

(2017) 01 MAD CK 0112

In the Madras High Court

Case No : Writ Petition No.21819 of 2016 and W.M.P. Nos. 18664, 18665 and 3221 of 2016

G. Rani

APPELLANT

Vs

Government of Tamil Nadu

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2017) LIC 1577

Hon'ble Judges : Mr. R. Subbiah, J.

Bench : Single Bench

Advocate : Mr. S. Thanka Sivan, Advocate, for the Petitioner; Mr. K. Venkataramani, AAG-VII assisted by Mr. K. Dhananjayan, Spl GP, for the Respondents

Final Decision : Disposed Off

Judgement

Mr. R. Subbiah, J.—This writ petition has been filed by the petitioner praying for issuance of a Writ of Mandamus, directing the respondent to grant promotion to the petitioner to the post of Chief Engineer in Highways Department with effect from 31.05.2016 and to grant her all benefits consequential thereto, within a time frame.

2. In the affidavit filed in support of the writ petition, it has been averred by the petitioner as follows:-

2-1. The petitioner is a M.E. Civil Engineering Graduate and she joined the Highways Department as Assistant Engineer on 03.10.1989. After getting promotion from time to time, the petitioner is presently working as Superintending Engineer, Institutional Capacity Enhancement and Road Safety.

2-2. It is stated by the petitioner that there are nine wings in Highways Department as follows-

(1) Director General

- (2) Construction and Maintenance
- (3) Planning, Designs and Investigation
- (4) National Highways
- (5) Projects
- (6) Highways Research Station
- (7) Nabard and Rural Roads
- (8) Metro
- (9) Tamil Nadu Road Sector Project.

The above said each wing is headed by a Chief Engineer. The feeder category for the post of Chief Engineer is Superintending Engineer only. The post of Chief Engineer is filled up by way of promotion from the post of Superintending Engineer. The service of all Engineers working in the Tamil Nadu Highways Department is governed by the Tamil Nadu Highways Engineering Service.

2-3. According to the petitioner, presently there are four posts of Chief Engineer vacant. Three vacancies arose for the post of Chief Engineer in the Highways Department on 31.05.2016 i.e., (i)Chief Engineer - Tamil Nadu Road Sector Project; (ii)Chief Engineer - National Highways; (iii)Chief Engineer - Planning, Designs and Investigation. Another vacancy arose as on 30.06.2016 due to retirement of one Mr. K.C. Parameswaran, Chief Engineer - Metro Wing.

2-4. As per G.O. Ms. No.440, Personnel and Administrative Reforms (Per. S) Department, dated 26.10.1990, the State Government has stipulated a condition that promotion/appointment as Head of the Department requires a minimum period of one year left over service for the candidate as a qualification. The crux of the conditions stipulated under the said GO is as follows:-

(i)to be eligible for promotion as Head of Department, the officer should have not less than one year period of left over service prior to the retirement.

(ii)If a person is found short of one year left over service before retirement, he/she shall be compensated by appointing him as Officer on special duty with the same scale of pay as that of Head of Department.

In order to avoid any delay in filling up the vacancies in the post of Head of Department, a Government Letter dated 23.04.1993 was circulated by the Chief Secretary to Government to all Department Secretaries of the State Government requiring them to fill up the post of Heads of Department by passing and issuing orders before the retirement of the existing incumbent. The said official letter of the State Government is specifically requiring the Secretary to prepare the proposal to fill up the vacancies of Heads of Department to be initiated sufficiently in advance from the date of retirement of the existing incumbent, so that orders can be issued before the date of retirement of existing incumbent

and in order to ensure that persons who have minimum service of one year to the date of retirement are appointed as Head of the Department. This serves as a guiding principle regarding the promotion to the post of Chief Engineers.

