
(2016) 10 MAD CK 0065

In the Madras High Court

Case No : Writ Petition No. 5696 of 2016 and W.M.P. Nos. 5039 and 27726 of 2016

S. Jacob Rajan Babu

APPELLANT

Vs

Government of Tamil Nadu

RESPONDENT

Date of Decision : 21-10-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16
Madras City Municipal Corporation Act, 1919 — Section 86

Citation : (2016) 8 MLJ 523 : (2017) 1 WritLR 59

Hon'ble Judges : Mr. R. Subbiah, J.

Bench : Single Bench

Advocate : Mr. Balan Haridas, Advocate, for the Petitioner; Mr. R. Muthukumaraswamy, A.G., Assisted by, Mr. S. Gunasekaran, AGP, for the Respondent No. 1; Mr. R. Muthukumaraswamy, A.G., Assisted by, Mr. K. Soundararajan, Advocate, for the Respondent No. 2

Final Decision : Allowed

Judgement

Mr. R. Subbiah, J. - This writ petition has been filed by the petitioner seeking for the issuance of a Writ of Certiorarified Mandamus, to call for the concerned records from the respondents, quash G.O.(Nilai) No.33, Municipal Administration and Water Supply (Ma.Na.3) Department, dated 12.02.2016, issued by the first respondent, in so far approving to fill-up the post of Senior Law Officer in the second respondent/Corporation, only by deputation and Resolution No.236 of 2015, dated 27.05.2015, bearing Po.Thu.Na.Ka.No.E2/21762/2013 of the second respondent resolving to fill up the post of Senior Law Officer only by deputation, as illegal, arbitrary and contrary to law and quash the same and consequently, direct the respondents to frame the rules creating avenue of promotion from the post of Law Officer to the Post of Senior Law Officer and consider the petitioner for promotion to the post of Senior Law Officer.

2. The facts, as projected by the petitioner and which led to the filing of the above case, read thus :-

The petitioner is a B.Sc., Graduate in Zoology and completed his B.L. Degree in the year 1986. He was enrolled in the Tamil Nadu Bar Council on 15.10.1986 and practised as an Advocate, both in the High Courts and Subordinate Courts for thirteen years. Thereafter, he was recruited to the post of Assistant Law Officer, in the second respondent/Corporation, on 22.03.1999 and subsequently promoted as Law Officer on 26.07.2006.

3. While the petitioner is working as Law Officer, the second respondent created the post of Senior Law Officer and resolved to fill up the post, by Direct Recruitment/Promotion/Deputation and qualification for the same had been prescribed. While so, the second respondent, by the impugned resolution, dated 27.05.2015, resolved to fill up the post of Senior Law Officer, only by deputation. This was objected to by the petitioner, through his representation, dated 27.05.2015, pointing out that he is fully qualified to hold the post of Senior Law Officer and that his right of promotion will be completely taken away, if the post is filled up only on the basis of deputation. However, the first respondent, by the impugned Government Order (Nilai) No.33, dated 12.02.2016, has approved the Resolution of the second respondent, dated 27.05.2015 and thereby, the post of Senior Law Officer, in the second respondent/Corporation, can be filled up only by deputation, thereby barring the internal candidates.

4. Heard the learned counsel appearing for both sides.

5. The learned counsel appearing for the petitioner, while reiterating the aforesaid facts, submitted that earlier the second respondent passed a resolution dated 26.07.2013, wherein the qualification of ten years as Law Officer was deliberately fixed, with a view to make the petitioner ineligible for the post of Law Officer, since at that time the petitioner has completed only 9 years and 6 months of service as Law Officer and hence, the petitioner made a representation on 18.11.2013 and while the same was pending consideration, the second respondent has passed the Resolution, dated 27.05.2015, without cancelling the earlier Resolution, 26.07.2013; in the resolution dated 27.05.2015, two posts were created, viz., one for the post of Health Education Officer and another for the post of Senior Law Officer; further, for the post of Health Educational Officer, it is mentioned that the post has to be filled up either by promotion or by deputation; however, for the post of Senior Law Officer, it is mentioned that the post has to be filled up only by deputation. Whereas in the earlier resolution dated 26.07.2013, a minimum period of 10 years experience in the post of Law Officer at Corporation of Chennai had been fixed as a qualifying service to the post of Senior Law Officer by promotion, but at that time the petitioner had completed only 9 years and 6 months of service as Law Officer. The petitioner made a representation to the respondents on 01.07.2015, pointing out to the proposed Rule as illegal, arbitrary and contrary to law and that it will totally affect the promotional avenue; however, without considering the said representation, the first respondent/Government passed G.O.Ms.No.33, dated 12.02.2016, approving the Resolution, dated 27.05.2015.

