

(2000) 07 KAR CK 0087
In the Karnataka High Court
Case No : Writ Petition No. 7347 of 2000

Sri. K.J. Ninge Gowda

APPELLANT

Vs

Bangalore Development Authority and Another

RESPONDENT

Date of Decision : 10-07-2000

Acts Referred:

Citation : (2000) 3 KCCR 1988

Hon'ble Judges : R. Gururajan, J

Bench : Single Bench

Advocate : B.G. Sreedharan, for the Appellant; N.K. Patil, for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

R. Gururajan, J.—Petitioner in this petition has sought for following prayer on the following facts-

(1) Issue a writ of mandamus directing the 1st Respondent to consider the case of the Petitioner for promotion to the cadre of Superintendent in Bangalore Development Authority retrospectively w.e.f. the date on which the 2nd Respondent was promoted and to confer all other consequential benefits flowing therefrom uptodate;

(2) Issue a writ of certiorari to quash the official Memorandum bearing No. BDA/Commissioner/CV 1374 99-2000 dated 5.8.1999, issued by 1st Respondent, marked as Annexure J;

(3) Issue a writ of mandamus directing the 1st Respondent to disburse the annual increments payable to the Petitioner with effect from the year 1996 and onwards uptodate, forthwith;

(4) Issue such other writ, order of direction as deemed fit in the circumstances of the case and allow the writ petition with costs in the interest of justice and equity.

2. The Petitioner is an employee of Respondent-1, Bangalore Development

Authority (for short "BDA"), he joined the service of BDA as a Second Division Assistant on 1.5.1972 by selection. He was promoted to the cadre of First Division Assistant/Assistants in 1987. Along with the Petitioner and other nine officials were also promoted to the post of FDA and the said promotions were made in order of seniority. The next promotional post from the cadre of FDA/ Assistants is to the cadre of Superintendent. The said promotion was based on seniority-cum-merit. The conditions being that the candidate should have completed five years of service and passed the prescribed departmental examinations. The Petitioner has passed all the departmental examinations as prescribed under the Rules and was eligible for promotion after completion of 5 years of service to the promotional post of Superintendent.

3. The B.D.A. published a seniority list in the cadre of FDA. Petitioner's name is shown at serial No. 56 and Respondent 2 was shown at serial No. 60. One Smt. Indira who was senior to the Petitioner could not be promoted on account of her retirement from service. One Smt. Vasanthamma was promoted and subsequently retired. One Sri. S.J. Srinivas though junior to the Petitioner was promoted as Superintendent on account of his passing departmental examination during which time Petitioner was yet to complete the departmental examination. Respondent-2 who is shown at serial No. 60 was promoted as Superintendent in 1999 ignoring seniority of the Petitioner. Petitioner states that certain proceedings were initiated against him and he was suspended on 3.5.1992 for the said misconduct. Petitioner filed writ petition challenging the said order of suspension and for consequential relief. The said petition was rejected against which writ appeal was filed in Writ Appeal No. 1726 of 1994. The Appellate Court directed the Respondent to complete the enquiry within 2 months from 2.12.1994. Now the said enquiry is still pending according to the petition averments.

4. Petitioner was granted certain increments which was sought to be recovered by an order dated Annexure-J dated 5.8.1999. The said order is without an opportunity to the Petitioner in the matter. The said recovery is on account of the Petitioner's failure to pass the examination within the prescribed time.

5. Petitioner asserts in the petition that now he has completed all the papers in 1999, the Respondents have effected promotion of Respondent 2 in 1999 overlooking the promotion of the Petitioner. In these circumstances the Petitioner has sought for above referred prayers in the writ petition.

6. BDA filed counter statement in which a defence of pending proceedings for denial of promotion is raised by it. It is further stated that unless and until he passes the departmental examination he is not eligible for any increments. They do not say as to whether any notice as such was issued to the Petitioner before the recovery.

