
(2020) 08 J&K CK 0096
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 946 Of 2020

Ghulam Hassan Rather

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 04-08-2020

Acts Referred:

Citation : (2020) 08 J&K CK 0096

Hon'ble Judges : Rajesh Bindal, J;Rajnesh Oswal, J

Bench : Division Bench

Advocate : Salih Perzada, Sajad Ashraf, Momin Khan,

Judgement

Rajesh Bindal, J

1. The petitioner is before this Court impugning the order dated 18.06.2020 passed by the Central Administrative Tribunal (for short ?the Tribunal?), Jammu Bench, Jammu vide which interim relief was denied to him in the OA No. 04/2020, filed by him.
2. Learned counsel for the petitioner submitted that vide order dated May 20, 2020 impugned by the petitioner before the Tribunal, an earlier order passed by the respondent No. 1 was withdrawn and enquiry was directed to find out as to how the petitioner was designated as I/c Executive Engineer in the earlier communication by the Commissioner, Srinagar Municipal Corporation and other documents, when he was only an I/c Assistant Executive Engineer.
3. Trying to make out a prima facie case, learned counsel for the petitioner submitted that the petitioner, apprehending his reversion had immediately approached the Tribunal, Chandigarh Bench with prayer for grant of interim relief. However, the same was declined vide order dated 27.05.2020, treating the prayer as premature. However, liberty was granted to the petitioner to approach the Tribunal again. When the petitioner came to know about the order passed on May 20, 2020, he immediately approached the Tribunal, amended his earlier OA and prayed for interim relief.

4. Taking his arguments further, he submitted that Engineering Wing of the Local Bodies Department was transferred to the Corporation vide order dated 04.02.2020. On 28.02.2020 the relevant staff was relieved. The name of the petitioner finds mention at Serial No. 1 in the list. Though his substantive designation is shown as I/c Assistant Executive Engineer but he was shown to be working at that time as I/c Executive Engineer. He further submitted that substantively the petitioner is Assistant Executive Engineer though he was given the charge of the post of Executive Engineer. Such a course is permitted in the Rules. He further submitted that even a Junior Engineer working in the department, who is not substantively promoted but can be given charge of the post up to Chief Engineer. He further referred to an order dated 28.05.2019 passed by the Director, Urban Local Bodies, whereby the charge of I/c Executive Engineer was given to the petitioner. He further submitted that the petitioner is the senior most Assistant Executive Engineer in the department, who is entitled to be promoted to the post of Executive Engineer. Hence, there is no error even in giving charge of that post to the petitioner.

5. In the aforesaid factual matrix, challenge to the order of the Tribunal has been made on the ground that the same is in violation of Article 311 of the Constitution of India as the petitioner has been reduced in rank without holding any enquiry or by issuing any show cause notice to him.

6. Further the argument is that the petitioner is not seeking a declaration from the Tribunal as to whether he was I/c Executive Engineer or not. The only issue is whether the designation earlier granted to him could be withdrawn without affording opportunity of hearing.

7. On the other hand, learned counsel for the respondent No. 1 submitted that the petitioner admittedly was working as I/c Assistant Executive Engineer. However, he was given the charge of I/c Executive Engineer as has been shown in the order dated 28.02.2020. He is substantively an employee of PWD (R&B). He was on deputation with the department of Local Bodies. His lien still remains with his parent department. The order dated 28.05.2019, which the petitioner wants to rely, in order to claim that he had been promoted as Executive Engineer on Incharge basis, is totally misconceived. Vide aforesaid order, on account of retirement of Executive Engineer, Urban Local Bodies, only power of drawing and disbursing officer in respect of Engineering Division of Urban Local Bodies, Kashmir, was assigned to him. It was wrongly mentioned in that order that he is senior most Assistant Executive Engineer whereas there is no document on record to show that the petitioner was ever given the charge of Executive Engineer as he was merely working as I/c Assistant Executive Engineer. In the communication sent by the Director Local Bodies to the Corporation also by mistake his present position was mentioned as I/c Executive Engineer. In terms of order impugned, enquiry was initiated and the petitioner never participated in that. In the absence of any order showing that the petitioner was ever given the charge of Executive Engineer, his claim is totally baseless.