6. The learned counsel for the petitioner further submitted that the impugned orders are not sustainable in law, for more than one reasons, viz., the prescribed qualification for appointment to the newly created post of Senior Law Officer, making it only by deputation, for all time to come, is only to eliminate the petitioner, who is occupying the feeder category post of Law Officer (single cadre post with no avenue of promotion). It is the further submission of the learned counsel for the petitioner that, if the resolution, dated 27.05.2015 and the impugned Government Order, dated 12.02.2016 are implemented, it will result in the petitioner to stagnate and retire in the post of Law Officer, without even having a chance of being considered for the post of Senior Law Officer, either by Direct Recruitment or by Promotion. In support of the said contention, the learned counsel for the petitioner relied upon the decision reported in (1994) 2 SCC 24 (Gujarat Housing Board Engineers Association and another v. State of Gujarat and Others), wherein it has been held that, when there is an in-service candidate occupying the feeder post, he/she cannot be denied promotion to the next higher post by bringing in a person on deputation.

7. The learned counsel for the petitioner further submitted that the action of the first respondent in prescribing the post to be filled-up only deputation, as a method of recruitment and completely excluding the in-service candidate from the zone of consideration suffers from malice in law and the same is illegal. In support of the said contention, the learned counsel relied upon the decision reported in 2010 (9) SCC 437 (Kalabharati Advertising v. Hemant Vimalnath Narichania and others) wherein, it has been held that the state is under obligation to act fairly without ill will or malice, in facts or in laws.

8. The learned counsel for the petitioner further submitted that bringing the person in deputation like the regular candidate amounts to nepotism. In support of the same, the learned counsel relied upon the decision reported in 1996 (9) SCC 214 (Jai Ram Sharma v. Jammu Development Authority). He further submitted that, if the impugned orders are implemented, it will completely debar the petitioner from being considered to the post of Senior Law Officer, either by promotion or by direct recruitment, thus violating Articles 14 and 16 of the Constitution of India. In support of the said contention, the learned counsel relied upon the decisions reported in 1989 (4) SCC 635 (Council of Scientific and Industrial Research and another v. K.G.S.Bhatt and another), 1990 (Supp.) SCC 688 (Dr. Ms.O.Z.Hussain v. Union of India), 2004 (9) SCC 65 (State of Tirupura and others v. K.K.Roy) and 2008 (5) SCC 100 (Food Corporation of India and others v. Parashotam Das Bansal and Others).

9. Per contra, the learned Advocate General appearing for the respondents submitted that the second respondent passed a Resolution, dated 26.07.2013, to create a post of Senior Law Officer, for the Corporation of Chennai, since there is no such post till date and to obtain necessary orders from the Government to create and frame service rules for such post and on the basis of the said Resolution, the second respondent herein, in his proceedings, dated 17.06.2015,

requested the Government to create the post of Senior Law Officer, for the Corporation of Chennai and to frame service Rules for the said post; accordingly, the second respondent has passed the Resolution, dated 27.05.2015 to fill up the said post permanently on deputation, since the sanction of Council is required to send proposal for filling up the post of Senior Law Officer, by promotion. He further submitted that, based on the proposal received from the second respondent, the first respondent has passed the Government Order, dated 12.02.2016 and the post of Senior Law Officer was created for the Legal Cell of the Corporation of Chennai and to fill up the post permanently on deputation only, therefore, there is no illegality in passing the impugned orders and they are perfectly valid in the eye of law.