2-5. The intention of the above said G.O. Ms. No.440 and Government Letter date 23.04.1993 is to ensure that persons who are eligible to be appointed as Head of Department are not omitted due to the administrative delay, citing the requirement of one year service from the date of their appointment to the post of Heads of Department (Chief Engineer). Subsequently also, the Government issued an order in G.O. Ms. No.368 (Personnel & Administrative Reforms Department), dated 18.10.1993, which makes it clear that preparation for filling up the post of Heads of Department should be initiated by the Secretaries themselves three months in advance to the prospective date of retirement of existing incumbent. This was made mandatory in order to ensure that the persons having minimum service of one year from the date of retirement of the existing incumbent are not omitted from grant of promotion because of administrative delay.

2-6. So far as the case of the petitioner is concerned, she had become Superintending Engineer on 31.01.2016. Three vacancies to the post of Chief Engineers in the Highways Department arose on 31.05.2016, viz., (i)Chief Engineer - Tamil Nadu Road Sector Project; (ii)Chief Engineer - National Highways; (iii)Chief Engineer - Planning, Designs and Investigation. That apart, another vacancy arose as on 30.06.2016 due to retirement of one Mr. K.C. Parameswaran, Chief Engineer - Metro Wing. Therefore, as on date there are four vacancies in the post of Chief Engineer. It is stated by the petitioner that as per G.O. Ms. No.368, dated 18.10.1993, the respondent ought to have prepared the proposal for filling up the vacancies of Head of Department sufficiently in advance as to the date of retirement of the existing incumbent. As on date, the petitioner is the senior most person having the requirement of minimum one year of left over service and the respondent ought to have promoted and appointed the petitioner as Chief Engineer from 01.06.2016 onwards. Unfortunately, the respondent has failed to do so, though there are adequate number of vacancies in the department. There is a statutory duty cast on the respondent to follow the instructions issued by the State Government laying down guiding principles. Hence, the petitioner approached the respondent with a request to give promotion to her; but, she could not get any favourable reply. If the petitioner is not given promotion before 30.06.2016, she would not be able to get promotion as Chief Engineer during her service because of the requirement of one year left over service for being appointed as Head of Department as stipulated under G.O.Ms.No.440, Personnel and Administrative Reforms (Per.S) Department, dated 26.10.1990. Hence, the petitioner has come forward with the present writ petition.

3.When the matter came up on 30.06.2016, this Court has passed an interim order, as follows:-

"It is represented by the Counsel for the petitioner that the petitioner would lose the chance of getting promotion, if it is adjourned to another date, as the one year minimum requirement period would expire on 30.06.2016. It is further stated that since she has already filed a writ petition, that one year period should not be a bar for her promotion.

In view of the above, since the matter is adjourned to 05.07.2016, the period of minimum one year period should not be an impediment to her for promotion till 05.07.2016."

Subsequently, by order dated 11.07.2016, the above said interim order was modified as follows -

"Taking into consideration the fact that the one year minimum period expired on 30.06.2016, this Court by order dated 30.06.2016, ordered that the requirement of minimum one year period should not be an impediment for the petitioner for promotion. It is made clear that this safeguard was issued only insofar as the petitioner herein alone is concerned. The order dated 30.06.2016 is modified to the extent above. Post on 19.07.2016."

To vacate the above said interim order, the respondent has filed a miscellaneous petition in W.M.P. No.3221 of 2016.

4. That apart, opposing the prayer made by the petitioner, the respondent has filed a detailed counter, contending that the crucial date for preparation of panel for the post of Chief Engineer is 15th July of every year. Accordingly, a panel of 16 Superintending Engineers fit for promotion as Chief Engineer as on the crucial date which falls on 15th July 2015 was approved vide G.O.(4D).No.1, Highways and Minor Ports (HK1) Department, dated 23.02.2016. Among the above said 16 Superintending Engineers, 3 were promoted as Chief Engineers and 13 Superintending Engineers, who had less than one year of service before retirement on the date of issuance of promotion order, were promoted as Special Chief Engineer in accordance with G.O.(Ms).No.440, Personnel and Administrative Reforms (Per-S) Department, dated 26.10.1990. The crucial date for the next panel i.e., the panel for the year 2016- 2017, falls on 15.07.2016 and the panel could be prepared only after 15.07.2016. The petitioner reaches the zone of consideration for promotion as Chief Engineer only for the panel for the year 2016-2017 and her name would be considered and included in the panel if she is otherwise eligible. Since her date of retirement is 30.06.2017 and she has less than one year of service before retirement as on the crucial date for preparation of panel for the year 2016-2017, she is entitled only for promotion as Special Chief Engineer if she is otherwise eligible with effect from the date of promotion of her juniors, who have more than one year of service before retirement as Chief Engineer. Even though there are vacancies prior to the crucial date, panel could be prepared only on the crucial date and in the Government Letter No.99628/92-2, Personnel and Administrative Reforms Department, dated 23.04.1993, instructions were issued regarding initiation of proposals for

