

(1995) 01 KL CK 0057
In the High Court Of Kerala
Case No : O.P. No. 3167 and 6040 of 1985

K. Kunhunni

APPELLANT

Vs

Rubber Board and Others

RESPONDENT

Date of Decision : 18-01-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1)

Citation : (1995) 1 KLJ 253

Hon'ble Judges : M.M. Pareed Pillay, Acting C.J.; T.V. Ramakrishnan, J; P. Shanmugam, J

Bench : Full Bench

Advocate : P. Ravindran, for the Appellant; Joseph Vellappally, S. Sirijagan and George Thomas, for the Respondent

Final Decision : Dismissed

Judgement

P. Shanmugam, J.—The following questions are referred to the Full Bench :

- (a) Under what circumstances promotion of a person could be withheld pending disciplinary proceedings?
- (b) Whether in cases where withholding of promotion by itself is one of the substantive punishments in the disciplinary Rules, promotion should necessarily be given during the pendency" of the disciplinary proceedings?
- (c) Whether the judgment in W.A No. 296 of 1987 is correct or not?

Briefly stated facts of the case are as follows. The petitioner was working as a Selection Grade Field Assistant in the Regional Nursery of the Rubber Board at Manjeri. Disciplinary proceedings were, initiated against him by the Board vide its office Memorandum dated 29-1-1981 under Rule 11 of the Rubber Board Service (Classification, Control & Appeal) Rules, 1961. Ultimately the disciplinary authority imposed a penalty of withholding increment of pay of the petitioner for a period of two years without cumulative effect by order dated 21-2-1983. In the

meanwhile the Departmental Promotion Committee considered the selection of candidates for promotion to the post of Farm Assistant which is an selection post from the Selection Grade Field Assistant with three years experience. In view of the pendency of the Departmental proceedings, the D.P.C. did not recommend the petitioner for promotion. In the second D.P.C. meeting held on 4-12-1982 the petitioner was again considered but not recommended for promotion. Since the charges against the petitioner were proved subsequently and a penalty imposed on him, the findings of the Committee in the sealed cover were also not acted upon. The Departmental Promotion Committee met subsequently on 13-6-1983 but it did not find" the petitioner suitable for promotion. Petitioner's representation was rejected by Ext. P 8 Memorandum dated 19-12-1983 by the Rubber Board stating that his case for promotion can be considered in the normal course after the period of penalty imposed on him is over, Meanwhile the petitioner's appeal against Ext. P4 order of penalty was rejected Ext. P6 order of the Government of India dated 8-2-1985. The petitioner's first appeal against penalty and second appeal against denial of promotion were considered by the 1st respondent and while confirming the order of penalty held that the petitioner is not eligible for promotion during the period of penalty by Ext. P 9 order. The 1st respondent also found that the D.P.C. did not find him suitable for promotion. The petitioner is challenging is non-promotion and also the order of penalty as confirmed by the 1st respondent in these Original Petitions.

2. Mr. P. Ravindran, counsel appearing for the petitioner made the following submissions :

(a) Part V Rule 9 of the Rubber Board Service (Classification, Control & Appeal) Rules, 1961 provides for the penalty of withholding of increments or promotion. The petitioner having been awarded the punishment of withholding of increment, cannot be denied of his promotion.

(b) The non-consideration of the petitioner's case for promotion on the ground that disciplinary proceedings were pending and further the overlooking of his promotion consecutively by the three D.P.Cs. are violative of Article 16 (1) of the Constitution of India,

(c) The failure to consider the petitioner's case for promotion amounts to withholding of promotion and that is a punishment. After the completion of the period of punishment the petitioner should have been considered for promotion retrospectively as per the subsequent clarification issued by the Central Government.

3. Learned Counsel for the Rubber Board submitted that the petitioner is not eligible to be considered for promotion during the pendency of the departmental proceedings and that the D.P.C. did not consider him fit for promotion. He further submitted that after the imposition of the penalty the petitioner was not found suitable during the currency of the punishment.