10. The learned Advocate General further submitted that merely because the petitioner is working as a Law Officer, he cannot challenge the Government Order, for the sole reason that he cannot be promoted to the newly created post, which is unsustainable in law. He further submitted that, in order to handle large number of cases and to execute the projects and schemes of the second respondent, in a time bound manner, the Government has a prerogative right to create, fix qualifications and experience for any post, therefore, the challenge made by the petitioner is not sustainable in law.

11. The learned Advocate General further submitted that the method of recruitment and conditions of service in the case of the employees of the second respondent/Corporation is governed by Section 86 of the Chennai City Municipal Corporation Act, 1919 and as per the said provision, the first respondent has framed the Rules, therefore, the submission of the learned counsel for the petitioner, as otherwise, is not valid.

12. The learned Advocate General further submitted that the creation of post and method of recruitment is within the purview of the employer to decide and the employee has no right to claim any particular method of recruitment. In support of the said contention, the learned Advocate General relied upon the judgment reported in (1995) Supp (1) SCC 589 (U.P.State Tourism Development Corporation Ltd. v. I.B.Misra and Ors) and 2008 (1) SCC 683 (Divisional Manager, Aravali Golf Club and another v. Chander Hass and another). The learned Advocate General further submitted that no employee has got a right of promotion to any post, viz., in other words, promotion is not a matter of right. In support of the said contention, the learned Advocate General relied upon the decision reported in (2011) 10 SCC 121 (Hardev Singh v. Union of India). He further submitted that the method of recruitment and conditions of service are governed by statutory rules and no malafide can be attributed to such subordinate legislation and in support of the said contention, the learned Advocate General, relied upon the decision reported in 1985 (1) SCC 523 (K.Nagaraj and Ors v. State of Andhra Pradesh and another). In the upshot, the learned Advocate General submitted that the contentions raised by the petitioner deserves no consideration and are liable to be rejected, in limini.

13. This Court has carefully considered the submissions made by the learned counsel for both sides and perused the materials available on record.

14. The undisputed facts are that the petitioner is a B.Sc., Graduate in Zoology and completed his B.L. Degree in the year 1986 and he got enrolled in the Tamil Nadu Bar Council on 15.10.1986. After thirteen years of practise, he was recruited to the post of Assistant Law Officer, in the second respondent/ Corporation, on 22.03.1999 and subsequently promoted as Law Officer on 26.07.2006. While the petitioner is working as Law Officer, the second respondent created the post of Senior Law Officer and resolved to fill up the post, by Direct Recruitment/Promotion/Deputation and requisite qualification had been prescribed. While so, the second respondent, by the impugned resolution, dated 27.05.2015, resolved to fill-up the post of Senior Law Officer, only by deputation. This was objected to by the petitioner, through his representation, dated 27.05.2015, pointing out that he is fully qualified to hold the post of Senior Law Officer and that his right of promotion is completely taken away. However, the first respondent, by the impugned Government Order (Nilai) No.33, dated 12.02.2016, has approved the resolution of the second respondent, dated 27.05.2015 and thereby, the post of Senior Law Officer, in the second respondent/Corporation, can be filled up only by deputation.

15. At the outset, it has to be noted that, initially the second respondent has passed Resolution dated 26.07.2013 prescribing ten years experience as Law Officer for promotion to the post of Senior Law Officer, and subsequently, the second respondent has passed a resolution, dated 27.05.2015, by creating two posts, one for Health Educational Officer and another for Senior Law Officer, that too, without cancelling the earlier Resolution, dated 26.07.2013, prescribing the mode of recruitment to the post of Senior Law Officer "Only on Deputation permanently", without fixing any minimum years of experience of practise as an Advocate/lawyer or as Deputy Secretary to Government. This act of the respondents clearly shows that the avenue of promotion to the post of Senior Law Officer is totally taken away and without any basis, the post is sought to be filled-up only by deputation. Further, there is no explanation submitted before this Court that there is no Rule to fill up the post or any other Posts, only by deputation in the second respondent/Corporation, when an Officer/employee is available in the feeder category.

