
(2001) 06 AP CK 0026

In the Andhra Pradesh High Court

Case No : Writ Petition No. 26998 of 1999

M. Adbutha Rao

APPELLANT

Vs

Govt. of A.P., Irrigation and CAD Dept. and Others

RESPONDENT

Date of Decision : 26-06-2001

Acts Referred:

Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991 — Rule 24(1), 9
Constitution of India, 1950 — Article 16(1), 226

Citation : (2001) 4 ALT 407

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Advocate : P. Balakrishna Murthy, for the Appellant; Samson Babu, G.P. for Services-III, for the Respondent

Judgement

S.B. Sinha, C.J.—This Writ Petition is directed against the Judgment of the Andhra Pradesh Administrative Tribunal in O.A.No. 5606 of 1997 dated 13-8-1999 whereby and whereunder the prayer of the petitioner to set aside G.O.Rt.No. 1405, 1 and CAD (CAD Ser. II) Department dated 22-12-1995 treating the period of suspension of the petitioner from 17-9-1991 to 28-9-1994 as substantive punishment, etc. was rejected.

2. The petitioner who was working as Superintending Engineer, Investigation and Administration, I and CAD Department has filed the aforesaid Original Application with the following prayer:

(a) to call for the records connected with G.O.Rt.No. 1405,1 and CAD (CAD Ser. II) Department dated 22-12-1995 and quash the same:

(b) to declare that the respondents have no authority in law to impose the penalty of recovery of Rs. 7.25 lakhs from the applicant:

(c) to direct the respondents to promote the applicant as Chief Engineer with effect from the date on which Sri D. Rami Reddy was promoted as Chief

Engineer, vide CO.Ms.No. 338 dated 10-10-1994 with all consequential benefits of seniority, pay, etc. and

(d) also direct the respondents to consider the applicant for promotion to the post of Engineer-in-Chief from the date on which his junior Sri P. Sambasiva Rao was promoted to the said post through G.O.Ms.No. 85 dated 24-6-1997.

3. The basic fact of the matter is not in dispute.

The petitioner was appointed as Dy. Executive Engineer by direct recruitment through APPSC in 1967 and subsequently promoted as Executive Engineer in 1985 and as Superintending Engineer in 1991.

In May, 1990 a severe Cyclone ravaged the coastal districts disrupting the irrigation system. The State under Cyclone Emergency Repair Project (CERP) took up various repair works for various irrigation sources. The petitioner and one Sri T. Venkat Reddy were working as Executive Engineers in Irrigation Circle, Dowlaiswaram when the cyclone damage repair works were undertaken in the said circle. Sri Venkat Reddy was then holding full additional charge of the post of Superintending Engineer of the said Irrigation Circle. On 22-3-1991 both were promoted as Superintending Engineers. On promotion, the petitioner was posted as Superintending Engineer, Irrigation Circle, Dowlaiswaram. It appears that all was not well between Venkat Reddy and the petitioner and both approached the Tribunal as regards the posting to the Officer of Superintending Engineer, Irrigation Circle, Dowlaiswaram. It was alleged that while Sri Venkat Reddy was under orders of transfer, he sent a report to the Government on 29-5-1991 complaining that certain irregularities have been committed by the Engineers including the petitioner herein in relation to execution of 14 works taken up under CERP. Thereafter, the Government by reason of enquiry report submitted by the Chief Technical Examiner, placed the petitioner and others under suspension by issuing G.O.Rt.No. 899 dated 17-9-1991 in spite of the fact that the Chief Technical Examiner opined that it would be highly difficult and impossible to assess the ground conditions and ground levels as existed before the commencement of works, and on the same day issued orders in G.O.Rt.No. 896 appointing the Commissioner of Enquiry as Enquiry Officer to conduct a departmental enquiry. The Enquiry Officer issued charge memo on 18-12-1991 framing the following charges against the petitioner:

- (1) Assigning DR Nos. to the works without actually receiving the estimates for the same in the division;
- (2) Awarding works on nomination without actually according sanction to the estimates/ clearance from the Superintending Engineer.
- (3) Splitting up the works to enable awarding them on nomination without approval of the competent authority;
- (4) Failure to execute the works to the standards, specifications and agreement conditions.

(5) Failure to detect the fraudulent/ excess measurements while conducting test check-measurements and thereby causing unauthorised excess payments to the contractors.