4. We have heard the arguments and gone through the records. The post of Farm

Assistant is a post to be filled up by promotion from Selection Grade Field Assistants with three years experience. The Rubber Board Service Rules, 1961 governs the recruitment of employees of the Rubber Board. Rule 12 of the said Rules states that the conditions of service of the members of the Service., in respect of matters for which no provision is made in these rules, shall be the same as are for the time being applicable to officers of the Government of India of corresponding category. Thus in so far as the promotions are concerned the same rules that are applicable to the officers of the Government of India of corresponding category are applicable. The relevant rule governing the promotion of an officer who is undergoing disciplinary proceedings is found in the circular issued by the Central Government dated 30-1-1982. According to the said instruction, in the case of an officer against whom disciplinary proceedings are pending is considered for promotion by the D.P.C, the findings of the Committee are kept in a sealed cover to be opened after the conclusion of the disciplinary proceedings. If any penalty is imposed on the officer as a result of the disciplinary proceedings, the findings in the sealed cover shall not be acted upon. The Departmental Promotion Committees-Procedure and Guidelines to be followed by-Govt. of India Instructions O.M. No. F 22011/5/86-Estt. D. Dated 10-3-1989 outlines the guidelines for promotion by selection method. As per that circular, while merit has to be recognised and rewarded, advancement in an officer's career should not be regarded as a matter of course but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the annual confidential reports and based on strict and rigorous selection process. In the same circular it has been stated that before making the overall grading after considering the Confidential Reports for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity.

5. In this case charge was framed against the petitioner on 29-1-1981 and during the pendency of the disciplinary proceedings there were two DPC meetings, one on 30-4-1981 and the second on 4-12-1982. The petitioner was imposed a penalty on 21-2-1983. When the D.P.C. met on 13-6-1983 he was again not considered for promotion in view of the subsistence of the punishment. The petitioner could be considered for promotion only after 1-2 1986 viz. after the completion of penalty. So, as per the existing rules, though the D.P.C. followed the sealed cover procedure during the pendency of the disciplinary proceedings, the petitioner could not be promoted after the completion of disciplinary proceedings because a penalty was imposed on him. Since during the currency of the punishment he could not be considered for promotion, the respondents have followed the rules governing the promotion of an officer undergoing disciplinary proceedings.

6. The main contention of the petitioner is that those rules cannot be strictly applied because as far as the Rubber Board is concerned, the Rubber Board

Service (C.C. & A) Rules, 1961 while detailing the nature of penalties grouped the penalty of withholding increments or promotion as a single minor penalty. According to the Learned Counsel either withholding of increments or promotion can be imposed and not both. In his case since withholding of increments has already been imposed, he should not be denied promotion due to the pendency of the departmental proceedings or the penalty. The said argument is without any substance. The petitioner has no right to get promotion. This being a selection post the rules governing promotion says that in the case of an officer who is undergoing disciplinary proceedings, he will not be considered for promotion. Similarly being a selection post the D.P.C. has found him not eligible for promotion in view of the penalty. The question of imposition of the punishment of withholding of promotion will not arise in this case. The explanation to Rule 11 of the C.C.S. (Classification, Control & Appeal) Rules which is extracted below makes it clear that it shall not amount to penalty.

Penalties

11. The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely -

Minor Penalties -

- i).....;
- ii) withholding of his promotion;
- iii).....;
- iv) withholding of increments of pay;.....

EXPLANATION The following shall not amount to a penalty within the meaning of this rule, namely:-

- i).....;
- ii).....;
- iii) non-promotion of a Government servant, whether in a substantive or officiating capacity, after consideration of his case, to a Service, grade or post for promotion to which he is eligible;

7. In support of his contention Learned Counsel for the petitioner relied on the decision reported in Md. Habibul Haque Vs. Union of India, of that judgment the Court held as follows :

It is seen that the punishment imposed was only reduction of scale of pay for one year with cumulative effect. That does not have the effect of reducing his seniority nor would it be a punishment of reduction of seniority of any placement which the appellant would be entitled to hold in the order of seniority

The said judgment will have no application to the facts of this case. In that case

the disciplinary authority by order dated August 9, 1973 imposed a penalty of reducing the pay for one year with cumulative effect. Thereafter a question arose as to whether the appellant therein was entitled to his seniority as on February 29, 1968. The appellant's right to get fitment of his seniority from the year 1968 had to be considered since the punishment was given at a later point of time and that will not have the effect of reducing his seniority. Therefore, this case will not have any avail to the case of petitioner here.

8. Learned Counsel also referred to the decision reported in P. Narayanan V. State bank of Travancore-1989 (6) S.L.R. 709. In that case the State Bank of Travancore imposed a penalty of reduction in the time scale of pay by two stages against one of their staff and took the stand that this punishment will have the effect for two years and that during the said period he cannot be considered for promotion to the higher cadre. The learned Single Judge took the view that by imposition of the punishment of reduction in time scale the whole punishment has come into effect and the operation cannot be limited to two years. The facts of the case are different and the rules governing the consideration for promotion are also different. Therefore, the above decision will not be applicable to the facts of the case.

