

(1996) 08 KL CK 0044
In the High Court Of Kerala
Case No : O.P. No. 6183 of 1989

P.N. Devarajan

APPELLANT

Vs

Rubber Board and Others

RESPONDENT

Date of Decision : 02-08-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Rubber Board Service (Classification, Control and Appeal) Rules, 1961 — Rule 12, 157, 18, 9

Citation : (1997) 2 LLJ 45

Hon'ble Judges : B.N. Patnaik, J

Bench : Single Bench

Advocate : P.G. Parameswara Panicker, for the Appellant; Joseph Vellappally and Siri Jagan, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Patnaik, J.—The petitioner, an employee of the Rubber Board, Kottayam (2nd Respondent) which is a statutory Body constituted and governed under the Rubber Act, 1947, has prayed for issue of a direction to quash Exts. P3, P7 and P9 and by a subsequent petition he has also prayed for restoration of his seniority in the promotion post which was overlooked when his juniors, namely Respondents 4 to 26, were promoted.

2. By Ext.P3 penalty of withholding the increment for a period of three months without cumulative effect was imposed on the petitioner . By Ext. P7 his appeal against the penalty imposed in the disciplinary proceeding was dismissed by the Government of India, Ministry of Commerce, New Delhi (1st Respondent). By Ext.P9 the appeal against the order of promotion of Respondents 4 to 26 in supersession of his claim to the post of Upper Division Clerk, from that of the Lower Division Clerk was rejected. Since, during the pendency of the Original Petition he was promoted to the post of U.D. Clerk, he has now claimed that his position of seniority in the gradation list of L.D. Clerk may be directed to be

restored in the gradation list of U.D. Clerks above Respondents 4 to 26.

3. The petitioner's service as L.D. Clerk was confirmed with effect from October 1, 1985. While serving as L.D. Clerk the second Respondent initiated disciplinary action against him under Rule 12 of the Rubber Board Service (Classification, Control and Appeal) Rules, 1961 by Memo No.CI/20/86/Vig. dated June 12, 1987. The charge against him was that he failed to carry out the lawful and clear orders of his superiors thereby committing wilful insubordination and dereliction of duty. The petitioner was given an opportunity to make a representation against the memo of charges. After taking into consideration his representation dated June 24, 1987, wherein he has expressed his regret for the misconduct and assured the disciplinary authority that such misconduct will not be repeated in future, the disciplinary authority (2nd Respondent) imposed the aforesaid penalty. The appeal filed under rule 18 of the Rubber Board Service (Classification, Control and Appeal) Rules, 1961 (for short, the Rules) against the penalty was dismissed by the first Respondent, by order dated February 16, 1988 (Ext.P7). While so, by Ext.P5 order dated September 24, 1987, the second Respondent promoted Respondents 4 to 26, who were junior to him, by overlooking his seniority to the posts of Upper Division Clerk on the recommendation of the Departmental Promotion Committee (for short, the DPC). The petitioner filed O.P. No. 9316 of 1987 before this Court challenging Ext.P5 memorandum dated September 24, 1987 relating to the promotion of Respondents 4 to 26. This Court, by judgment dated June 8, 1988, disposed of the O.P. with a direction to the petitioner to file an appeal as provided in Rule 19 of the Rules. Accordingly, the petitioner filed Ext. P8 appeal before the Government of India. However, the appeal was dismissed by Ext.P9 order by the first Respondent. Subsequently, he was promoted as U.D.Clerk on June 16, 1988. But he was not given his earlier position of seniority above Respondents 4 to 26 in the promotion post as per the gradation list issued on March 31, 1994. It is contended by the petitioner that the post of U. D. Clerk was not a selection post. The qualified L.D. Clerks are to be promoted strictly on the basis of seniority. An employee whose increments have been withheld cannot be considered to be ineligible for promotion to the higher grade as the specific penalty of withholding promotion has not been imposed on him. The denial of promotion to the petitioner amounts to imposition of double penalty which is unsustainable in law. Stoppage of increment will have no effect whatsoever on the seniority of the petitioner. Respondents 1 and 2 are, therefore, bound to grant promotion to him with effect from September 24, 1987 and he should be given seniority above Respondents 4 to 26 from that date when they were promoted by Ext.P5 order. It is further contended that the second Respondent, under similar circumstances, gave promotion with retrospective effect to one Kunjunni in pursuance of the direction of this Court in O.P.No.6040 of 1985 (reported in 1995 (1) KLJ 253. The case of the petitioner being similar to that of Sri Kunjunni and in view of the Circular dated August 30, 1990 (Ext.P10) he should be promoted with retrospective effect.