4. During the course of enquiry, by reason of further investigation made by the Chief Engineer, Minor Irrigation, the enquiry was enlarged to 261 works. However, no further charges were framed in relation to such works. The respondents in their counter-affidavit admitted the said fact stating:

The oral enquiry was conducted based on the investigations carried out by the Chief Engineer, Minor Irrigation, Hyderabad. During the enquiry, it was specifically informed all the accused officers including Sri M. Adbutha Rao that the scope of enquiry on all the accused officers covers all the 261 works.

5. The petitioner filed O.A.No. 41206 of 1991 against the order of suspension and by order dated 19-1-1993, the Tribunal directed reinstatement of the petitioner and others into service.

6. The Enquiry Officer upon holding the departmental enquiry submitted his report on 27-12-1993. The findings of the Enquiry Officer are:

Charge 1: As the allegation is not substantiated by the custodian of records viz., S.E., Dowlaiswaram, the charge is treated as not established.

Charge 2: After considering the deposition of S.E., Dowlaiswaram the charge is treated as not established. However, when there are clear orders, the EE should have taken SEs orders before awarding works on nomination.

Charge 3: Both Chief Technical Examiner and SE have found no substance in the allegation. The charge is not established.

Charge 4: However, as the investigation was done after two years of execution with heavy rains in between and guidelines issued by CE were not followed and there were lot of presumptions. The A.O. is entitled to benefit of doubt vide para 29.

Charge 5: In spite of all the defence put up by the A.O. there is definitely some over payment and no sufficient care was exercised during execution by thorough checking by senior officers. Every precaution should have been taken to rightly utilize/spend the money on works. However, as the result of investigation is not accurate the A.O. is entitled to benefit of doubt, vide para 29.

7. The Enquiry Officer, however, found that the total excess payments assessed by the Investigating team was Rs. 136.46 lakhs which includes Rs. 20.45 lakhs measured and billed but not paid to the contractors and 75% benefit of doubt be extended to the accused officers and 25% of loss to be recovered from the officers. The loss was tentatively put at Rs. 29 lakhs with the appointment at 30% from Officer who initially recorded the measurements, 40% from the officer who check-measured, 5% from the administrative head in-charge of operations and at 25% from the petitioner who is in-charge of work and accordingly the

amount to be recovered from the petitioner was estimated at Rs. 7.25 lakhs and accordingly a show-cause notice was issued to the petitioner on 29-1-1996. Subsequently a revised estimation of loss was arrived at taking into account the amount of Rs. 20.45 lakhs to be paid to the contractors and the petitioner's share was fixed at Rs. 8.63 lakhs and a revised show-cause notice was issued on 3-6-1998.

8. In pursuance of the directions of the Tribunal dated 19-1-1993, the petitioner was reinstated into service by reason of orders passed by the Government in G.O.Rt. No. 1041 dated 28-9-1994. Thereafter in the D.P.C. held on 7-10-1994, the petitioner was found fit to be promoted as Chief Engineer, but promotion was deferred because of pendency of enquiry. In the DPC convened on 4-11-1995 also, his promotion was deferred though the DPC found him eligible to be promoted. One Rami Reddy who was his immediate junior was promoted as Chief Engineer on 10-10-1994. The petitioner approached the Tribunal in O.A.No. 1343 of 1995 wherein the Tribunal by order dated 29-3-1995 while granting interim orders directed the DPC to consider the case of the petitioner and also gave directions to dispose of the disciplinary enquiry within a period of two months from the date of receipt of the order.

9. While things stood thus, the Government, on a consideration of the report of the Enquiry Officer, issued final orders in G.O.Rt.No. 1405, I& CAD dated 22-12-1995, the relevant portion whereof reads as under:

Government after detailed examination of the matter have decided to treat the suspension period of Sri M. Adbhutha Rao, the then Executive Engineer (now Superintending Engineer) as substantive punishment in addition to the recovery of an amount of Rs. 7.25 lakhs apportioned to him being his share of loss caused to the Government.

Accordingly, the Government direct that the period of suspension of Sri M. Adbhutha Rao, the then Executive Engineer (now Superintending Engineer) be treated as substantive punishment specified under Rule 9(v) of A.P. Civil Services (CC & A) Rules, 1991.

Separate orders will be issued in respect of the recovery mentioned in para 6 above after following due procedure.

Review Petition filed thereagainst was rejected by the Government on 22-10-1997. The petitioner challenged the above order in O.A.No. 5606 of 1997 out of which the present Writ Petition arose.