8. Learned counsel for the respondent No. 2, while adopting the stand taken by the respondent No. 1 submitted that the petitioner had been wrongly projecting himself to be I/c Executive Engineer. In fact, when this matter came to the notice of the Corporation, the same was taken up with the Director Local Bodies and the Government. It was thereafter found that it was totally wrong on the part of the petitioner to have claimed that he was ever promoted as I/c Executive Engineer. Once correct position came to the notice of the department, a corrective order was passed and enquiry was ordered as to who all were involved in this manipulation. In fact, the enquiry has been completed on 22-06-2020 and the report thereof has been sent even to the appellant and his counsel as well.

9. He further referred to the judgment of Hon^{ble} the Supreme Court in case titled as Suraj Parkash Gupta and others Vs. State of J&K and others reported as (2000) 7 Supreme Court Cases 561, to submit that the practice of giving promotion on incharge basis without regular promotion was deprecated by Supreme Court. In any case, in the case of the petitioner, there is not even an order passed by any authority giving him charge of the post of Executive Engineer. He was merely given the duties of Drawing and Disbursing officer, which earlier were being exercised by Executive Engineer. The moment he was transferred to other department, the charge automatically goes and the petitioner could not claim himself to be working on that post only.

10. He further submitted that after the order dated May 20, 2020 was passed by the competent authority, the petitioner had been working as I/c Assistant Executive Engineer. It was only after the interim order passed by this Court on 25.06.2020 staying the operation of order dated May 20, 2020 that the status quo ante was restored, otherwise that order had already been executed.

11. It was further argued that the question of grant of opportunity will arise only if the petitioner is able to establish that he was ever given the charge of the post of Executive Engineer and is sought to be reverted back. Merely because there was some error in mentioning his designation in any document, will not confer any right on him, as it was merely correction of error.

12. Learned Counsel for the petitioner submitted that time was sought by the respondents to file objections. Though it is claimed that they have filed objections but the copy thereof has not been supplied to him. In our opinion, objections are not required to be considered in this case for the reason that the matter is still pending before the Tribunal, where even the objections have not been filed. If this Court admits the objections filed by the respondents at the interim stage and records a finding thereon, nothing will remain to be decided by the Tribunal, which has to adjudicate the issue. Hence, the objections filed by the respondents are not being considered. In any case, it is for the petitioner before the Court to make out a prima facie case for grant of interim relief. He needs to stand on his own legs and not depend on the stand taken by the respondents in their objections. In any case material, which was before the Tribunal could be considered to judge the legality thereof.

13. Heard learned counsel for the parties and perused the paper book.

14. The principles for grant of interim relief are well settled. These are prima facie case, balance of convenience and irreparable loss.

15. A reference to the principles laid down by Hon^{ble} the Supreme Court in Suraj Prakash Gupta's case (supra) is also relevant in the case in hand. Relevant paragraph there from is extracted below:

"84. Apart from the above specific directions, we think this is an occasion to issue certain general directions to the State of J&K. As pointed out earlier, the State of J&K has been flouting basic rules of recruitment by granting relaxation of the rules of direct recruitment as also the rules requiring consultation with PSC/DPC for promotions/recruitment by transfer. In order to ensure that this is not done in future, the following directions shall also issue:

(A) The State of J&K shall appoint a High Level Committee within a month from today to go into the question as to whether in any department in government service, direct recruitment of existing vacancies has not been made and if there was unreasonable delay. The State will consider making direct recruitment expeditiously depending on the needs in the service and other relevant factors. But it will ensure that no promotees are put in the direct recruitment quota, temporarily or on stopgap and ad hoc basis unless simultaneously proceedings are initiated for direct recruitment through the Service Commission. The Committee will recommend in what manner the direct recruitment could keep pace with promotions as contemplated by rules.

(B) Similarly, the Committee will find out in which department the ad hoc/stopgap promotees are languishing without their cases being referred to the Service Commission/DPC for regularization within their quota.

(C) The State of J&K will ensure that no relaxation of the basic recruitment rules is made for direct recruitment through PSC, or for purposes of regular promotions/recruitment by transfer. The recommendations of the Committee referred to above may be considered by the Government and implemented in accordance with the rules and in accordance with law without unreasonable delay."