4. In the counter-affidavit filed by Respondents 2 and 3, it is contended that there is no violation of any principles of natural justice or any statutory rule in the procedure followed by Respondents 1 and 2 while imposing the penalty in the disciplinary proceeding and while considering the appeal against it. No case is made out 2 that the orders of the disciplinary authority and the appellate authority are either perverse or unreasonable. It is further contended that the promotion to selection as well as non- selection post in the Rubber Board is made on the basis of the recommendations of the DPC duly constituted as per the guidelines / instructions of the Government of India in pursuance of Rule 12 of the Rules. In assessing the suitability of a candidate on whom a penalty has been imposed, the DPC i will take into account the circumstances leading" to the penalty and decide whether in the light of the general service records of the candidate and the fact of the imposition of the penalty, he should be considered suitable for promotion. As per the instructions of the Government of India in G.I.C.S. (Department of Personnel) O.M.No.220tl/6/75/Ests. (D) dated December 30, 1976, an official on whom the penalty of withholding of increment or reduction to a lower service, grade or post or to a lower scale or to a lower stage in time scale has been imposed for a specific period, should not be transferred or posted to another grade or post, on or after the date of orders imposing the penalty but; before the date from which the orders finally cease to be operative, it" such postings or transfer results in payments of basic pay higher than that admissible to him in the existing service, grade or post consequent on punishment orders. Therefore, it is contended, that in the case of employees who have been awarded the penalty of withholding of increments, promotion is made only after the expiry of the period of penalty. If any promotion is made during the pendency of the penalty it will result in payment of basic pay higher than that admissible to him in the existing post in which such penalty was imposed. In the case of the petitioner, the disciplinary authority has imposed a penalty of withholding of increment for a specific period i.e. three months from the date on which the next increment becomes due. The DPC which met on July 8, 1987 considered the case of the petitioner along with others in conformity with the aforesaid instructions/guidelines of the Government of India and found that the petitioner was not suitable for promotion to the post of Upper Division Clerk before the expiry of the penalty period. The petitioner"s name was not recommended for promotion and not included in the list of candidates who are found to be eligible for promotion to the said post. The DPC also found that he was not suitable for promotion on the basis of his record of service and conduct. The first Respondent considered all aspects of the case and found that there are no merits to interfere with the order of the disciplinary authority regarding the imposition of penalty and as such rightly dismissed the appeal as per Ext.P9 order.

The non-consideration of the petitioner for promotion is not a punishment imposed on him and as such the question of imposition of double penalty does not arise. Since the order imposing penalty has not been set aside in appeal it

was subsisting when juniors were promoted on the basis of the report of the DPC. The petitioner could not be promoted on or after the date of the order imposing penalty and till the expiry of the period of penalty. The non-consideration of the petitioner for promotion is not a punishment imposed on him but has been done on the recommendation of the DPC as per the aforesaid instructions/guidelines of the Government of India. In view of the recommendation of the duly constituted DPC the petitioner was not found eligible for promotion until the expiry of the period of penalty. The allegation that there is a total non-application of the mind by Respondents 1 to 3 in promoting Respondents 4 to 26 above the petitioner is totally baseless.