10. A show-cause notice was issued to the petitioner on 29-1-1996 for the recovery of Rs. 7.25 lakhs apportioned against the petitioner and the petitioner submitted his explanation. The petitioner again filed O.A.No. 2812 of 1996 and by interim order dated 14-5-1996 the Tribunal directed to consider the case of the petitioner for promotion to the post of Chief Engineer as per rules and eligibility along with others.

When the petitioner was holding full additional charge of the post of Superintending Engineer, DPC was convened on 28-5-1997, but the petitioner was not found fit for promotion. Interim directions were also issued in O.A.No. 5607 of 1997 dated 26-9-1997 to consider the case of the applicant for promotion as Chief Engineer in any existing vacancies. Again the DPC was convened on 29-12-1997 but again in spite of the directions of the Tribunal he was not considered for promotion. The Departmental Promotion Committee was convened on 27-5-1998 and it opined that the opinion of the learned Advocate-General should be obtained in person by the Secretary concerned. Again in pursuance of the orders of the Tribunal dated 26-9-1997, the DPC was convened on 19-8-1998 but the petitioner was again not recommended for promotion. It is alleged that in the process 35 Superintending Engineers junior to him were promoted ignoring his case.

11. As noticed above. It appears that, a revised estimation of loss was arrived at subsequently taking into account the amount of Rs. 20.45 lakhs to be paid to the contractors and finally the apportionment against the petitioner was assessed at Rs. 8.63 lakhs and accordingly a revised show-cause notice was issued to the petitioner on 3-6-1998. The petitioner submitted his explanation to the same. The Government after consulting the A.P. Public Service Commission issued final orders directing recovery of Rs. 8.63 lakhs in G.O.Ms.No. 194 I & CAD dated 30-10-1999 which was challenged by the petitioner before the Tribunal in O.A.No. 7629 of 1999 and obtained interim suspension of the same on 23-12-1999 and the said O.A. is pending before the Tribunal.

12. In the counter, it was stated that in the DPC held on 13-12-1997 it was decided to obtain the views of the Law Department on the issue as to whether after treating the period of suspension as substantive punishment, the pendency of recovery of amount would amount to pendency of disciplinary case. In the counter it was alleged that the Law Department returned the file on 21-1-1998 with the endorsement that the petitioner tried to influence the Secretary (Law) in the matter and since it is not possible to give an unbiased advice, the advice of the learned Advocate-General may be obtained. The learned Advocate General advised that ordering recovery is only to regulate/recoup the loss caused to Government and is a consequential administrative act and, therefore, does not amount punishment on the same charge. The review DPC met on 19-8-1998 felt that further clarification and advice was to be obtained from the Advocate General. After obtaining the clarification, the review DPC met on 19-8-1998 and considered the case of the petitioner for promotion. But, in view of the allegation against the petitioner that he had tried to influence the Secretary (Law), it was opined that he cannot be recommended for promotion. The DPC again met on 23-12-1998 and found that he is not fit to be recommended for promotion. The petitioner was also issued show-cause notice on 4-11-1998 for violation of Rule 24(1) of APCS (Conduct) Rules, allegedly, on the ground that he had tried to influence the Secretary (Law). After considering the explanation submitted by the petitioner, an Enquiry Officer was appointed to inquire into the charges.

13. During the pendency of O.A. No. 5606 of 1997, the petitioner filed M.A.No. 702 of 1999 for amendment of the prayer to the effect that the action of the respondents in not promoting him as Chief Engineer and further, promotion as Engineer-in-Chief as unco(SIC)situational, mala fide and discriminatory. Petitioner also filed M.A.No. 703 of 1999 to treat the affidavit filed in W.P.No. 34305 of 1995 as part and parcel of the O.A. and both the applications were allowed.

14. By the order under challenge, the Tribunal held that the order of punishment imposed on the petitioner treating the period of suspension as substantive punishment is valid and proper. However, as regards the promotion, it was held:

Therefore, taking into consideration the law and the observations made with regard to the promotion, the case of the applicant has to be considered for promotion. The retrospective promotion as claimed by the applicant cannot be given as the applicant suffered punishment though minor in nature. As regards the promotion, the applicant is entitled to be considered by the DPC in pursuance of the interim order of the Courts, and, therefore, the respondents are directed to consider the promotion of the applicant to higher post without basing upon the minor punishment within two months from the date of receipt of this order.

