

(2010) 1 ALT 178

Andhra Pradesh High Court

Case No: Writ Petition No's. 19913 and 21739 of 2009

State of A.P. and
Another

APPELLANT

Vs

A. Ramulu and Another

RESPONDENT

Date of Decision: Oct. 30, 2009

Acts Referred:

Andhra Pradesh State and Subordinate Service Rules, 1996 " Rule 22, 5, 6#Constitution of India, 1950 " Article 14, 16, 162, 21, 309

Citation: (2010) 1 ALT 178

Hon'ble Judges: Vilas V. Afzulpurkar, J; V. Eswaraiah, J

Bench: Division Bench

Advocate: G.P. for Services II in W.P. 19913/2009 and P.V. Krishnaiah, in W.P. No. 21739/2009, for the Appellant; G.P. for Services II in W.P. 21739/2009, P.V. Krishnaiah, in W.P. No. 19913/2009 and M. Ratna Reddy, in W.P. 19913/2009, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V. Eswaraiah, J.

Since the question involved in both the writ petitions is one and the same and both the O.As on the file of the Andhra

Pradesh Administrative Tribunal are filed by the same applicant, namely, A. Ramulu, who is petitioner in W.P. No. 21739 of 2009 and 1st

respondent in W.P. No. 19913 of 2009, as such these two writ petitions are being heard together and disposed of by a common order.

2. Government filed W.P. No. 19913 of 2009 aggrieved by the order of the Tribunal in O.A. No. 7307, dated 3.7.2009, directing to consider the

case of the applicant for promotion without reference to the disciplinary proceedings. The said interim order was made absolute by order

24.8.2009. The applicant, A. Ramulu filed W.P. No. 21739 of 2009 seeking writ of mandamus to declare the orders of the Tribunal in O.A. No.

6719 of 2009, dated 24.6.2009 and 24.8.2009 as illegal and arbitrary and to set aside the same.

W.P. No. 19913 of 2009:

3. The 1st respondent filed O.A. No. 7307 of 2009 before the Andhra Pradesh Administrative Tribunal seeking a direction to consider his case

for promotion to the post of Assistant Commissioner of Prohibition and Excise and the Tribunal by its order dated 3.7.2009 directed the

Government to consider his case for promotion to the post of Assistant Commissioner of Prohibition and Excise without reference to the

disciplinary proceedings initiated against him in G.O.Rt. No. 444, Revenue Department, dated 11.2.2008, in the ensuing D.P.C., which will meet

on 4.7.2009, pending disposal of the O.A. The said-order was made absolute on 24.8.2009. Aggrieved by the same, the Government filed this

writ petition.

W.P. No. 21739 of 2009:

4. The petitioner filed O.A. No. 6719 of 2009 before the Andhra Pradesh Administrative Tribunal to declare the action of the respondents in not

considering his case for promotion to the post of Assistant Commissioner of Prohibition and Excise on the sole ground of pendency of disciplinary

proceedings initiated in G.O.Rt. No. 444, Revenue (Vig.V) Department, dated 11.2.2008, without completing the said disciplinary proceedings

within the stipulated time as illegal and arbitrary and to direct the Government to forthwith consider his case for promotion to the post of Assistant

Commissioner of Prohibition and Excise. The Tribunal while issuing notice before admission on 24.6.2009, posted the matter to 6.7.2009 so as to

enable the Government to file counter and in the meanwhile it was directed not to effect any promotions. The said order was vacated by the

Tribunal on 24.8.2009. Aggrieved by the same, the applicant filed this writ petition.

5. For the purpose of convenience, the parties hereinafter are referred to as they were arrayed before the Tribunal as applicant and respondents.

