

(2002) 11 MAD CK 0119

Madras High Court

Case No: Writ Petition No. 5692 of 1995 W.P.M.P. No. 9282 of 1995

M. Ramasamy

APPELLANT

Vs

Union of India (UOI) and
Nathersa, Neravy Commune
Panchayat

RESPONDENT

Date of Decision: Nov. 7, 2002

Acts Referred:

- Constitution of India, 1950 - Article 16(4), 335

Hon'ble Judges: K.P. Sivasubramaniam, J

Bench: Single Bench

Advocate: N.G.R. Prasad, for Row and Reddy, for the Appellant; T. Murugesan, Special Govt. Pleader for Respondents 1 to 3, for the Respondent

Judgement

K.P. Sivasubramaniam, J.

The petitioner questions the order of the second respondent appointing the fourth respondent as Office Manager Grade III and to direct the respondents to promote the petitioner to the said post.

2. According to the petitioner, he joined the services of the third respondent Panchayat on 15.6.1987 as Junior Assistant. He belongs to Scheduled Caste community and his services were regularised during 1989. The post of Officer Manager Grade III fell vacant during 1987 and the said vacancy was meant for S.C./S.T. in the Roster prescribed by the Central Government. The said post can be filled up by promotion failing which by direct recruitment. A Junior Assistant who had passed S.S.L.C. with five years of service in the Grade was eligible to be promoted. The last vacancy arose in the year 1987 and as there was no eligible S.C./S.T. candidate it was de-reserved and one Shanmuga Sundaram from the General category was appointed on 16.2.1987. He retired on 28.2.1993 and the post of Office Manager Grade III was lying vacant from 1.3.1993. By that time the petitioner who had completed five years of service, and was eligible to be promoted.

In fact, the Under Secretary to the Government (Enforcement Cell) in a Circular dated 8.8.1994 has given instructions for strict observance of orders regarding reservation. As soon as Shanmuga Sundaram retired, the petitioner gave a representation requesting the respondents to give promotion to him. His representation dated 7.6.1993 and 28.3.1995 did not invoke any response. The petitioner would further submit that the Deputy Director, Local Administration has stated in his letter dated 29.10.1993 that the Special Officer was of the opinion that the present vacancy was a reserved one and has to be filled up by a reserved category candidate. But the respondents contrary to the policy of reservation, were now trying to appoint one Nathersa, namely, the fourth respondent who was working as Office Superintendent, drawing the same scale of pay as that of Office Manager Grade-III. The third respondent also appears to have approved the appointment of the fourth respondent. Even though the Special Officer had taken a decision not to abolish the post of Superintendent (Accounts), the third respondent had abolished the post and appointed the fourth respondent as Office Manager Grade III. The promotion and his action was in violation of Article 16(4) and 335 of the Constitution of India. The petitioner belongs to S.C. category and therefore, he was entitled to be appointed to the post and the second respondent was not justified in approving the promotion of the fourth respondent. Hence the writ petition.

3. In the counter affidavit filed by the third respondent, it is contended that Neravy Panchayat had two posts in the category of Manager carrying the same salary and as such equivalent. But there was no need to maintain the posts on account of non-availability of sufficient work. There was need to restrict structure of the establishment and to reduce the overhead charges. Therefore, the Special Officer recommended abolition of temporary post of Superintendent of Accounts retaining the post of Office Manager Grade-III since both the posts are identically carrying the same scale of pay. This fact was brought to the notice of the first respondent with a request to accord sanction to abolish temporary post of Superintendent of Accounts. In the meantime the post of Office Manager had become vacant as the incumbent retired on 28.2.1993. The fourth respondent was directed to hold full additional charge with effect from 1.3.1993. Ultimately, the Government had accepted the recommendation and consequently abolished the post of Superintendent of Accounts. Therefore, the fourth respondent was transferred to the permanent post. In the said circumstances, the contentions of the petitioner were not sustainable. The allegations made in the affidavit filed in support of the writ petition were denied. As regards representation submitted by the petitioner, the first representation dated 7.6.1993 was given to the Commissioner seeking promotion. It was forwarded to the Director of Local Administration who has returned directing the Commissioner to resubmit the same with a detailed report annexing bio-data of the petitioner. All the details were submitted to the Director. The representation dated 28.3.1995 was not at all submitted to the Commissioner,

but sent to the Director without the knowledge of the Commissioner. The abolition of post was complied with for reduction of expenditure. The impugned order was clear and perfectly in order and there was no infirmity.