promotion of officers who are found in the panel, to fill up the vacancy of Heads of Department; therefore, the petitioner is not entitled for promotion prior to inclusion in the panel. In G.O.(Ms).No.440, Personnel and Administrative Reforms (Per-S) Department, dated 26.10.1990, it is clearly stated that the officers, who do not have a minimum period of left over service before retirement, but are otherwise found to be fully qualified, fit for promotion as Head of Department and deserving recognition on the crucial date of preparation of panel, shall be compensated by appointing them as Officer on Special Duty with a specific assignment and with the same scale of pay as that of the Head of the Department. The officers who are found eligible for promotion as on the crucial date for the panel can only be promoted as Chief Engineer/Special Chief Engineer to whichever they are eligible for. Thus, it is stated by the respondent that the petitioner reaches the zone of consideration for the panel for the year 2016-2017 for which the crucial date falls on 15th July 2016; but, she is having less than one year of service and as such, her name is not considered for the post of Chief Engineer and she is entitled only to the post Special Chief Engineer. Thus, the respondent sought for dismissal of the writ petition.

5. The learned counsel for the petitioner would submit that the petitioner herein was promoted as Superintending Engineer by including her name in the panel for the year 2016, for which the crucial date is 15.07.2015. The post of Superintending Engineer is the feeder category for promotion to the post of Chief Engineer. The State Government issued orders vide G.O. Ms. No.440, dated 26.10.1990 and Government Letter date 23.04.1993, so as to ensure that persons who are eligible to be appointed as Head of Department are not omitted due to the administrative delay, citing the requirement of one year service from the date of their appointment to the post of Heads of Department (Chief Engineer). Subsequently also, the Government issued an order in G.O. Ms. No.368 (Personnel & Administrative Reforms Department), dated 18.10.1993, which made it clear that preparation for filling up the post of Heads of Department should be initiated by the Secretaries themselves three months in advance to the prospective date of retirement of existing incumbent. In the instant case, the vacancies in the post of Chief Engineer arose on 31.05.2016; therefore, as per G.O. Ms. No.368 (Personnel & Administrative Reforms Department), dated 18.10.1993, the respondent should have initiated the proposal to fill up the post of Chief Engineer three months prior to 31.05.2016. Had the proposal been initiated three months prior to 31.05.2016, the petitioner who is a senior most person in the feeder cadre viz. Superintending Engineer, would have got promotion to the post of Chief Engineer on 01.06.2016. But, in spite of the representation/request made by the petitioner, the respondent did not choose to take step to fill up the post of Chief Engineer. However, in view of the interim order passed by this Court, the interest of the petitioner was protected.

6. The learned counsel appearing for the petitioner would further submit that in the counter filed by the respondent it has been stated that the petitioner is not

having one year of service from the crucial date for preparation of panel for promotion viz., 15th July 2016. But, according to the learned counsel for the petitioner, promotions are to be decided upon with reference to the time of occurrence of vacancies and not the time of making the appointments; therefore, it is incorrect to state that the petitioner should have one year period of service from the crucial date for preparing the panel, when the vacancy arose on 31.05.2016 itself. The petitioner is having not less than one year period from the date vacancy arose ie., 31.05.2016, as such, the petitioner is entitled to be promoted with effect from 01.06.2016. In support of his contention, the learned counsel for the petitioner relied upon the decision delivered by a Full Bench of the Kerala High Court in W.A. No.291 & 292 of 1979 (Varghese and others v. State of Kerala and others, reported in CDJ 1981 Ker HC 102).