7. I heard this case at great length. Mr. B.G. Sridharan, learned Counsel, took me the pleadings and justified the prayers of the Petitioner. He essentially argued

that the promotion cannot be held up for no fault of the Petitioner in the absence of completion of the proceedings inspite of an appellate court order to complete the same within two months i.e., 1.2.1995. In so far as Annexure-J is concerned he argued the same is to be set aside for want of opportunity.

8. Learned Counsel for BDA states that the proceedings against the Petitioner is there and hence he would not be entitled for promotion and no sooner the proceedings come to an end his case would be considered.

9. Heard the parties at great length, I am of the view that the Petitioner's complain of denial of promotion is fully justified. Admittedly in the case on hand the Petitioner joined services in 1972 as SDA, he was promoted after 15 years in 1987. The next promotional post is that of Superintendent. Petitioner is admittedly an eligible candidate for the said promotional post. Respondent 2 even according to the seniority list is junior to the Petitioner. She has been promoted overlooking the case of the Petitioner. The only reason given for denial of promotion is that of "pending proceedings" by BDA. Materials reveal that the Petitioner was suspended on 3.5.1992, a writ petition was filed which came to be dismissed by an order dated 30.6.1994. A writ appeal was preferred by the Petitioner which the Division Bench has passed the following order-

Dismissed with an observation that if the Appellant makes a representation to the Commissioner or the Chairman or the competent authority for revocation of the suspension order, then the concerned authority shall consider the same objectively and dispose of the same on merits within one month from today. Looking to the facts of the case, we are also of the opinion that it would not be proper to keep the Appellant under suspension for a long period and therefore the concerned authority is directed to complete the enquiry within two months from today.

With this observation, the appeal is disposed of.

10. The said order of the Division Bench is dated 2.12.1994. Time granted to complete the enquiry is 2 months from 2.12. 1994 i.e., before 1.2.1995. Even after six long years the Respondents have not chosen to complete the enquiry inspite of specific direction to complete the enquiry within 2 months by the Division Bench. In these circumstances the defence of pending proceedings in my opinion is not available to BDA. BDA seems to be not serious about the completion of enquiry as I see from the way in which the progress is made in completing the enquiry. In these circumstances Petitioner cannot be denied a promotion on the sole ground of pending proceedings.

11. In identical circumstances a learned Judge of Andhra Pradesh High Court in WP No. 9911 of 1992, in the case of T. Ganga Rao v. Chairman, Karimnagar District, Co-operative Central Bank Limited, Karimnagar and Ors. 1996(4) SLR 263 has ruled as under in paras 5 and 6-

5. From the narration of events it is seen that the Petitioner was suspended on

6.5.1974 and no disciplinary action could be initiated till 1983 when the Petitioner successfully challenged the order of suspension. Eventhough the Directions were given by this Court time and again to complete the disciplinary proceedings within the time schedule fixed by this Court, the Respondent did not take any action. In WP No. 4978 of 1987 this Court issued specific directions to complete the enquiry within five months by orders dated 22.9.1987, but the Respondents for the reasons best known to them maintained silence.

6. Now the present position is the Petitioner has retired from service and his principal grievance is in the guise of pendency of the enquiry proceedings, his case was not considered. It is now well settled that mere pendency of the disciplinary proceedings is not absolute bar for considering the case of the employee for promotion. But, however in the instant case, the attitude adopted by the Respondent is ununderstandable. On 10.12. 1985 direction was granted by this Court to complete the enquiry within three weeks. Again on 22.9.1987 in another writ petition filed by the Petitioner- employee a further direction was given to complete enquiry within a period of five months. The Respondents have not implemented the directions of this Court whereby they were permitted to proceed with the enquiry on expeditious basis in the interest of the organisation and also in the interest of the officer. No progress was made in the disciplinary proceedings and finally the Petitioner was retired from service on 31.1.1996. The inordinate and unexplained delay right from 1985 till 1996 is only a clear indication that the Respondents have no inclination to proceed against the Petitioner. Thus the pendency of the disciplinary proceedings cannot be pleaded as an impediment in the way of the promotion of the Petitioner. The promotion is a necessary aspiration of an employee apart from being an essential condition of service. The said service condition cannot be impaired at the whims and fancies of the Respondent by adopting dilatory attitude. Thus, I find that the Respondents failed to implement the directions of this Court and thereby denied the Petitioner of his promotion to the post of Assistant General Manager.