6. The facts, in brief, are that the applicant, A. Ramulu filed O.A. No. 942 of 2009 seeking the following prayer:

It is therefore prayed that this Hon"ble Tribunal in the interest of justice be pleased to declare the action of the respondents in not considering the

claim of the applicant for promotion as Assistant Commissioner of Prohibition of Excise against a vacancy reserved to be filled by Scheduled Caste

candidates on the ground of pendency of disciplinary proceedings initiated pursuant to Charge Memo issued vide G.O.Rt. No. 444, Revenue

(Vigilance. V) Department, dated 11.2.2008 and consequently to direct the respondents to consider the claim of the applicant for promotion as

Assistant Commissioner of Prohibition and Excise against a vacancy reserved to be filled by Scheduled Caste candidates as per his seniority,

suitability and eligibility and without reference to the pendency of the disciplinary proceedings with all consequential benefits and pass such other

order or orders as may be deemed fit and proper in the circumstances of the case.

7. It is his case that while he was working as Prohibition and Excise Superintendent he was unnecessarily implicated in a sting operation conducted

on .31.10.2007 on a false complaint that he made illegal demand to do a favour in favour of licensee and pursuant to the same the Government

issued charge memo in G.O.Rt. No. 444, Revenue (Vigilance. V) Department, dated 11.2.2008, and the said memo is coming in the way of his

promotion to next higher post. Therefore, he sought for a direction to direct the respondents to consider his case for promotion to the post of

Assistant Commissioner of Prohibition and Excise without reference to the said proceedings initiated in the said G.O. But the said application was

opposed by the Government contending that as per orders of the Government in G.O.Ms. No. 257, G.A. Dept., dated 10.6.1999, the case of the

applicant cannot be considered for promotion to the post of Assistant Commissioner of Prohibition and Excise. The Tribunal disposed of the said

O.A. with the following direction:

It is seen that the Charge Memo is issued on 11.2.2008. The charges and disciplinary proceedings are still pending. In view of this, the case of the

applicant will not cover under any of the parameters contained in G.O.Ms. No. 257, dated 10.6.1999. I am afraid that this Tribunal cannot

interfere in this matter and concede to the prayer of the applicant. The Counsel for the applicant requests that the disciplinary proceedings be

expedite as they are pending since one year. Having regard to the request of the applicant to fix the time limit for concluding the disciplinary

proceedings, now that a year elapsed since issuance of the Charge Memo, it is desirable to direct the respondents to conduct and conclude the

disciplinary proceedings within a period of 3 months from the date of receipt of the copy of this order. The O.A. is disposed of accordingly.

8. This is evident from the aforesaid order of the Tribunal that the Tribunal was not inclined to grant relief as claimed by the applicant to consider

his case for promotion without reference to the charge memo, but only a direction was given to conduct and conclude the disciplinary proceedings

within a period of three months from the date of receipt of its order. The said order of the Tribunal was questioned by the applicant before this

Court in W.P. No. 2725 of 2009 and this Court by order dated 1.6.2009 dismissed the writ petition observing that if the disciplinary proceedings

are not completed within the period stipulated, it is open for the applicant to approach the Tribunal for non-compliance of the said order and

accordingly there was no infirmity legal or otherwise in the said order of the Tribunal. Thereafter, the applicant filed O.A. No. 6719 of 2009 for the

self-same relief and the relief as claimed in the said O.A. is reproduced as hereunder:

In the circumstances, it is therefore prayed that this Hon"ble Tribunal may be pleased to grant appropriate relief, declaring for promotion to the

post of Assistant Commissioner of Prohibition and Excise, on the sole ground of pendency of disciplinary proceedings initiated in G.O.Rt. No.

444, Revenue (Vig. V) Department, dated 11.2.2008, without completing the said disciplinary proceedings within the stipulated time given by the

Hon'ble Tribunal in O.A. No. 942/2009 dated 3.2.2009, which was confirmed by the Hon'ble High Court in W.P. No. 2725/2009 dated

1.6.2009, as arbitrary, illegal, unconstitutional violating Article 14, 16 and 21 of the Constitution of India and issue consequential directions

directing the respondents to forthwith consider and promote the applicant to the post of Asst. Commissioner of Prohibition and Excise as per his

seniority and also against the vacancies reserved for S.C candidates under Rule 22 of A.P. State and Subordinate Service Rules, without reference

to the disciplinary proceedings initiated in G.O.Rt. No. 444, Revenue (Vig. V) Dept, dated 11.2.2008, before promoting any juniors to the

applicant and pass such other order or orders as it deems fit and proper.