4. Mr. N.G.R. Prasad, learned counsel for the petitioner contends that though the petitioner was eligible to be promoted in 1987 itself, for reasons best known to them, the post was de-reserved and one Shanmuga Sundaram came to be appointed. He retired on 28.2.1993 and the post ought to have been filled up by applying Roster and the petitioner was entitled to be appointed. In spite of several representations the post was kept vacant. The fact that the post has to be filled up by S.C. candidate was also endorsed by the then Commissioner as well as the Deputy Director, Local Administration. In respect of the same, the third respondent appears to think that he can act independently notwithstanding the directions of the superiors. The reason that one of the two posts have been abolished is not at all valid. The abolition of the post was only during 1995 whereas the vacancy had arisen in 1993 itself. The entire action discloses apathy towards the petitioner and a determined approach not to fill up the vacancy by a Scheduled Caste candidate.

5. Learned Standing Counsel for the respondents contended that the petitioner is not entitled to question the abolition of the post which was effected purely due to administrative reasons. As a result of the same, the cadre strength got reduced to 1 from 2. Therefore, the roster will not apply to a single vacancy. There was no basis for the allegation for any communal bias or motive not to appoint the petitioner.

6. I have considered the submissions of both sides. The fact that the petitioner belongs to S.C. and is entitled to be considered in accordance with the roster formula for promotion from the post of Junior Assistant to the next higher promotional category namely, Office Manager Grade III is not denied. In paragraph Nos.2 and 3 of his affidavit, he has stated that even in the year 1987 a vacancy arose and as there was no suitable S.C./S.T. candidate, the vacancy was de-reserved and one Shanmuga Sundaram from the general category was appointed. In the meantime, he had acquired necessary qualification of five years experience to be promoted and therefore, he should have been considered as against the vacancy which arose on 28.2.1993, on which date Shanmuga Sundaram retired. In terms of the roster regulation, the de-reserved vacancy should have been treated as a carried over vacancy and the claims of the petitioner ought to have been considered. This claim of the petitioner is not only a glossed over by the third respondent in his counter, but also clearly upheld by the then Commissioner of Panchayat in his letter dated 29.10.1993 addressed to the Deputy Director, Local Administration Department. After referring to the observation of the Special Officer that the post which fell vacant on retirement of Shanmuga Sundaram was a reserved one and that it should be filled up only by a reserved category candidate, the Commissioner had positively requested that the post of Office Manager Grade III may be filled up by S.C. candidate. This reply itself was in fact sent by the Commissioner on receipt of

a memo of the Deputy Director dated 10.6.1993 for proposals to fill up the vacancy. Along with the reply, the Commissioner had also enclosed necessary certificates and up to date confidential reports of the eligible candidates. However, for reasons best known to the Commissioner, it is not known as to whether it was the same Commissioner or some other individual who had taken over, appears to have taken a conflicting stand in his letter dated 30.11.1993 stating that there was no Scheduled Caste candidate available in the Panchayat. Another discrepancy was also found in the stand taken by the Commissioner as regards a particular Junior Assistant who was shown as eligible, but still to be confirmed. The Deputy Director, Rural Development, by his letter dated 22.12.1993 pointed out this discrepancy and contradiction in the Commissioner's letter and the Commissioner was called upon to clarify the same. The text of the letter is as follows:-

"It is informed in the proforma/compliance report cited above against Sl.No.1, that the proposal has already been sent to the department to fill up the vacant post of Office Manager Gr.III in Neravy Commune Panchayat on 29.10.93. It is seen that the Commissioner has stated in the proposal that the vacancy falls at Point No.2, which is carried forward vacancy of point No.1 and should be filled up a reserved candidate. It is also stated that the present vacancy will be filled up as per roster point and recruitment rules in force as and when a reserved candidate is eligible for the post of Office Manager Grade-III and no Scheduled Caste candidate is available in the Commune Panchayat at present for filling up the post of Office Manager Grade III. Hence this will be processed later.