15. Sri P. Balakrishnamurthy, the learned Counsel appearing on behalf of the petitioner, inter alia submitted that the charges are not only vague but having regard to the report of the Enquiry Officer and the evidence adduced in the enquiry the findings of the Enquiry Officer must be held to be wholly perverse. Further, proportionate recovery of the amount was recommended despite arriving at a finding to the effect that no charge against the petitioner had been established. According to the learned Counsel, the enquiry was conducted against five officers jointly and out of them except the petitioner all were found not guilty of certain misconduct. The learned Counsel would urge that the question of recovery of any amount from the petitioner does not arise inasmuch as no amount as such had been paid to the contractors, who, aggrieved by such non-payment of the amounts due from the Government had in fact approached this Court by way of Writ Petitions praying for recovery of amounts due and it is only pursuant to the directions of this Court, they were paid the amounts due. In one of those writ petitions viz W.P.No. 9958 of 1998, it was directed:

I am not inclined to go into the aspect of the matter as it is for the authorities to consider the same. In view of this, the Writ Petition is disposed of with a direction to the respondents that the balance amount, which is liable to be paid to the petitioner, shall be assessed and paid within six weeks from the date of receipt of a copy of this order.

16. The learned Counsel would also urge that against an interlocutory order a writ petition being W.P.No. 34305 of 1998 was filed before this Court wherein allegation of mala fide was made against the members of the Departmental Promotion Committee. Our attention in this connection has been drawn to the statements made therein to the following effect:

At this juncture I beg the permission of Honourable Court to place before it that I belong to SC community and in spite of the crying from the house - top to support the weaker sections and the underdogs of the society there is a pronounced and clear bias against the member of community in the hierarchy of the Government and we are never allowed to get our due share.

In the grand design of preventing me for getting promotion in spite of the fact that assuming without conceding that the minor penalty imposed on me by way of converting the suspension period as substantive one the same stood exhausted on 1-10-1994 itself and so far on the recovery of money no orders have yet been passed. Apart from the one under challenge in regard to the above minor penalty no other disciplinary cases or allegations are pending against me. Equally with confidence I can state that there are no adverse remarks against me communicated till to-day.

17. The learned Counsel would contend that the members of the Departmental Promotion Committee acted mala fide inasmuch as the petitioner belongs to Scheduled Caste community. Our attention has been drawn to the fact that although the learned Advocate-General gave his opinion, not once but twice, that the petitioner was entitled to promotion as Chief Engineer, he had been denied the same on the allegation that he had made attempts to obtain favourable opinion of the Law Secretary, even though the first and the 2nd Departmental Promotion Committees did recommend that he was fit to be promoted. In this connection, our attention has been drawn to the interim order passed by the Tribunal in O.A.No. 5606 of 1997 dated 26-9-1997 directing the respondents to consider the case of the petitioner for promotion as Chief Engineer. Our attention has also been drawn to the minutes of the DPC held on 7-10-1994 wherein as regards the petitioner, it was found:

On the basis of the overall records placed before the DPC, the DPC considers that he is suitable for promotion to the post of Chief Engineer and recommends inclusion of his (SIC) in the panel 1993-94 on par with their juniors at appropriate places in the category of Chief Engineers but his promotion be deferred in terms of G.O.Ms.No. 424, G.A. (Ser. C) Deptt. dated 25-5-1996.

18. The learned Counsel would contend that in May, 1998 the DPC in its meeting did not state that any attempt has been made by the petitioner to influence the Law Secretary, but, thereafter also they sought for the opinion of the learned Advocate General only with a view to deny promotion to the petitioner. It was submitted that for the purpose of proving mala fides, it is not necessary that the same should be proved beyond any reasonable doubt particularly when the allegations of mala fide had not been denied by any responsible officer in his counter-affidavit nor it is necessary to mention in the petition the names of particular officer or officers responsible for the official act. In this connection, our attention has been drawn to page 7 of the counter-affidavit which is in the following terms:

The applicant's case for promotion as Chief Engineer while the disciplinary case was still pending, was considered after his reinstatement by the Departmental Promotion Committee in its meeting held on 7-10-1994, along with other eligible candidates. The DPC found the applicant herein suitable for promotion to the post of Chief Engineer, but his promotion was deferred in view of the pendency of the disciplinary case. The applicant's case again came up for consideration by the DPC at its meeting on 20-10-1995. The DPC too is of the view that his case has already been considered by the DPC in its meeting held on 7-10-1994 and his promotion was deferred until termination of the disciplinary proceedings pending against him in terms of G.O.Ms. No. 424, GA Deptt., 25-5-1976.

