 are not considering his candidature for promotion to the post of Junior Specialist. The circular aforesaid prescribes necessary instructions required to be adhered while making promotions to different posts in different services in the State of Rajasthan. As per this circular if the Government servant has suffered withholding of increments with cumulative effect, he shall not be entitled to be considered for promotion as many times as for the years increment has been withheld. The petitioner suffered a penalty of withholding of five annual grade increments, therefore, in view of the Government of Rajasthan circular dt. 26.7.2006 his case shall not be considered for promotion five times.

2. While challenging the condition aforesaid under the circular dt. 26.07.2006, the arguments advanced by counsel for the petitioner are that:

(1) the criteria, eligibility and procedure for promotion to various posts including the post of Junior Specialist in Rajasthan Medical & Health Services is prescribed under the Rules of 1963 and as per provisions of the Rules the Departmental Promotion Committee is required to consider entire record of an eligible person while making promotions, as such no instructions checking discretion of the competent authority beyond the procedure already given under the Rules of 1963 could have been prescribed by the State Government through administrative instructions. The circular dt. 26.07.2006, thus, is nothing but abdication of powers vested with the Departmental Promotion Committee and the appointing authority;

(2) as per the procedure prescribed the punishment suffered by the petitioner could have been taken into consideration for five years from the date of its imposition, but could have not been thrown out of the zone of consideration for five times; and

(3) withholding of promotion itself is a penalty prescribed under the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 (hereinafter referred to as "the Rules of 1958"), therefore, non consideration for promotion on the count of penalty suffered shall amount "double jeopardy.

3. Before coming to merits of the issue involved, it shall be appropriate to notice that the petitioner is having the qualification of Master of Surgery (Orthopedics) and he entered in services of the respondents as Medical Officer on 24.08.1984. A memorandum under Rule 16 of the Rules of 1958 dt. 30.07.1994 was served upon him to explain the allegation that he remained absent from duties unauthorisedly from 15.02.1985 to 12.11.1990. An explanation was submitted by the petitioner, however, the same was not found satisfactory, thus, a regular inquiry was conducted. The Inquiry Officer exonerated him, but the disciplinary authority was not in agreement with the findings so given. Hence, a notice containing reasons for disagreement was served and after providing necessary opportunity to meet such reasons the disciplinary authority vide order dt. 16.07.1999 subjected the petitioner with a penalty of withholding of five annual grade increments with cumulative effect. The period of absence i.e. from 15.02.1985 to 12.11.1990 was ordered to be treated as break in service. His Excellency the Governor of Rajasthan while exercising powers under Rule 34 of the Rules of 1958 modified the penalty imposed by regularising the period of absence as extraordinary leave, as such, the break in service effected under the order dt. 16.07.1999 came to be set aside.

4. The respondents then published a seniority list of Medical Officers, wherein Shri Pawan Kumar Goyal and Shri Harsh Vardhan Bhati were shown juniors than the petitioner, however, promotion was accorded to them as Junior Specialist (Orthopedics) ignoring the petitioner's claim. Being aggrieved by the same the

petitioner submitted a representation to the competent authority through proper channel. After insistence of the petitioner by submitting repeated representations the Additional Director (Gazetted), Medical & Health Services, Government of Rajasthan, Jaipur informed that the case of the petitioner for promotion to the post of Junior Specialist (Orthopedics) shall be considered on availability of the vacancies pertaining to the non-reserved category in the year 2012-13. Prior to the vacancy year of 2012-13 the petitioner could not be considered for promotion as he suffered a penalty of stoppage of five annual grade increments with cumulative effect. Under an another communication dt. 02.08.2010 the Additional Director (Gazetted), Medical & Health Services, Government of Rajasthan, Jaipur conveyed that the petitioner shall be entitled for "Annual Career Progression" after 01.11.2011 as he suffered a penalty of stoppage of five annual grade increments with cumulative effect.

5. Being aggrieved by the decision of the respondents this petition for writ is preferred.

6. A reply to the writ petition has been filed on behalf of the respondents with assertion that the instructions prescribed in the circular dt. 26.07.2006 are not contradictory to the procedure prescribed under the Rules of 1963, but are supplemental, hence the allegation of abdication of authority is ill-founded. According to the respondents the order of penalty acquired finality under an order dt. 15.10.2003 passed by the Governor of Rajasthan, therefore, for coming seven years the case of the petitioner cannot be considered for promotion to the next higher post i.e. of Junior Specialist. So far as grant of "Annual Career Progression" is concerned, it is stated that the same is in lieu of the promotion, therefore, the criteria applicable for grant of promotion is required to be adhered while considering the case of the petitioner for extending such career progression.

7. Heard counsel for the parties.

8. The issue as to whether the Government is right in providing certain checks to the discretion of the Departmental Promotion Committee and the appointing authority has been considered by this Court in *Kishore Chand Chandawat vs. State of Rajasthan & Ors.*, SB Civil Writ Petition No. 8442/2008, decided on 19.11.2012, holding as under:

The promotion to the post of Assistant Commercial Taxes Officer is required to be made in accordance with Part-IV of the Rules of 1971. Rule 17 of the Rules aforesaid provides that a certain number of posts shall be filled by promotion, and for that the Commissioner shall prepare a correct and complete list containing names not exceeding five times the number of vacancies from among the senior-most persons who are qualified under the rules and who have passed the qualifying examination for promotion to the service as prescribed in Schedule II. The list so prepared shall be forwarded to the Secretary to the Government of Rajasthan, Incharge of Commercial Taxes Department with necessary confidential rolls and personal files of the enlisted persons. A committee

consisting of the Chairman of the Rajasthan Public Service Commission or any other Member of the Commission nominated by the Chairman, Secretary to the Government, Incharge of the Commercial Taxes Department or the Special Secretary concerned nominated by the Government of Rajasthan, Incharge of the Commercial Taxes Department and Commissioner, Commercial Taxes Department shall consider cases of all persons enlisted and if necessary interview them. After such process, a list containing name of the suitable candidates upto twice the number of existing posts shall be prepared. Promotion then is required to be accorded as per the criteria of seniority-cum-merit.