7. That apart, the learned counsel for the petitioner has also submitted that during May-2008, two Superintending Engineers viz., T.S.Kuthalanathan and R.Gopal were given promotion to the post of Chief Engineer, without reference to any crucial date for preparing panel for promotion and it is evident from the orders in G.O. Ms. No.150, Highways (HK1) Department, dated 31.05.2008, issued by the Secretary to Government, Highways Department. Thus, the learned counsel for the petitioner sought for a suitable direction to the respondent.

8. Countering the submissions made by the learned counsel for the petitioner, the learned Additional Advocate General appearing for the respondent, by inviting the attention of this court to the Government Order in G.O.(D).No.3, Highways (HK.1) Department, dated 09.01.2008, would contend that by the said GO, the Government has amended the Special Rules whereby the crucial date for the purpose of drawing up the annual list of approved candidates for appointment to the posts of Chief Engineer, Superintending Engineer, Divisional Engineer by promotion, on which the date the candidates should have acquired the prescribed qualification, was changed from 1st January to 15th July of every year. As per the said amended Rule, for the promotion to the post of Chief Engineer, the Superintending Engineer should have acquired the prescribed qualification on the crucial date i.e., 15th July of every year. In the instant case, the petitioner is going to retire from service on 30.06.2017 and from the crucial date i.e., 15th July 2016, she is not having the required one year service period. Thereafter, as per the above said amended Rule, the petitioner is not eligible to be promoted to the post of Head of the Department viz., Chief Engineer. It is further submitted by the learned Additional Advocate General that out of the 16 Superintending Engineers, 3 were promoted as Chief Engineers and 13 Superintending Engineers, who had less than one year of service before retirement, were promoted as Special Chief Engineer in accordance with G.O. Ms. No.440 P and AR Dept, dated 26.10.1990. Further, by relying upon the decision of the Hon'ble Supreme Court reported in (2010) 2 SCC 637 [Rakhi Ray v. High Court of Delhi], the learned Additional Advocate General would contend that a person whose name appears in the select list does not acquire any indefeasible

right of appointment; empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed and the vacancies have to be filled up as per the statutory Rules.

9. With regard to the submission made by the learned counsel for the petitioner with reference to the promotion given to two Superintending Engineerings viz., T.S. Kuthalanathan and R. Gopal, the learned Additional Advocate General by producing the relevant government order in G.O. Ms. No.150, HWD, dated 31.05.2008 submitted that it is a panel of the Chief Engineer for the year 2007-2008 for which the crucial date was 15.07.2007 and as on the said crucial date, both the above said two Superintending Engineers had one year of service and as such they were given promotion. Thus, the learned Additional Advocate General contended that the submission made by the learned counsel for the petitioner with reference to the promotions given to the said two individuals, is totally incorrect.

10. Keeping the submissions made on either side, I have carefully gone through the materials available on record.

11. It is the contention of the learned counsel appearing for the petitioner that the petitioner was promoted as Superintending Engineer with effect from 31.01.2016 and it is the feeder category for the promotion to the post of Chief Engineer. The petitioner claims promotion to the post of Chief Engineer with effect from 31.05.2016. As per G.O.Ms.No.440, Personnel and Administrative Reforms (Per. S) Department, dated 26.10.1990, the State Government has stipulated a condition that promotion/appointment as Head of the Department requires a minimum period of one year left over service for the candidate as a qualification and if an officer is found short of one year left over service before retirement, he/she shall be compensated by appointing him/her as Officer on special duty with the same scale of pay as that of Head of Department. Pursuant to the said GO, the Chief Secretary to Government has circulated a Government Letter dated 23.04.1993 to all Department Secretaries of the State Government requiring them to fill up the post of Heads of Department by issuing orders before the retirement of the existing incumbent. The intention of the above said G.O. Ms.No.440 and Government Letter date 23.04.1993 is to ensure that persons who are eligible to be appointed as Head of Department are not omitted due to the administrative delay citing the requirement of one year service from the date of their appointment to the post of Heads of Department (Chief Engineer). Further, as per G.O. Ms.No.368 (Personnel & Administrative Reforms Department), dated 18.10.1993, preparation for filling up the post of Heads of Department should be initiated by the Secretaries themselves three months in advance to the prospective date of retirement of existing incumbent. It is the contention of the learned counsel for the petitioner that as on 31.05.2016, three vacancies arose in the post of Chief Engineer and the respondent ought to have prepared the proposal for filling up the vacant post of Chief Engineer, three