19. In support of the above contentions, the learned Counsel for the petitioner has placed reliance on the decisions of the Apex Court in C.S. Rowjee and Others Vs. Andhra Pradesh State Road Transport Corporation, and State of Punjab Vs. Ramjilal and Others, . In these circumstances, Mr. Balakrishna-murthy would urge that the learned Tribunal committed a manifest error in not directing the respondents to promote the petitioner as Chief Engineer. Reliance in this connection has been placed on the decision of the Apex Court in Badrinath Vs. Government of Tamil Nadu and Others, .

20. Mr. Samsonbabu, learned Government Pleader appearing on behalf of the State, on the other hand, submitted that on allegations of overpayment of several lakhs of rupees, the State upon holding a detailed enquiry directed recovery of the said amount proportionately from the concerned officers. According to the learned Government Pleader, out of five Officers, four of them had not questioned the said orders. Learned Counsel would contend that promotion to a selection post cannot be claimed as a matter of right. In any event, the State, having regard to the facts and circumstances of this case and the allegations made against the petitioner, particularly charges 4 and 5 and also the guidelines issued in G.O.Ms.No. 203 G.A. (Ser. C) Dept. dated 5-5-1999 to the effect that the Departmental Promotion Committee should take into account the overall performance of an Officer including the past punishments and not merely to be guided by the fact whether a punishment is subsisting as on the date of the meeting of the DPC or on the qualifying date for the preparation of the panel, the petitioner (sic. respondents) cannot be directed to consider the case of the petitioner.

21. The contention of the petitioner before the Tribunal as also before us is that although he was not found guilty of commission of any misconduct, the disciplinary authority by reason of the order dated 22-12-1995 imposed the punishment.

22. Having considered the voluminous material placed on record by the parties, we are of the considered view that the petitioner has more been sinned than sinning. The petitioner was required to answer the charges against him which are absolutely vague on the basis whereof no departmental enquiry could be initiated. The petitioner continued under suspension for a period of little more

than three years. If further stands admitted that although the charges against the petitioner related to 14 works, without amending the charges, the same had been extended to 261 works. We, however, do not intend to go into the aforementioned question as the petitioner has not shown before us as to what extent he had been prejudiced thereby.

23. The petitioner, as noticed hereinbefore, although was found to be not guilty on any of the charges, inter alia, on the ground that no sufficient material has been produced by the Department, the Enquiry Officer, however, has observed:

This assessment of excess payment suffers from the following infirmities.

- (1) The method of assessment is not scientific but at best an approximate one.
- (2) There have been several deviations in the actual assessment from the guidelines. No trial trenches at prescribed intervals were excavated. The bores made are few and stopped where the augur did not go easily. The point is joined to the ground level on either side in the cross section sheet.
- (3) Senior officers have not checked the levels or the augur penetration.
- (4) The augur method itself is unsatisfactory.
- (5) No soil tests have been conducted to assess the change of nature of soil.
- (6) Assessment attempted after nearly 2 years of the execution of work cannot give dependable results.
- (7) Pre-levels on which most of the excess payments are assessed have not been precisely established.

On the other hand, there is definitely some excess payment and much of the levelling and check-measurement appears unreliable. As no substantial evidence is adduced in favour of accuracy of the assessment made, the accused officers are entitled to benefit of doubt to the extent of 75% which is considered reasonable in all types of works executed. Thus the loss can be tentatively put at Rs. 29 lakhs which is recoverable if it cannot be made good from the contractors. The appointment among the departmental officers can be as per the following proportion:

AEE/AE initial recording officer: 30% DEE who is check-measuring and is responsible for accuracy: 40% EE who is overall in-charge of work and should be in the know of the goings on: 25% SE who is administrative head and has to direct the operations: 5%

24. From the above it is evident that the petitioner had been made liable to pay a huge amount in the event the same could not be recoverable from the contractors although no charges against were found to be proved. In any event, there does not appear to be any reasonable basis whereupon the extent of loss had been fixed. Such a finding, ex facie based on surmises and conjectures, cannot be accepted in law.

25. It is unfortunate that the departmental enquiry on such serious charges had been conducted in such a casual and cavalier manner.