16. As far as the submissions of the learned Advocate General, that : (i) the employee has no right to claim a particular method of recruitment, by relying upon (1995) Supp (1) SCC 589 (referred to supra); (ii) Nobody has got a right of promotion to any post, i.e., the promotion is not a matter of right, by relying upon (2011) 10 SCC 121 (referred to supra); (iii) the method of recruitment and conditions of service are governed by Statutory Rules and no male fide can be attributed to such subordinate legislature, by relying upon (1985) 1 SCC 523 (referred to supra) are concerned, it has to be pointed out that there is no quarrel with respect to the settled legal position enunciated therein, but the facts

of the said decisions are totally different from the case on hand and the same are distinguishable.

17. As far as the submission of the petitioner that act of the respondents in passing the Resolutions amounts to malice in law, by relying upon 2010 (9) SCC 437 (referred to supra), is concerned, it has to be noted that "Legal Malice" or "Malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of person ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. The action of the respondents, in fixing 10 years experience as Law Officer, in the earlier resolution dated 26.07.2013, when the petitioner has completed only 9 years and 6 months and subsequently, when the petitioner has reached 10 years of service, fixing deputation alone as the mode of recruitment for promotion to the post of Senior Law Officer, clearly establish that the same comes within the ambit of "Malice in law". The action of the respondents, in prescribing "only deputation" as the method of recruitment and completely excluding the in-service candidates from the zone of consideration suffers from malice in law and the same is contrary.

18. In the decision reported in 1994 (2) SCC 24 (referred to supra), the Hon''ble Supreme Court has held as follows:-

"7. that clause (2) of Regulation 3 has application to sub-clause (a) of clause (1); that is to say, clause (2) sets out the eligibility criteria of employees working as Executive Engineers in the Housing Board for appointment to the said post on the basis of seniority-cum-merit under sub-clause (a) of clause (1). Clause (3) sets out how and when an Executive Engineer from the State Government's Building and Communication Department can be appointed on deputation to the said post under the provisions of sub-clause (b) of clause (1). Clause (4) sets out the eligibility requirements for candidates to be appointed by direct selection under the provisions of sub-clause (c) of clause (1).

8. We have no doubt, therefore, that clause (3) does not set out an additional, fourth mode of filling in the said post but is only a provision which sets out how and when an Executive Engineer from the State Government's Building and Communication Department can be appointed to the said post on deputation. It provides that an appointment can be made of an Executive Engineer from the State Government's Building and Communication Department to the said post on deputation only if a suitable eligible candidate is not available for appointment by promotion from among the Executive Engineers of the Housing Board."

19. If the facts of the case on hand is considered in the light of the above stated principles, it is crystal clear that, when there is an in-service candidate occupying the feeder post, he/she cannot be denied promotion to the next higher post, by bringing in person, on deputation. In the case on hand, if the impugned orders are implemented, it will result in the petitioner to retire as Law Officer, without even having the chance for being considered for the post of Senior Law Officer, either by direct recruitment or by promotion. The action of the respondents is obviously illegal and arm-twist to nepotism.

20. In the decision reported in 1989 (4) SCC 635 (referred to supra), the Hon"ble Supreme Court has held as follows:-

"9. That then is the scope of bye-law 71(b)(ii). But that does not mean that we should interfere with the relief granted to respondent- 1. By pointing out the error that crept into the decision of the Tribunal, we need not to take to its logical end which will defeat justice. Respondent-1 is not a lay-man. He is a highly qualified engineer. Although joined service with a diploma in Engineering, he later passed Bachelor of Engineering (B.E.) and also acquired M. Tech. degree and one more diploma (D.P.M.). He was however, left without opportunity for promotion for about twenty years. This is indeed a sad commentary on the appellant's management. It is often said and indeed, adroitly, an organisation public or private does not "hire a hand" but engages or employees a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organization. It is an incentive for personnel development as well. (See : Principles of Personnel Management by Flipo Edwin B. 4th Ed. p. 246). Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, mis-allocation of personnel, low morale, and ineffectual performance, among both no managerial employees and their supervisors". (See : Personnel Management by Dr. Udai Pareek p. 277). There cannot be any modern management much less any career planning, man-power development, management development etc. which is not related to a system of promotions. (See : Management of Personnel in Indian Enterprises by Prof. N.N. Chatterjee, Chap. 12 p. 128). The appellant appears to have overlooked this basic requirement of management so far as respondent-1 was concerned till N.R. & A.S. was introduced."