9. On the contrary the counsel for the Rubber Board cited the decision reported in Union of India and others Vs. K. Krishnan, in support of his contention that denial of promotion during the currency of penalty will not amount to a double punishment. The relevant portion in para 4 of the judgment is as follows :

We have considered the matter closely and in our opinion the view taken by the Tribunal both in the impugned judgment and in the earlier decisions holding that as a result of the provisions of Rule 157 forbidding the promotion of a State employee during the currency of the penalty results in a second punishment visiting the respondent as a result of the conclusion reached in the disciplinary proceeding leading to the withholding of increment, and the denial of promotion during the currency of the penalty is merely a consequential result thereof. The view that a Government servant for the reason that he is suffering a penalty or a disciplinary proceeding cannot at the same time be promoted to a higher cadre is a logical one and no exception can be taken to Rule 157. It is not correct to assume that Rule 157 by including the aforementioned provision is subjecting the Government servant concerned to double jeopardy. We do not find any merit in the argument that there is no justification or rationale behind the policy; nor do we see any reason to condemn it as unjustified, arbitrary and violative of Articles 14 and 16 of the Constitution of India. On the other hand, to punish a servant and at the same time to promote him during the currency of the punishment may justifiably be termed as self-contradictory.

10. In the decision reported in Union of India Vs. K.V. Jankiraman, etc. etc., Supreme Court was dealing with the denial of promotion. Para 8 of the said judgment sets out the procedure and the rationale for not considering an officer for promotion who is found guilty, which is as follows :

According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the "same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in presenting. When an employee is held guilty and penalised and is, therefore, not promote at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal, and unjustified. If; further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the paid portion of the second subparagraph after clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal.

11. From the decisions referred to above and the relevant rules, it is clear that the petitioner's contention that he will be subjected to a double penalty and that he is entitled to be considered for promotion during the pendency of departmental proceedings holds no water.

12. The distinction made by the Learned Counsel for the petitioner that under Rule 11 of the Central Civil Services (Classification, Control and Appeal) Rules withholding of promotion and withholding of increments of pay are treated as separate penalties and whereas under the Rubber Board Service (Classification

Control and Appeal) Rules it forms part of a single rule is a difference without any distinction. It does not make any difference whether the penalties are classified as one or separately. As stated above, the consideration of promotion is different and the failure to consider for promotion cannot be treated as a punishment. Our answer to the questions referred may be summarised as follows :

a) As per the service rules and the decisions of the Supreme Court referred above, promotion of a person could be withheld pending disciplinary proceedings.

b) The withholding of promotion will not amount to penalty even in cases where "withholding of promotion is a substantial punishment.

c) The Division Bench in W.A. No. 296/1987 relied on Rule 11 (6) of the Kerala Rules and held that where the penalty of reduction to a lower stage in a time scale cannot be given effect to or becomes inoperative, the monetary value equivalent to the amount of reduction ordered can be recovered from the pay of the officer and that promotion could be given even during the period when the person is undergoing punishment. Rule 11 (6) in our view is intended to apply to cases where a person would have otherwise retired within the period of punishment and in that event the monetary value equivalent to the amount of reduction would have to be recovered. The said provision cannot be applied in all cases of reduction to a lower stage so as to enable the officer to get promotion during the period of penalty.

13. However, the submission made by the Learned Counsel for the petitioner that in view of the clarification given by the Central Government in the Circular dated 30-8-1990 he is entitled to be considered for promotion retrospectively has to be considered. It is true that the petitioner has been subsequently promoted. However, according to the petitioner he is entitled to be considered for promotion and given seniority from the date of his eligibility to be considered for promotion. Without expressing any opinion on the petitioner's claim it is sufficient if we direct the respondents herein to consider the case of the petitioner in the light of the clarification issued by the Central Government in C & A.G. of India, New Delhi, Circular No. NGE/38/1990 (497-N. 2/89 -90), dated the 30th August, 1990. Accordingly we direct respondents 1 and 2 to consider the petitioner's claim based on the said clarification within a period of three months from today.

14. In O.P. No. 6040/1985 the petitioner has challenged the orders Exts. P4 and P6. The contention of the counsel for the petitioner is that the Enquiry Officer has exonerated him of all charges except one and even on that charge he has not conclusively given a finding. According to the petitioner there is total non-application of the mind by the 2nd respondent in passing the impugned order dated 21-2-1983 while imposing the penalty. We have gone through the Enquiry Report and also the order passed by the 2nd respondent as well as the Appellate Authority. We find that the charge against him that he was running private nurseries has been established beyond any reasonable doubt and the disciplinary

authority has gone through the findings and imposed the penalty after giving ample opportunity to him. The Appellate Authority has also given cogent reasons for passing the impugned order. We do not see any ground to interfere with the orders. We accordingly dismiss the Original Petitions, but no order as to cost.