26. It also stands admitted that this Court having regard to the stand taken by the State in several writ petitions filed by the contractors, directed payment of the amount due to them, wherefrom, it can safely be inferred that even according to the State, no over-payment had been made to the contractors and in fact the State owed much amount to the contractors at the relevant point of time. It is, therefore, clear that there was no legal basis for the disciplinary authority to issue the order of punishment. The said order, thus, not only suffers from a total non-application of mind on the part of the disciplinary authority but also suffers from the vice of unreasonableness. In this view of the matter, the impugned order of punishment dated 22-12-1995 cannot be sustained.

27. So far as the matter relating to promotion is concerned, in any event, having regard to the fact that a minor punishment was imposed upon the petitioner, there was no bar in promoting him to the higher post. The respondents, therefore, in our opinion, have acted for an unauthorised purpose which would amount to malice in law. There cannot be any doubt whatsoever that the post of Chief Engineer and Engineer-in-Chief being selection posts, though the petitioner did not have a right to be promoted, but, in terms of Article 16(1) of the Constitution of India, he had a right to be considered therefor. It is now well settled principle of law that such consideration must pass the test of fairness. It is also axiomatic that if the DPC while considering the case of a promotee has taken into consideration extraneous matters and fails to take into consideration the relevant factors, its decision would be vitiated in law.

28. The petitioner had been denied promotion only on the ground that a disciplinary enquiry was pending against him and/or punishment had been imposed upon him. Having regard to our aforementioned findings that the action on the part of the DPC and/or the respondents in not granting promotion to the petitioner was vitiated in law, as the same suffers from the vice of Wednesbury's unreasonableness as also being mala fide in-law, this Court, in exercise of its power of judicial review, can issue appropriate directions.

29. In *Badrinath case* (3 *supra*), *Jagannadha Rao, J*, was considering a matter where promotion had been denied to the appellant before it against whom an order of censure was passed and also there had been adverse remarks. Some adverse remarks which were made prior to his promotion were taken into consideration and certain good academic works done by him had been ignored. The Apex Court held that the Court is entitled to consider the merit of the matter. The Apex Court held that a writ or order in the nature of mandamus can issue to promote the officer in exceptional cases stating:

We may, however, point out that it is not as if there are no exceptions to this general principle. The occasions where the Court issued a writ of certiorari and quashed an order and had also issued a mandamus at the same to the State or

public authority could be very rare but we might emphasise that the power of this Court to mould the relief in the interests of justice in extraordinary cases cannot be doubted. In *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, such a power on the part of this Court was accepted by a three-Judge Bench. Madon, J, referred to the observations of Subba Rao, J. (as he then was) in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, wherein the learned Judge explained that our Constitution designedly used wide language in Article 226 to enable the Courts to "reach justice wherever found necessary" and "to mould the reliefs to meet peculiar and complicated requirements of this Country". Justice Madon also referred to *Rochester Corpn. v. R* 1858 EB & E 1024 : 27 LJQB 434 *R. v. Revising Barrister for the Borough of Hanley* (1912) 3 KB 518 : 81 LJKB 1152 *Padfield v. Minister of Agriculture Fisheries and Food* 1968 AC 997 : (1968) 1 All. ER 694 : (1968) 2 WLR 924 (HL) and to a passage from Halsbury's laws of England, 4th Edn. Vol. 1, p. 59. Finally, Madon, J, observed: (SCC pp 692-693, para 20)

"There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a Writ of Mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a Writ of Mandamus or a writ in the nature of mandamus or pass orders and give discretion to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the parties concerned, the Court may itself pass an order or give directions which the "Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

We emphasise the words underlined in the above passage to the effect that the Court may in some rare situations itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion. The same view was expressed by another three-Judge Bench in *B.C. Chaturvedi Vs. Union of India and others*, even regarding disciplinary cases. Verma, J, (as he then was) observed (at SCC P. 762, para 18) as follows:

"The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and imposed some other penalty. If the punishment imposed by the disciplinary authority or the appellate

authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

The underlined words reiterate the powers of this Court in rare and exceptional cases.

30. The present case fulfills the criteria mentioned in *Badrinath* (3 supra) and indeed stands on a stronger footing. In the facts and circumstances of the case, the petitioner has not only been denied promotion on the basis of an order of punishment which was per se illegal, the State had not even acted fairly despite the opinion rendered by the learned Advocate-General to the effect that he may be promoted. It has not been disputed before us that having regard to the nature of punishment imposed upon the petitioner which was minor in nature, and in particular having regard to the findings arrived at by the Enquiry Officer in the departmental proceedings, he could be promoted.