12. I respectfully agree with the reasoning of the learned Judge in the said judgment. Admittedly in the case on hand inspite of specific direction to complete the enquiry within 2 months from 2.12.1994 the same is not so far completed by the Respondent. Promotion is necessarily an aspiration in service jurisprudence. Promotion not only results in monetary gain but also in position in the organisation. The same cannot be delayed indefinitely on the sole ground of pending proceedings. Under these circumstances I deem it proper to set-aside the promotion effected by BDA for Respondent 2 and direct the Respondent to consider the case of the Petitioner for promotion on the day on which Respondent 2 was promoted as Superintendent by BDA.

13. This Court in *B. Chandragupta v. The Chairman, P and T. Board, New Delhi and Anr.* in 1970(1) M LJ 77 in almost same/similar circumstances considered the grant of promotion when proceedings are pending. This Court after noticing has given the following direction in paras 10, 11, 12 and 13 reading as under-

10. In all these circumstances, it appears to us that it will be unreasonable to continue to keep in abeyance the consideration of the Petitioner's case for promotion. That case can now be considered without prejudice to the conduct of the disciplinary enquiry or to the interest of public service itself. The readjustment of the position consequent upon the result of the enquiry can also be made without prejudice to any individual's interest or even public interest.

11. We therefore make the following directions.

12. The Respondents will take up for consideration within one month from today the Petitioner's case for promotion to the next higher post of Accounts officer in the Posts and Telegraphs Department, and come to a decision thereon within the said period of one month.

13. The Respondents will have the liberty of either reverting the Petitioner from the promotional post if he is found guilty and awarded any punishment in the disciplinary enquiry, if in the light of circumstances then existing and the findings of the enquiry officer they consider it necessary in public interest to do so. They will also be at liberty in the event of Petitioner being exonerated in the disciplinary enquiry to make such orders as they may consider just in the circumstances then existing and in the light of the findings of the enquiry officer including an order to give retrospective effect to his promotion as from such date as they may consider proper in the circumstances.

14. Following the Division Bench, I further hold that the promotion to the Petitioner is subject to the final outcome of the pending proceedings. Respondents are at liberty to revert the Petitioner from the promotional post if he is found guilty and if he is not found guilty he is eligible to be continued in the promotional post. This liberty is reserved to BDA on the facts and circumstances of the case.

15. The second prayer of the Petitioner is to set aside the recovery proceedings. Petitioner's Counsel has raised several grounds in support of this. I do not want to go into merits of the matter, since admittedly the recovery proceedings have been initiated without notice to the Petitioner. It is well settled now that any recovery has to be done after an opportunity to the affected party. The same has not been done in the present case. In the circumstances I deem it proper to hold that Annexure-J is to be treated as show-cause notice to the Petitioner and the Petitioner is directed to submit his reply to the show-cause notice, Annexure-J, within two months and Respondent-BDA has to consider and pass appropriate orders 2 months thereafter. Respondent-2 though served did not appear and Respondent 2 is placed exparte.

16. In the result this petition is allowed. The direction is issued to BDA to consider the case of the Petitioner to the post of Superintendent in the BDA from the date on which Respondent 2 was promoted and grant all benefits to the Petitioner subject to the outcome of the final proceedings. If Petitioner is found guilty in the pending proceedings BDA is at liberty to revert him from the

promotional post. It is made clear that if on consideration Petitioner is found eligible Respondent 2 has to pave way to the Petitioner. No costs.