9. The Tribunal while issuing notice before admission on 24.6.2009, directed the respondents not to effect any promotions till 6.7.2009.

Thereafter, the Government filed counter affidavit in the said O.A. in the last week of July, 2009 and also filed V.M.A. No. 1430 of 2009 to

vacate the said interim order dated 24.6.2009. But, the Tribunal after hearing both the parties and following the judgment of the Division Bench of

this Court in B. Nageswara Rao and Others Vs. Government of A.P. and Others, vacated the said interim order holding that the respondents were

entitled to proceed with the promotions and the case of the applicant may also be considered for promotion, otherwise the stay of promotions is

not just, as it will hamper the chances of several persons for promotions.

10. While the interim order granted by the Tribunal on 24.6.2009 in O.A. No. 6719 of 2009 was in force till 6.7.2009, the applicant filed another

O.A. No. 7307 of 2009 on 2.7.2009 to declare the action of the respondents in convening the D.P.C on 4.7.2009 for promotion to the post of

Assistant Commissioner of Prohibition and Excise even though the Tribunal directed not to effect any promotions till 6.7.2009 in O.A. No. 6719

of 2009, dated 24.6.2009, as arbitrary and illegal.

11. When the orders of the Tribunal in O.A. No. 6719 of 2009, dated 24.6.2009, are still subsisting, we are of the opinion that there was no fresh

cause of action warranting the petitioner to file another O.A. No. 7307 of 2009 on 2.7.2009 and therefore the same is not maintainable. However,

it is stated that in fact no D.P.C. was convened on 4.7.2009. Though the said O.A. was not maintainable, the Tribunal was persuaded to grant

interim order dated 3.7.2009 directing the respondents to consider the case of the applicant for promotion to the post of Assistant Commissioner

of Prohibition and Excise without reference to the disciplinary proceedings initiated against him vide G.O.Rt. No. 444, dated 11.2.2008 for

enabling the D.P.C, which will meet on 4.7.2009, pending disposal of the O.A. The said order was later made absolute by order dated 24.8.2009

on the ground that the departmental enquiry was not completed within the time stipulated by the Tribunal in the earlier O.A. No. 942 of 2009

which was confirmed by this Court in W.P. No. 2725 of 2009.

12. Heard both the Counsel appearing for the respective parties.

13. When the applicant filed O.A. No. 942 of 2009 seeking a direction to the respondents to consider his case for promotion to the post of

Assistant Commissioner of Prohibition and Excise without reference to the disciplinary proceedings initiated against him in G.O.Rt. No. 444,

Revenue Department, dated 11.2.2008, the said O.A. was disposed of by the Tribunal on 3.2.2009 directing the respondents to conduct and

complete the disciplinary proceedings within a period of three months from the date of receipt of the said order. If the disciplinary proceedings are

not completed within the said period, it cannot be said that the disciplinary proceedings will get lapsed. It is for the Government either to seek

extension of time or it is for the applicant to take appropriate steps on the aforesaid directions. In fact, aggrieved by the order of the Tribunal dated

3.2.2009 in O.A. No. 942 of 2009 the applicant filed W.P. No. 2725 of 2009 and this Court dismissed the said writ petition. Therefore, it cannot

be said that the applicant is entitled to be considered for promotion without reference to the pendency of the disciplinary proceedings initiated

against him in G.O.Rt. No. 444, Revenue Department, dated 11.2.2008. When once the aforesaid claim relating to the consideration of promotion

to the post of Assistant Commissioner of Prohibition and Excise without reference to the disciplinary proceedings has been rejected in O.A. No.

942 of 2009, as confirmed in W.P. No. 2725 of 2009, it is not open for the applicant to file any subsequent O.A. for the self-same prayer.

14. The issue that arises for consideration is whether the applicant, against whom disciplinary proceedings are pending, is entitled to be considered

for promotion to the post of Assistant Commissioner of Prohibition and Excise.