21. In the decision reported in 1990 (Supp.) SCC 688 (referred to supra), in paragraph 7, the Hon"ble Supreme Court has held as follows:-

"7. This Court has on more than one occasion, pointed out that provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. There too is no justification why while similarly placed

officers in other Ministries would have the benefit of promotion, the non-medical "A" Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model of rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed within four months from now providing promotional avenue for the "A" category scientists in the non-medical wing of the Directorate."

22. In the decision reported in 2004 (9) SCC 65 (Referred to supra), the Hon"ble Supreme Court has held as follows:-

"6. It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue of appointment, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the Appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore, it was expected that the Appellant should have followed the said principle."

23. In the decision reported in 2008 (5) SCC 100 (referred to supra), the Hon"ble Supreme Court has held that if there is no channel of promotion in respect of a particular group of officers resulting in stagnation over the years, the Court although may not issue any direction as to in which manner a scheme should be formulated or by reason thereof interfere with the operation of existing channel of promotion to the officers working in different departments and officers of the Government but the jurisdiction to issue direction to make a scheme

cannot be denied to a Superior Court of the country.

24. Thus, from the aforesaid judgments of the Supreme Court, it is clear that if the person is appointed to service in one post and any Rule that completely debars an employee, who is stagnating in the post of feeder category, from being considered to the next level post, either by direct recruitment or by promotion, the same will be in violation of the Articles 14 and 16 of the Constitution of India. The right to be considered for promotion to a higher post, particularly, when there is no other avenue of promotion, is a fundamental right. In the present case, the rule prescribing "only by deputation permanently" as a source of recruitment to the post of Senior Law Officer, is thus, in infringement of Articles 14 and 16 of the Constitution of India.

25. Further, this Court is not inclined to accept the contention of the learned Advocate General appearing for the respondents that the right to create and fix qualification for the post is a managerial function and as such Court cannot interfere with the same. Further, this Court is of the opinion that if the Rule violates an employee's right to be considered for promotion to higher post for all time to come, then certainly, the same would be in violation of the Articles 14 and 16 of the Constitution, which this Court can certainly interfere with the same. As far as the submission of the learned Advocate General that the Government has prerogative right to post particular person in any post and the same cannot be questioned by an individual is concerned, this Court is of the opinion that there cannot be any quarrel over the said submission made by the learned Advocate General, but, at the same time, when the mode of appointment by the Government/Corporation affects the right to promotion to the feeder category employees, the same can be questioned. Therefore, only when there is an avenue for promotion, the right to consider for promotion can be exercised. When that being the legal position, the present Government Order, giving no scope to consider the claim of the petitioner for promotion from the feeder category of Law Officer and to fill up the post only by way of deputation, is not legally sustainable.

26. As far as the contention of the learned Advocate General made to the effect that the method of recruitment and conditions of service in the case of the employees of the second respondent/Corporation is governed by Section 86 of the Chennai City Municipal Corporation Act, 1919 and as per the said provision, the first respondent has to frame the Rules and in the case on hand, it has been followed strictly, this Court is of the opinion that the procedure adopted by the respondents might be correct, but the manner in which the same was passed and the reasons assigned in the impugned resolutions and the Government Order are erroneous.

27. For the foregoing reasons, this writ petition deserves to be allowed and the same is allowed. G.O.(Nilai) No.33, Municipal Administration and Water Supply (Ma.Na.3) Department, dated 12.02.2016, issued by the first respondent in so far approving to fill up the post of Senior Law Officer in the second respondent/

Corporation, only by deputation and the Resolution No.236 of 2015, dated 27.05.2015, bearing Po.Thu.Na.Ka.No.E2/21762/2013 of the second respondent resolving to fill up the post of Senior Law Officer only by deputation, are hereby quashed. Further, a direction is hereby issued to the respondents to frame appropriate Rule/s and pass a Government Order/s, creating the avenue of promotion from the post of Law Officer/s to the post of Senior Law Officer/s. No costs. Consequently, the connected WMPs are closed.