In fact, as noticed hereinbefore, the case of the petitioner had not been considered as per the interim directions of the Tribunal, allegedly, by reason of the instructions issued in G.O.Ms.No. 203 dated 5-5-1999.

31. However, the instructions contained in G.O.Ms.No. 203 do not prohibit promotion where the employee was imposed a minor penalty. What all it says is that where a person undergoes a series of punishments, he does not deserve to be promoted to a selection post even though at the time of DPC no punishment is subsisting. Therefore, the Government directed that the DPC should take into account the overall performance of the officer concerned which includes past punishments and should not be guided by the fact whether a punishment is subsisting as on the date of the meeting of the DPC or on the qualifying date for the preparation of the panel. In the instant case, even assuming that the impugned punishment has validly been imposed, it is only a minor penalty and it shall not come in the way of considering the case of the petitioner for promotion as Chief Engineer.

32. Further, it is not the case of the respondents that the petitioner had suffered several past punishments. Therefore, the petitioner, even as per G.O.Ms.No. 203 should have been promoted at least with prospective effect because, he, as noticed hereinbefore, on the basis of his CRs and past performance, was found fit for promotion by two DPCs on earlier occasions. The latter DPCs did not recommend his name on irrelevant and extraneous considerations, namely, the petitioner had been trying to influence the Secretary (Law) although the Secretary (Law) had no role to play and who even was not the convener of the meeting of the DPC. Despite a clear direction issued by the Tribunal in its order dated 26-9-1997 in O.A.No. 5606 of 1997, as noticed hereinbefore, his case was not considered by the DPC. We, therefore, are of the opinion that in view of the

decision of the Supreme Court in Badrinath's case (3 supra), directions should be issued: to promote the petitioner from the date his immediate junior Sri D. Rami Reddy was promoted in G.O.Ms.No. 338, I & CAD dated 10-10-1994 as Chief Engineer and also to consider his case for promotion to the post of Engineer-in-Chief. In the instant case, as noticed hereinbefore, the petitioner has more been sinned than sinning. He, despite a thorough probe was found not guilty of any of the charges levelled against him, but, still he had undergone the punishment not only by reason of the impugned order dated 22-12-1995, but also by constantly denying him his legitimate right of being promoted keeping in view the recommendations made by the DPC. He had to suffer the ignominy of working under his junior for a long time and unfortunately his case had been pending before the Tribunal as also before this Court. We are informed at the Bar that the petitioner had retired in February, 2001.

33. However, we are not in a position to accept the contention of Mr. Balakrishnamurthy that the impugned order should be set aside on factual malice on the part of the members of the DPC. It is true that in a given situation, the mala fides attributed on the part of the concerned authorities by the party may be inferred from the circumstantial evidence as also the attendant circumstances. But, before such finding is arrived at, those authorities against whom malice has been attributed should be impleaded as parties to the proceeding. The petitioner has raised the question of malice in fact to the effect that he had been denied promotion only on the ground that he was a member of Scheduled Caste community. Such allegations against the members of the DPC were serious in nature. The petitioner, therefore, should have impleaded those members of the DPC as parties to the writ application in their personal capacity so as to enable them to reply to the said allegations.

34. In C.S. Rowjee's case (1 supra) it was observed:

The next question is as regards the inference to be drawn from these facts which in the absence of their denial have to be taken as true. It is here that we have felt the greatest uneasiness because if the facts which serve as the foundation for the plea of mala fides are made out, the only question would be whether the inference of mala fides on the part of the Chief Minister would be a reasonable one to draw. It is at this point that we are faced there being any effective answer to the propriety of drawing the inference which the appellants desire. There has been no denial by the Chief Minister nor an affidavit by any person who claim or can claim to know personally about the truth about these allegations..... We are, therefore, constrained to hold that the allegations that the Chief Minister was motivated by bias and personal ill-will against the appellants, stand un rebutted.

In the above case, though the Chief Minister had been impleaded as a party, he did not deny the allegations of mala fide made against him by filing any reply and under those circumstances, it was observed by the Supreme Court that the allegations that the Chief Minister was motivated by bias and personal ill-will

against the appellants stood un rebutted.