months prior to 31.05.2016, on which date the petitioner is working as Superintending Engineer, which is a feeder category for the promotion to the post of Chief Engineer; but, the respondent failed to do so.

12. But, according to the learned Additional Advocate General, the Government amended the Special Rules by G.O.(D).No.3, Highways (HK.1) Department, dated 09.01.2008, whereby the crucial date for the purpose of drawing up the annual list of approved candidates for appointment to the posts of Chief Engineer, Superintending Engineer, Divisional Engineer by promotion, on which date the candidates should have acquired the prescribed qualification, was changed from 1st January to 15th July of every year. In the instant case, the petitioner is going to retire from service on 30.06.2017 and from the crucial date i.e., 15th July 2016, she is not having the required one year service period; as such, she is not eligible to be promoted to the post of Head of the Department viz., Chief Engineer.

13. The relevant portion in G.O.(D).No.3, Highways (HK.1) Department, dated 09.01.2008, is extracted hereunder -

"(c)For the purpose of drawing up annual list of approved candidates for appointment to the posts of Chief Engineer, Superintending Engineer and Divisional Engineer by promotion, the crucial date on which the candidate should have acquired the prescribed qualification shall be the 15th July of every year."

The above amendment came into force with effect from 12th August, 1998. When the Rule, which was made by exercising the power under Article 306 of Constitution, makes it clear that the candidate should have acquired the prescribed qualification on the crucial date alone will be considered for promotion, the submission made by the learned counsel for the petitioner will not be legally sustainable. As contended by the learned Additional Advocate General, the petitioner was promoted to the post of Superintending Engineer on 31.01.2016 and she attains the age of superannuation on 31.06.2017 and the crucial date for preparing the panel is 15.07.2016, as such, the petitioner has got less than one year service from the crucial date for preparing the panel. Hence, the petitioner is not eligible to the post of Chief Engineer, as contended by the learned Additional Advocate General.

14. It is the contention of the learned counsel for the petitioner that as per the administrative instruction given in G.O. Ms. No.368 (Personnel and Administrative Reforms Department), dated 18.10.1993, the preparation for filling up the post of Heads of Department should be initiated at least three months prior to the prospective date of retirement of existing incumbent.

15. But, it is well settled legal principle that the post is cadre oriented and not person oriented; hence, the petitioner cannot claim that whenever any vacancy arises, promotion should be given to those eligible persons. The panel for promotion post is prepared once in a year taking into consideration the crucial date. The panel cannot be prepared as and when vacancies arises. The

Government Orders in G.O. Ms. No.440, dated 26.10.1990 and G.O. Ms. No.368, dated 18.10.1993, on which the petitioner placed her reliance, are only in the nature of guidelines. When there is a specific Rule prescribing the conditions for preparing the panel for promotion, such post has to be filled up only in accordance with the Statutory Rules. In this regard, a reference could be placed in the judgment, relied upon by the learned Additional Advocate General, reported in (2010) 2 SCC 637 [Rakhi Ray v. High Court of Delhi], wherein it has been held by the Hon''ble Supreme Court as follows:-

"A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory Rules and in conformity with the constitutional mandate."

16. For the foregoing reasons as well as applying the principle laid down in the above judgment, I do not find any merit in the submissions made by the learned counsel for the petitioner. The petitioner is not entitled to the relief sought for in the present writ petition. Hence, the writ petition is liable to be dismissed.

17. In fine, the writ petition is dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.