

(2013) 08 MAD CK 0254
In the Madras High Court
Case No : W.P. No. 2604 of 2009

N. Srinivasa Rao

APPELLANT

Vs

Member Secretary, Chennai Metropolitan Development
Authority and Another

RESPONDENT

Date of Decision : 29-08-2013

Acts Referred:

Citation : (2014) 2 MLJ 724

Hon'ble Judges : T. Raja, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

T. Raja, J.—The petitioner seeks for issuance of a writ of certiorarified mandamus to quash the impugned order passed by the first respondent/ the Member Secretary, Chennai Metropolitan Development Authority (in short "CMDA"), Chennai, in Proc. No. E2/21930/2008, dated 20.2.2009, by calling for the records connected thereto and consequently, to direct the first respondent to treat the petitioner as senior to the second respondent and thereafter, to promote him to the post of Executive Engineer on that basis with effect from 20.2.2009, with all consequential benefits. Learned counsel appearing for the petitioner submitted that the petitioner entered in service of CMDA as Junior Engineer on 2.8.1985. Subsequently, he passed B.E. (Civil Engineering) in 1991 and also M.E. (Structural Engineering) in 1993 from Anna University. After five years of unblemished service, he was promoted to the post of Assistant Executive Engineer on 13.12.1998, whereas his juniors--Mr. Shanmuga Vadivelu/2nd respondent herein and Mr. Oom Narayanan--were promoted to the post of Assistant Engineer only on 25.2.2000. Thereafter, he went on leave for a period of two years i.e. from 12.4.2001 to 20.3.2003, after getting approval from the CMDA. On completion of leave period, he had also rejoined duty on 21.3.2003. However, when the next avenue of promotion to the post of Executive Engineer fell vacant, the petitioner's juniors--Mr. Shanmuga Vadivelu/2nd respondent

herein and Mr. Oom Narayanan--were promoted as Executive Engineers purely on a temporary basis, since the regular incumbent-Mr. E.V.K.S. Mathivanan was posted as Chief Administrative Officer of Market Management Committee. Therefore, challenging the said promotion given to his juniors, he filed a writ petition before this Court in W.P. No. 30209 of 2005 and the same is pending. During the pendency of the writ petition, since the promotion was on temporary basis, the said E.V.K.S. Madivanan repatriated to CMDA as Executive Engineer and thereafter, the second respondent also reverted to the post of Assistant Executive Engineer. Therefore, the said writ petition has become infructuous. While so, the grievance of the petitioner is that since the petitioner was senior to the second respondent in the post of Assistant Executive Engineer, the first respondent ought to have included the period of leave taken by the petitioner to count the service period so as to get him a promotion before the second respondent, the reason being that, as per the Tamil Nadu State and Subordinate Service Rules, he pleaded, leave period of a Government Servant should also be included as a part of service period, but, ignoring the same, the second respondent has been wrongly promoted to the post of Executive Engineer on 05.12.2005.

2. In support of his submission, he has also relied upon a judgment of the Apex Court in the State of Haryana and Others Vs. Rajindra Sareen, , wherein the Apex Court has held that if an officer has been appointed in a permanent post against a substantive vacancy and if he has completed the initial period of probation, then he becomes a permanent member of the service. Again, it was contended that the service condition of the petitioner and the second respondent to be regulated only in terms of regulation framed by CMDA and as per the said regulation, the case of the petitioner has been completely overlooked by the first respondent by wrongly giving weightage in the light of the Rule 35 of the Tamil Nadu State Subordinate Service, as the said Rule does not apply to the case of the petitioner as well as the second respondent, since they are not Government servants, hence, the first respondent ought not to have given promotion to the second respondent to the post of Executive Engineer, ignoring the length of service rendered by the petitioner. On that basis, he prayed for dismissal of the writ petition.

3. Per contra, learned counsel appearing for the second respondent, by filing a detailed counter, submitted that the petitioner, while serving as Assistant Executive Engineer, obtaining a long leave between 12.4.2001 and 11.4.2003, went outside the country to take up overseas employment at Bahrain. On his return from the foreign country, he joined duty on 21.3.2003 and he was also informed that his leave period would not be counted for increment, pension, promotion, etc. Only with this condition and understanding, the petitioner knowing pretty well that two years of long leave would not be taken into account for increment, pension and promotion, he has gone outside the country for taking overseas employment at Bahrain. Subsequently, when he joined the post after completion of two years of long leave, a vacancy for the promotional post of

Executive Engineer fell vacant and in the said vacancy, the second respondent was appointed as a stop-gap arrangement, since he had five years of experience on the date of promotion, whereas the petitioner did not have the requisite experience, therefore, he cannot question the appointment of the second respondent. Moreover, he further pleaded that as per Regulation 5 of the Madras Metropolitan Development Authority Service Regulations, 1980 (in short "Regulation"), one should possess 5 years of minimum experience in the post of Assistant Executive Engineer of CMDA, but admittedly, since the petitioner did not have the five years of experience, he was not included in the panel. Therefore, the present writ petition seeking a promotion above the second respondent cannot be entertained and on that basis, he prayed for a dismissal of the writ petition.