15. The post of Assistant Commissioner of Prohibition and Excise is a selection post. Under Rule 5 of A.P. State and Subordinate Service Rules,

1996, promotion to the post of Assistant Commissioner of Prohibition and Excise is by transfer on grounds of merit and ability, seniority being

considered only where merit and ability are approximately equal, by the appointing authority as specified in Sub-rule (a) of Rule 5 from the panel of

candidates. Such panel shall be prepared as laid down in Rule 6 by the appointing authority or any other authority empowered in this behalf. Under

Rule 5(b) so far as non-selection posts are concerned, promotion and appointment by transfer to higher posts other than those mentioned in Sub-

rule (a) shall be made in accordance with seniority-cum-fitness, unless (i) such promotion or appointment by transfer of a member has been

withheld as a penalty; or (ii) a member is given special promotion for conspicuous merit and ability. In so far as non-selection posts are concerned,

promotion and appointment by transfer cannot be given when any penalty is subsisting and such promotion is liable to be withheld.

16. Learned Counsel for the applicant submits that when the penalty proceedings are pending, only promotion to non-selection post can be

withheld, but not to a selection post and it is stated there is no provision in the Rules to withhold promotion in respect of selection post.

17. On the other hand, the learned Government Pleader for the respondents submits that as per orders of the Government in G.O.Ms. No. 257,

G.A (Ser. C) Dept., dated 10.6.1999, the Government issued certain guidelines in respect of appointment by promotion/transfer to higher

categories of employees, who are facing disciplinary cases and the earlier G.O.Ms. No. 74, Genl. Admn (Ser. C) Department, dated 24.2.1994

was cancelled and the relevant paras 5 to 8 as reproduced as hereunder:

Government also order that with immediate effect the following procedure and guidelines, be followed to consider the employees against whom

disciplinary cases or criminal prosecution are pending or whose conduct is under investigation, for appointment by promotion or transfer, to next

higher categories:

(A) The details of employees in the zone of consideration for promotion falling under the following categories should be specifically brought to the

notice of the Departmental Promotion Committees or Screening Committees;

(i) Officers under suspension;

(ii) Officers in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending;

(iii) Officers in respect of whom prosecution for a criminal charge is pending.

(B) Officers who are facing enquiry, trial or investigation can be categorized into the following groups based on the nature of the allegations or

charges pending against them or about to be instituted namely;

(i) an Officer with a clean record, the nature of charges or allegations against who related to minor lapses having no bearing on his integrity or

efficiency, which even if held proved, would not stand in the way of his being promoted;

(ii) an Officer whose record is such that he would not be promoted, irrespective of the allegations or charges under enquiry, trial or investigation;

and

(iii) an Officer whose record is such that he would have been promoted had he not been facing enquiry, trial or investigation, in respect of charges

which, if held proved, would be sufficient to supersede him.

(C) The suitability of the Officers for inclusion in the panel should be considered on an overall assessment based on the record, which should

include namely:

(i) Adverse remarks recorded in the Annual Confidential Reports, the penalties awarded and the bad reputation of the Officer as vouchsafed by

the Head of the Department and the Secretary to Government of the Department concerned;

The above cases should be considered as falling under category (ii) of item (B) above.

(ii) The Officers who do not have any adverse entry in the Annual Confidential Report and who have no penalties awarded against them in the

entire duration of the post and not merely in the past five years and whose reputation is vouchsafed by the Head of the Department and the

Secretary to Government of the Department concerned should be considered as falling under category (iii) of item (B) above.

The Officers categorized as under item (iii) of G.O.Ms. No. 424, G.A (Ser.C) Dept, dated 25.5.1976 as mentioned above only should be

considered for ad-hoc promotion after completion of two years from the date of the Departmental Promotion Committee or Screening Committee

Meeting in which their cases were considered for the first time.