5. The questions that arise for consideration are : (1) whether the petitioner has been able to show that the penalty was imposed on him illegally in the said disciplinary proceedings; (2) whether withholding of promotion amounts to double jeopardy as per the rules; and (3) whether the petitioner is entitled to get back his seniority above Respondents 4 to 26 in the gradation list of Upper Division Clerks although he was not considered fit for promotion by the DPC when Respondents 4 to 26 were promoted in the said post.

6. The Supreme Court in *B.C. Chaturvedi v. Union of India* 1996 I LLJ 231 while considering the scope of judicial review on findings of a disciplinary authority in a disciplinary enquiry against a public servant, laid down as follows: at p.1235.

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of; misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support, therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court / Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court / Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each

case".

7. It appears from Ext.P3 that the disciplinary authority was satisfied on a consideration of the representation of the petitioner that the allegations levelled against him are wholly true. The petitioner has expressed his sincere regret for the delay and assured the authority that he will not repeat such misconduct in future. Taking into consideration of his assurance and the facts and circumstances of the case, the disciplinary authority has taken a lenient view and decided to impose the said penalty. Thus, the penalty was imposed practically on the basis of admission of his guilt. The authority entrusted with the power to hold an enquiry has imposed the said penalty. There is nothing in his petition to show that while arriving at this conclusion there was violation of principles of natural justice or that the conclusion arrived at was based on no evidence or that the enquiry was held by an incompetent authority. In the absence of any such infirmity in the order, there can be no conclusion that the disciplinary authority committed any illegality in rendering the finding. So also, there is no allegation that the appellate authority, while hearing the appeal against Ext.P3 order, passed Ext.P7 order in violation of any principles of natural justice or without considering the evidence available on record. Hence there is no scope for a judicial review against the order of penalty (Ext. P3) and confirmation of the same in Ext.P7.

8. Rule 9 of the Rules lays down the nature of penalties that may be imposed on a Board's employee. In Clause (ii) of Rule 9, it is pointed out that one of the minor penalties is withholding of increments or promotion. Learned counsel for the petitioner contended that Clause (ii) of Rule 9 indicates that there can be only one penalty, namely, either withholding of increments or promotion, and not both. In this case, it is contended, that the petitioner having been denied the promotion in addition to the penalty of withholding of increments, two penalties were imposed on him contrary to the rules. But, this contention has no force. Similar such question came up for consideration before the Supreme Court in *Union of India v. K. Krishnan* AIR 1992 SC 1898. While considering similar such provision occurring in Rule 157 of the Post and Telegraph Manual, Volume 3 which inter alia provides that even where the competent authority considers the candidates fit for promotion in spite of punishment in a departmental proceeding, the promotion shall not be given effect to during the currency of the penalty, the Supreme Court held 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, is not correct. There is only one 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".

Thus in denying the promotion to the petitioner during the currency of the penalty he was not subjected to double jeopardy.

9. The learned counsel for the petitioner relies on the notes at pages 696 and 698 of Swamy's Complete Manual on Establishment and Administration (1994 Edition), the decision of the Supreme Court in Shiv Kumar Sharma Vs. Haryana State Electricity Board, Chandigarh and Others, ; Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, and K. Kunjunni v. Rubber Board (supra) besides the Government of India Circular No.NGE/38/1990(497-N 2/89-90) dated August 30, 1990 (Ext P10), in support of his contention that the petitioner is entitled to get back his position of seniority over Respondents 4 to 26 on subsequent promotion after expiry of the period during which the penalty was in force.

10. Admittedly promotion to the post of Upper Division Clerk in the Rubber Board is made on "non-selection" basis. In paras 7 and 13 at pages 696 and 698 of Swamy's book on "Establishment and Administration", it is stated as follows:

"7. Where the promotions are to be made on "non-selection" basis according to Recruitment Rules, the DPC need not make a comparative assessment of the records of officers and it should categorize the officers as "fit" or "not yet fit" for promotion on the basis of assessment of their record of service. While considering an officer Tit", guidelines in para 6.1.4 should be borne in mind. The officers categorized as "fit" should be placed in the panel in the order of their seniority in the grade from which promotions are to be made.