The procedure prescribed under the Rules of 1971 gives an exclusive jurisdiction to the Committee commonly known as the Departmental Promotion Committee (DPC) to consider cases of the eligible persons for promotion to next higher post. The criteria for promotion is also prescribed under the Rules of 1971 and in the instant matter i.e. seniority-cum-merit. As per the Rules, the entire personal file of eligible persons is required to be sent to the Departmental Promotion Committee with the annual confidential records to be considered for promotion. The Committee is supposed to consider the entire record available with it objectively. The Government of Rajasthan in its administrative side issued a circular prescribing guidelines for not considering candidature of the certain persons who suffered penalties. The Scheme of the Rules of 1971-nowhere empowers the State Government to provide instructions to a statutory Departmental Promotion Committee to act in a specific manner. The effect and impact of a specific punishment to a government servant under consideration for promotion is required to be examined by that Committee only. The Government is not supposed to provide administrative instructions to a Statutory Committee to act or to mold its consideration in a specific manner. As a matter of fact, the instructions issued under the circular dt. 26.07.2006 are nothing but an extraneous interference with the authority available to the Departmental Promotion Committee under the Rules of 1971.

9. Under the Rules of 1963 also Part-V of the Rules pertains to procedure for recruitment by promotion. As already stated the criteria for promotion to the post of Junior Specialist is seniority-cum-merit. As per the Rules of 1963 as soon as the appointing authority determines the number of vacancies and decides that certain number of posts are required to be filled in by promotion, it shall prepare a correct and complete list of senior most persons who are eligible and qualified for promotion. The list aforesaid is required to be placed before the Departmental Promotion Committee constituted as per Rule 24 of the Rules of 1963 with complete record of the persons under consideration for promotion. The committee shall prepare a list of the persons found suitable for promotion after assessing their candidature as per the criteria prescribed. The list prepared by the committee is required to be sent to the Government alongwith confidential roles and personal files of the candidates and the appointing authority thereafter shall avail consultation with commission, if necessary and make appointments by way of promotion. As per Rule 24-A of the Rules of 1963 no person shall be

considered for first promotion in service unless he is regularly selected on the post from which promotion is to be made in accordance with one of the methods of recruitment prescribed under the provisions of the Rules. No person shall also be considered for promotion for five recruitment years from the date of which his promotion becomes due, if he/she has more than two children on or after 01.06.2002. No other restriction except the two mentioned above is prescribed under the Rules. The respondent State under the Notification dt. 26.07.2006 has prescribed a check for Departmental Promotion Committee or as a matter of fact excluded the persons from consideration for promotion on account of penalties though no such restriction is prescribed in the Rules. As such, under the Notification dt. 26.07.2006 an effort is made to debar otherwise eligible persons from consideration for promotion on the grounds which are not statutorily available.

10. Suffice to mention here that the Departmental Promotion Committee is having all authority to examine conduct of a person while considering his candidature for promotion and the committee can very well arrive at the conclusion about non-suitability of such person for promotion after assessing his candidature, but such eligible person cannot be kept out from the zone of consideration by prescribing administrative instructions. The non-availability of any provision in the Rules of 1963 to keep a penalised person out of the consideration for promotion depicts intention of the law framing authority to have consideration of such person for promotion and to get such person's candidature scrutinised by the competent committee by taking into consideration his entire service record including the penalty imposed. As such, the denial of consideration for promotion of the petitioner in light of the Government of Rajasthan circular dt. 26.07.2006 is lacking authority of law.

11. It is further pertinent to note that the promotion to the post of Junior Specialist from the post of Medical Officer is first promotion under the Rules of 1963 and the criteria prescribed to do so is seniority-cum-merit. Under the criteria of seniority-cum-merit the authority competent to make promotions is having all authority to examine entire service record of the persons under scrutiny, however, the authority competent while doing so is required to keep in mind that it is the seniority, that will prevail as the term "merit" under the criteria concerned means the minimum merit necessary for efficiency of administration. If the authority arrives at the conclusion that the penalty imposed adversely affects minimum merit necessary for efficiency of administration, then it can treat such person unfit for promotion by recording necessary reasons, but in no case the consideration for promotion can be denied. Having considered the matter from all aspects, I am satisfied that the petitioner was kept out of consideration for promotion to the post of Junior Specialist for a reason that is not having authority of law. The petition for writ, thus, deserves acceptance. Accordingly, the same is allowed. The respondents are directed to consider candidature of the petitioner for promotion to fee post of Junior Specialist (Orthopedics) against the vacancies of the year 2006-07 ignoring the

restrictions made under Clause (3) of the circular dt. 26.07.2006. If he is found suitable for promotion, promotion be accorded to him and in the event of holding non-suitable for promotion against the vacancy year aforesaid, his case be considered for subsequent vacancy years for promotion ignoring the restrictions given under the circular dt. 26.07.2006 and promotion be accorded to him, if he is found suitable otherwise.