(6) The Appointing Authority should consider and decide that it would not be against public interest to allow ad-hoc promotion to the Officer

concerned and this shall be decided with reference to the charge under enquiry. If the charge is one of moral turpitude, misappropriation,

embezzlement and grave dereliction of duty then the appointing authority should consider as not in the public interest to consider ad-hoc promotion

to such Charged Officer. But, however, if the charge is not a grave one but is a minor one, not involving moral turpitude, embezzlement and grave

dereliction of duty then only in such cases the Appointing Authority should consider that it would not be against public interest to allow ad-hoc

promotion because till then his record is clear with reference to ACRs, past punishment and reputation in the Department as vouchsafed by the

Head of the Department and Secretary to Government. The Appointing Authorities should strive to finalize the disciplinary cases pursuing them

vigorously so that within two years the proceedings are concluded and final orders issued.

(7) If the Officer concerned is acquitted, in the criminal prosecution on the merits of the case or is fully exonerated in the Departmental

Proceedings, the ad-hoc promotion already made may be confirmed and the promotion treated as a regular one from the date of the ad-hoc

promotion with all attendant benefits. In case the Officer could have normally got his regular promotion from a date prior to the date of his ad-hoc

promotion with reference to his placement in the Departmental Promotion Committee proceedings and the actual date of promotion of the person

ranked immediately junior to him by the Departmental Promotion Committee, he would also be allowed his due seniority and benefit of notional

promotion.

(8) If the Officer is not acquitted on merits in the criminal prosecution but purely on technical grounds and Government either proposes to take up

the matter to a higher Court or to proceed against him departmentally or if the Officer is not exonerated in the departmental proceedings, the ad-

hoc promotion granted to him should be brought to an end.

18. On the other hand, the learned Counsel appearing for the applicant submits that the said orders of the Government cannot override the Andhra

Pradesh State and Subordinate Service Rules, 1996 framed under Article 309 of the Constitution of India.

19. When there are no guidelines in the Andhra Pradesh State and Subordinate Service Rules, we are of the opinion that it is open for the

Government to issue executive instructions which are not contrary or covered by the Rules and which are general in nature and such power is

traceable under Article 162 of the Constitution of India. Therefore, it cannot be said that the procedure and guidelines issued in G.O.Ms. No. 257,

dated 10.6.1999, are not applicable.

20. The learned Government Pleader for the respondents also relied on the judgment of the Supreme Court in Union of India Vs. K.V.

Jankiraman, etc. etc., wherein it was held in para 8 as under.

...An employee has no right to be considered for 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 a mis-conduct 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 penalized in praesenti. When an employee is

held guilty and penalized and is, therefore, not promoted at least till the date on which he is penalized, 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 a 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 promotion....

21. In view of the orders of the Government in G.O.Ms. No. 257, dated 10.6.1999, and the judgment of the Apex Court referred to above, we

are of the opinion that the applicant is not entitled to any relief in the said O.As and both the O.As are misconceived. Admittedly, pursuant to the

orders of the Government in G.O.Rt. No. 444, dated 11.2.2008, an enquiry officer was appointed and the enquiry officer submitted his report on

2.7.2009 holding that charge No. 2 is proved and the other charges are not proved. The Government while disagreeing with the findings of the

enquiry officer on charge No. 3, a show cause notice was issued vide memo No. 62574/Vig.V(2)/2007-I 1, dated 14.7.2009, calling upon the

applicant to submit his representation on the findings of the enquiry officer in respect of charge No. 2 and also on the disagreement factors in

respect of charge No. 3 to the Government by 31.7.2009. It is stated that in pursuance of the said memo, the applicant submitted his explanation

on 26.8.2009. It is stated that the matter is under consideration for consultation of the Vigilance Commissioner as well as Public Service

Commissioner, if necessary.

22. Therefore, we are not inclined to express any opinion on the merits of the case so far as the disciplinary proceedings are concerned. However,

in view of the pendency of the aforesaid disciplinary proceedings and the enquiry was already completed and show cause notice was also issued

and final orders are yet to be passed, the applicant is not entitled to be considered for promotion to the post of Assistant Commissioner of

Prohibition and Excise.

23. Accordingly, W.P. No. 19913 of 2009 filed by the Government is allowed and the order of the Tribunal in O.A. No. 7307 of 2009, dated

3.7.2009, made absolute on 24.8.2009, is set aside. W.P. No. 21739 of 2009 filed by the applicant is dismissed. No order as to costs.