13. Punishment no bar in assessing suitability for promotion - An officer whose increments have been withheld or who has been reduced to a lower stage in the time-scale, cannot be considered on that account to be ineligible for promotion to the higher grade as the specific penalty of withholding promotion has not been imposed on him. The suitability of the officer for promotion should be assessed by the DPC as and when] occasions arise for such assessment. In assessing the suitability, the DPC will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of the general service record of the officer and the fact of the imposition of the penalty he should be considered suitable for promotion. However, even where the DPC considers that

despite the penalty the officer is suitable for promotion, the officer should not be actually promoted during the currency of the penalty.

Clarification - It has now been decided in consultation with the Department of Personnel and Training that a Government servant, who is found fit for promotion by the DPC held after the imposition of the penalty, need not be considered again for promotion by the subsequent DPCs merely because he could not be promoted during the life of panel due to currency of the penalty. After the expiry of period of penalty, the official concerned will be promoted from the same panel in which he was originally empanelled. On his promotion, his pay and seniority in the higher post will be fixed according to his position in the panel from which he is promoted. But the monetary benefit in the higher post will be admissible only from the date of actual promotion.

As an illustration, an officer is undergoing a penalty of withholding of next increment for two years which will expire on June 30, 1992. The DPC which meets after the imposition of the above penalty for considering promotions during the panel year 1990 finds him fit for promotion in spite of the penalty and places him at position No.2 in the panel for 1990. As the officer is undergoing penalty upto June 30, 1992, he can be promoted only thereafter. But on his promotion his pay and seniority in the higher post will be fixed according to his position in the panel for 1990 from which he stands promoted".

In the aforesaid para (Para 13), relevant portions of C & AG of India, New Delhi, Circular No.NGE/38/1990 (497-N 2/89-90) dated August 30, 1990 have been extracted. The same has been filed as Ext.PIO.

11. On a perusal of the rules regarding promotion on the basis of "non-selection" it appears that the DPC should categorize the officers for promotion on the basis of assessment of their record of service. If he is found to be fit, he has to be included in a panel of candidates who are eligible for promotion. The distinction between promotion by selection and promotion by non-selection is that in the former case the DPC has to make a comparative assessment of the records of all the officers who are brought within the range of consideration for recommendation, whereas in the latter case there is no assessment of comparative merit. Nevertheless the DPC should give an opinion as to whether the candidate is fit for promotion or not.

12. The following guidelines have been prescribed to be followed when the questions of promotion of an officer as well as restoration of original seniority are considered during the pendency of the disciplinary proceeding during the currency of the penalty:

- (i) The DPC must have considered the case of the officer;
- (ii) The officer so considered must have been included in the panel of officers who are eligible for promotion.
- (iii) The officer against whom any disciplinary proceeding is pending or if the

consideration is made during the currency of the penalty, the opinion about him should be kept in a sealed cover and the same should be considered at the time of promotion after the aforesaid period lapses.

(iv) There is no necessity of placing his case before the second DPC for consideration, if the earlier DPC has recommended for his promotion.

(v) If in spite of the pendency of the disciplinary proceeding or during the currency of the penalty the DPC has opined that he is found fit to be promoted, the original seniority shall be restored and he shall be placed above all his juniors who were promoted prior to his promotion.

13. It appears from the counter-affidavit of Respondents 2 and 3, that the case of the petitioner was considered by the DPC at the time when his juniors were promoted. The DPC found him unfit for promotion. His name was not included in the panel of officers who are found fit to be promoted. Though later he was promoted on the recommendation of the DPC, 2 there is nothing on record to show that the DPC had furnished their opinion in a sealed cover recommending his promotion. In this context, the following observation of the Supreme Court in *Union of India v. K.V. Janakiraman* 1992 II LLJ 570 is pertinent: at pp 577-578

"It cannot be said 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. The officer cannot be; rewarded by promotion as a matter of course even if penalty is other than that of 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 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 praesenti. When an employee is held guilty and penalised and is, therefore, not promoted 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 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 pro- motion".