16. What is seen in the then State of J&K and now the Union Territory of J&K is that the aforesaid judgment of Hon^{ble} the Supreme Court is being complied with less and violated more, as practically in all the departments, promotions are being made on incharge basis. This practice is prevalent more in Engineering Department. The reasons therefor are not unknown. How an employee, who is substantively working on the lowest post, can be given the charge of a highest post in the department without there being regular promotions. No one knows their seniority position. It is the local adjustment made claiming that he is senior most available and there being a vacancy, he should be given charge of that. These employees continue working on that post for years together and whenever

any transfer is sought to be made, they approach the court and persuade to grant interim relief and as a result of that, continue on the same position for years together. This course adopted by the different departments is generating avoidable litigation as many of the employees approach the court raising the plea that they are senior to the person who has been given charge of some higher post. Not only this such a course also demoralizes other employees in the department. This is resulting in adhocism in the working of different departments of the government. The duties, which are required to be discharged by senior and experienced persons is being handed over to the juniors. Another facet of this system is that the employees already in service don't let the posts of direct recruitment filled up and usurp the same by adopting this system. With this practice being followed, the very object of having fresh talent at different levels in the department is defeated. This also results in delayed recruitments and as a result many of the eligible candidates may be over age by the time vacancies are advertised. There are many more issues which arises out of this illegal practice being followed.

17. Now coming to the merits of the controversy in the case in hand, the petitioner is aggrieved of the order passed by the Tribunal refusing to grant interim relief to him. He claimed that he was given the charge of the post of Executive Engineer, hence, could not have been reverted to the post of Assistant Executive Engineer, without affording him an opportunity of hearing. The fact remains that in support of his plea that he was ever given charge of the post of Executive Engineer, there is no document produced on record by him except order dated 28.05.2019, vide which he was given the powers of Drawing and Disbursing Officer in respect of Engineering Division of Urban Local Bodies, Kashmir on account of retirement of the Executive Engineer working there. The same cannot be termed to be an order giving charge of the post of Executive Engineer to him to claim that before asking him to discharge the duties of I/c AEE, he should have been afforded an opportunity of hearing. Substantively the petitioner is Assistant Engineer.

18. In the absence of any supportive documents to show that the petitioner was ever given the charge of post of Executive Engineer no prima facie, case is made out in his favour to grant him an interim relief. There is no error in the order passed by the Tribunal.

19. As far as grant of opportunity to an employee for taking action is concerned, it has been opined by Hon^{ble} the Supreme Court in JT 1999(5) SC 114 titled as M.C. Mehta Vs. Union of India, that interference on the ground of violation of principles of natural justice is not necessary, if result of interference would be restoration of an another order, which is not legal. In case, an order is challenged on that ground, the aggrieved person has to make out a prima facie case that there is substance in the arguments being raised by him. Only then, the matter can be referred back to the authority for grant of opportunity of hearing. Otherwise it would be an exercise in futility.

20. The writ petition is, accordingly, dismissed. However, it is made clear that nothing said above shall be considered as an expression of opinion on merits. This Court had to notice few facts and record some findings for the reason that the matter was argued in detail, least the parties would have been aggrieved of the fact that their arguments have not been noticed. Otherwise, the matter is listed before the Tribunal on 05.08.2020 for consideration on merits after the objections are filed by the respondents therein.

21. Before parting with the case and to take care of the fact that because of adhocism lot of litigation is being generated by the government, this court would like to seek comments from the government as to how this system can be put to an end and all recruitments and promotions are made strictly in terms of the Rules governing the post and not I/c basis. The system is being followed despite strict observations made by Hon^{ble} the Supreme Court way back in the year 2000 in the case of Suraj Parkash Gupta's case (supra). A High Level Committee was directed to be appointed to examine the entire issue. The report of the committee so appointed be also placed before the Court. For the present information would be required from all the departments giving the following details:

- i) Total sanctioned cadre strength in each of the cadres.
- ii) The notified service Rules governing the post.
- iii) Number of posts to be filled up from different sources, such as direct, promotional (giving source of feeder cadre wise, wherever relevant), deputation etc.
- iv) Number of actual employees working in each of the cadres.
- v) Whether the incumbents holding the posts are regularly recruited or promoted as per Rules or given charge of the post concerned.
- vi) If any of the employee has been given charge of a higher post, the date from which he is continuing on that post and the substantive post held by him.
- vii) Seniority list of each cadre, as on which date and when the same was circulated before finalization. If any of the seniority lists are still under finalization, reasons for delay.

22. A copy of this order be sent to the Chief Secretary and Secretary, General Administration Department to file their response in the matter. For the purpose the matter may be listed on September 04, 2020 before a bench to be constituted by Hon^{ble} the Chief Justice. Appropriate order in this regard may be obtained by the Registry from her.