35. Herein, it is not a case where the Members of DPC against whom allegations of mala fide are attributed are made parties to the writ application. In the absence of their being made parties and given an opportunity to come forward to place before the Court either their denials or their version of the matter, it is not possible to judge the veracity of the allegations made by the petitioner merely on tests of probability with nothing more substantial by way of answer. It is only when the version of the person against whom allegations are made is placed before the Court, the Court may be in a position to judge as to whether the onus that lies upon those who make allegations of mala fides on the part of authorities have discharged their burden of proving it.

36. In *State of Punjab v. Ramji Lal* (2 supra) in the peculiar facts and circumstances obtaining therein, the Apex Court held:

Counsel for the State of Punjab contended that the plea that the action of State was not bona fide cannot be said to be established, unless the party alleging that case names the officer or officers guilty of conduct which justifies an interference that the official act was done for a collateral purpose, and since no such attempt was made and the High Court did not find that any named officer or officers was or were responsible for that official act the plea that it was not bona fide must fail. We do not think that the law casts any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority and who acted on behalf of the State Government in issuing the order in the name of the Governor, are all within the knowledge of the State Government, and it would be placing an intolerable burden in proof of a just claim to require a party alleging mala fides of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose.

37. Yet again the Apex Court in *State of U.P. Vs. Yamuna Shanker Misra and another*, it was observed:

In this case also, as the findings recorded by the Tribunal of malice and arbitrariness on the part of Secretary as affirmed by the High Court are not warranted for two reasons. Firstly, since the Secretary was not a nominee to the proceedings and had no opportunity to explain the position, it would be violative of the principle of natural justice. Secondly, the vigilance enquiry was pending, unless the officer was exonerated and cleared from the cloud, necessarily, the Secretary could not clear the conduct and integrity of the officer. Therefore, the adverse remarks cannot be said to be to smack of arbitrariness.

In this case also, as noticed herein before, the members of the DPC had not been impleaded as parties in their personal capacities. This Court, therefore, cannot enter into the factual aspects of the allegations of such mala fides on their Article

38. Next aspect of the matter is, how to mould the relief in this case. The petitioner has prayed for setting aside the judgment and order of the learned Tribunal in O.A.No. 5606 of 1997 and also directing the respondents to promote the applicant as Chief Engineer with effect from the date on which his immediate junior Sri D. Rami Reddy was promoted as Chief Engineer and for further direction to the respondents to consider the petitioner for promotion to the post of Engineer-in-Chief from the date on which his junior Sri P. Samabhasiva Rao was promoted. The relief of consideration for the post of Engineer-in-Chief would not present any difficulty. Nonetheless the question arises as to whether we should issue a Mandamus directly without first enabling the authorities to consider the case of the petitioner. It is noticed supra that the petitioner was considered by at least three Departmental Promotion Committees as being suitable, eligible and qualified for being appointed as Chief Engineer. For one reason or the other his case was not considered illegally. The petitioner has since retired and hence any order directing the respondents to promote the petitioner, as Chief Engineer would not prejudice any of the promotees. As already noticed in Dwaraknath's case (5 supra) the Supreme Court ruled that Article 226 of the Constitution of India is designedly couched in wide language which enables the High Courts "to reach justice wherever found necessary" and to mould the relief to meet the peculiar and complicated requirements. The same view was reiterated in Hochtief Gammon Vs. State of Orissa and Others, . In cases where a person is a victim of illegality, this Court in exercise of its power under Article 226 can issue a Writ of Mandamus or give directions to compel the authorities to act in a proper manner. We are convinced that in the facts and circumstances of this case, we should issue a Writ of Mandamus directing the authorities to promote the petitioner as Chief Engineer. Accordingly the Writ Petition is allowed in terms of the following directions.

(i) The impugned judgment of the learned Tribunal in O.A.No. 5606 of 1997 dated 13-8-1999 and the Government Order in G.O.Rt. No. 1405, I & CAD dated 22-12-1995 are set aside;

(ii) The respondents are directed to promote the petitioner as Chief Engineer with retrospective effect from the date on which his immediate junior Sri D. Rami Reddy was promoted vide G.O.Ms.No. 338 I & CAD dated 10-10-1994 and give all monetary benefits;

(iii) The respondents are directed to consider the case of the petitioner on notional basis for promotion as Engineer-in-Chief in the event he is found fit for promotion therefore with all consequential benefits accruing therefrom; and

(iv) In the facts and circumstances of the case the petitioner shall be entitled to the costs quantified at Rs. 5,000/- (Rupees five thousand) to be paid by the respondents.