There can, therefore, be no grievance in view of the aforesaid observation, that the DPC or the authority competent to promote the petitioner committed any illegality in not promoting him during the currency of penalty.

14. In Shiv Kumar Sharma's case (supra), the question that arose for consideration is, whether the penalty imposed on an officer in the disciplinary proceeding, as a result of which, he was deprived of the monetary benefit of one increment for one year and, second, by placing him below his juniors in the seniority list. The principle laid down in the aforesaid decision has to be read in the context of the facts of that case. Firstly, it was not a case of promotion. Secondly, that question arose when at the time of confirmation of the appellant in a grade in which he was superseded by his juniors on account of the currency of punishment of stoppage of one increment. Promotion to a higher post means elevation to a higher grade. When a person is found unfit to hold the post in the higher grade in preference to his juniors, for some reason or other, it would result in unjust treatment to his juniors who were promoted earlier, if the person who was promoted later is placed above them. It is one thing to consider for promotion from a lower cadre to the higher cadre and quite another to appoint a person permanently along with his juniors in the same cadre. In view of this distinction, the principle laid down in Sharma's case is not applicable to the facts of this case.

15. Similarly, the facts of the case in Md. Habibul Haque v. Union of India (supra) being distinguishable from the facts of this case, the principle laid down therein has no application to this case. In that case, the disciplinary authority by order dated August 9, 1973 imposed a penalty of reducing pay for one year with cumulative effect. During the period when the disciplinary proceeding was pending some of his juniors were promoted. The appellant therein was a Grade II Officer and his juniors were promoted to the rank of Grade I Officer. Subsequently, both the grades were merged. The question that arose for consideration was whether he would have been entitled to be considered for fitment in the grade of Preventive Officers Grade I when his immediate junior was considered and promoted. In that context, the Supreme Court held that the punishment imposed upon him is 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 he would be entitled to hold in the order of seniority. He could not be denied seniority on the basis of the procedure prescribed in Circular F.No.375/69-Act IIIA-A Dt/25-4-1972. The appellant's right to get fitment of his seniority had to be considered since the punishment was even at a later point of time and as such that will not have the effect of reducing his seniority.

16. In *K. Kunjunni v. Rubber Board* (supra), the facts are as follows:

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 February 21, 1983. In the meanwhile, the DPC considered the selection of candidates for promotion to the higher post. In view of the pendency of the departmental proceedings the DPC did not recommend the petitioner for promotion. In the second DPC held on December 4, 1982 the petitioner therein was again considered but not recommended for promotion. Since the charges against the petitioner were proved subsequently and penalty imposed on him, the findings of the Committee in the sealed cover were also not acted upon. The DPC met subsequently on June 13, 1983 but it did not find the petitioner suitable for promotion. The petitioner's representation was rejected by the Rubber Board. In the meanwhile, the petitioner's appeal against the order of penalty was also rejected by the Government of India. The petitioner therein challenged the supersession in the matter of promotion and the order of penalty. Similar contentions as in this case were raised in that case also. The Full Bench dismissed the writ petition with the following observation:

"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 August 30, 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 August 30, 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".

Learned counsel for the petitioner has contended that similar such observation may be made in this case, for a reconsideration of the claim of the petitioner to place him above Respondents 4 to 26 in the grade of U.D. Clerks.

17. In view of the aforesaid Full Bench decision in an identical matter, the request of the learned counsel for the petitioner appears to be reasonable. While rejecting all the prayers in the O.P., I direct Respondents 1 to 3 herein to consider the case of the petitioner in the light of the clarification issued by the Central Government in the Circular dated August 30, 1990, a copy of which has been marked as Ext.P10.

18. With the above observation, the writ petition is dismissed. No costs.