4. Heard both sides.

5. Admittedly, the petitioner was appointed as Junior Engineer on 2.8.1985. After acquiring B.E. (Civil) in 1991, he further acquired M.E. (Structural) in 1993 from Anna University. Thereafter, the petitioner applied for a leave for two years between 12.4.2001 and 20.3.2003 before the first respondent. While considering the long leave period of two years, the first respondent sanctioned the said leave period on condition that these two years of leave period would not be taken into account for increment, pension and promotion, as he was intending to go outside the country for taking up overseas employment at Bahrain. In these circumstances, it is pertinent to refer to G.O. Ms. No. 295, dated 14.09.1995, which prescribes that the leave taken for foreign employment cannot be taken as service period for promotion. Following the said G.O., the case of the petitioner was not considered, hence, it is too late for the petitioner to say that the first respondent has not taken into consideration the long leave period of two years, while considering the case of the second respondent for promotion, who has been continuously working more than five years in the post of Executive Engineer from 5.12.2005, till the panel was drawn from the feeder category, namely, Assistant Executive Engineer, to fill up the promotional post of Executive Engineer in the year 2005.

6. When the matter stood as above, the petitioner, after availing two years of long leave, re-joined the duty on 21.3.2003. Subsequently, when a vacancy to the promotional post of Executive Engineer came into existence on account of one Mr. E.V.K.S. Mathivanan was promoted to the post of Chief Administrative Officer on 22.11.2004, the second respondent, having possessed five years of experience as per Regulation 5, was posted as Assistant Executive Engineer. In this context, it is pertinent to refer to Regulation 5, which reads as follows:

5. Special qualification--No person shall be appointed to any category specified in column (1) of the Table below unless he possess the qualifications specified in the corresponding entries in column (2) thereof:

The Table

Provided that preference shall be given to a person who has acquired in addition to the qualifications prescribed for each post, a Master's degree or an equivalent Diploma in Town and Country Planning or Engineering.

A mere reading of the above Regulation 5 shows that, for the post of Executive Engineer, one should possess B.E. Degree (Civil or Highways) and must also have an experience as Assistant Executive Engineer for a period of not less than five years in Madras Metropolitan Development Authority on the date of drawing the panel. In this case, admittedly, on the date of drawing the panel for filling up the promotional post of Executive Engineer, the petitioner, who has lost two years of service on account of his overseas employment, was not included in the said panel prepared for the year 2005. Therefore, it is not open to the petitioner to ask for promotion when he has not even come within the zone of consideration, as contemplated under Regulation 5. Hence, the second respondent, who has complied with the condition mentioned in Regulation 5, was considered and promoted to the post of Executive Engineer. Subsequently, in the existing two vacancies, the second respondent and one Mr. Oom Narayanan were considered to fill up the post of Executive Engineer. Later on, on Mr. E.V.K.S. Mathivanan was further promoted as Chief Administrative Officer from the post of Executive Engineer after making due amendment in the rules. However, the Government, vide letter dated 9.4.2008, directed the first respondent to revert the said Chief Administrative Officer as Executive Engineer. As a result, the second respondent was also reverted as Assistant Executive Engineer for want of vacancy, but that does not give any room to the petitioner to say that, after the second respondent was reverted from the post of Executive Engineer and in the meanwhile, he has acquired five years of experience, he should be considered above the claim of second respondent. As a matter of fact, the first respondent, finding that the second respondent has complied with the conditions mentioned under Regulation 5, has rejected the claim of the petitioner. Such view of the first respondent cannot be interfered with. In any event, on the date when the panel was prepared for the post of Executive Engineer, as per Regulation 5 framed by the first respondent, the petitioner was not having five years of experience in the post of Assistant Executive Engineer, although he was senior in the feeder category of Assistant Executive Engineer. Further, when the Regulation 5 has made it clear that one should possess five years of minimum experience in the feeder category, namely, Assistant Executive Engineer for the post of Executive Engineer, the judgment relied on by the learned counsel for the petitioner cannot be made applicable to support his claim. Accordingly, accepting the said submission of the respondent, this Court, finding no merit in the writ petition, is inclined to dismiss the writ petition. In fine, for the aforesaid reasons, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.