2. Further against Sl.No.2 it is stated that the proposal for filling up the vacant post of Office manager Grade-III is under process and the post of Superintendent (Accounts) is to be made permanent and not eligible for confirmation. In Sl.No.3 it is stated that one Junior Assistant has not passed the required text whereas in Column 8 the No. of post 1 is entered as eligible but still to be confirmed.

3. The Commissioner is requested to re-examine the above statement carefully and a correct reply may be furnished to this Department without any discrepancies. It may also be clarified why the compliance report has been furnished with contradictory reply against the original proposal dated 29.10.1993."

7. On these happenings nothing is clearly stated by the Commissioner in the counter which is as vague as possible. Even the file produced before me deals only with the events subsequent to the year 1995-96 after the writ petition had been filed and the decision which was taken to abolish the post in the year 1995. In spite of my specific direction to produce the files relating to the correspondence between the Government and the Panchayat regarding the proposals which were initiated in the year 1993 for filling up the vacancy which arose on the retirement of Shanmuga Sudaram, no such file had been produced. But for the typed set of papers filed by the petitioner disclosing the correspondence between the Commissioner and the Deputy Director, Local Administration during 1993, as referred to above, the said

facts would not have come to light. In the above background separate counters should have been filed and it is not possible to appreciate that the counter affidavit filed by the third respondent is sought to be treated as counter filed by all the respondents ignoring the circumstance that earlier the Government had been taking the stand that the vacancy should be filled up with S.C. candidate.

8. The present action of the respondents in posting the fourth respondent in the vacancy is sought to be justified on the basis of the two reasonings. Firstly, out of two vacancies in the promotional category, one post had been abolished and therefore, the roster policy will not apply to a single vacancy/post. The second reason is that the fourth respondent was holding only an equivalent post and as the post which he was holding was abolished, he was transferred to the present post and that hence the said appointment cannot be stated to have been made overlooking the claims of the petitioner.

9. The entire defence taken by the respondents coupled with the defects already pointed out above, reveals a determined attitude to keep out the petitioner. It is not the case of the respondents either that he is not qualified or that he suffers from any bad antecedents or that he is not up to the mark of required standards. The sequence of events which took place as seen from the correspondence between the Deputy Director and the Commissioner in 1993 as regards the proposals which were made to fill up the vacancy created by the retirement of Shanmuga Sundaram are glossed over and attempted to be ignored. One of the two posts was abolished admittedly only in the year 1995 namely, on 20.3.1995. This will not provide a justification for the respondents, either legal or moral, to have denied promotion to the petitioner who became eligible to be promoted in 1993 itself in the vacancy which ought to have been filled up by a Scheduled Caste candidate. To state that with the abolition of the post, reservation was not available for a single post, discloses a motivated manoeuvre and determined approach not to promote an individual belonging to S.C. Community. It is nothing but an attempt to make the reservation policy ineffective. It is this sort of attitude on the part of some of the Departments/Officials which leads to extreme and negative feelings, reaction and approach and exaggerated claims by the members of the reserved communities in dealing with reservation policies.

10. The reason that the fourth respondent had been posted only on transfer as the post which he was holding was abolished, does not also remove the sting in the action of the respondents. To repeat what has already been stated, the vacancy had arisen in the year 1993 itself. It is hardly a reason to deprive the claim of the petitioner which arose in the year 1993 itself and the roster requirement to fill up a carried forward vacancy in favour of S.C. category. Innovative excuses to bypass the policy of reservation cannot be appreciated. There is yet another dimension to this issue. Learned counsel for the petitioner also pointed out that the petitioner had passed the Departmental test as on 30.12.1994 and that the fourth respondent had

not passed the Departmental test which is evident from the impugned order itself which shows that the order was subject to the condition that the fourth respondent should pass the Departmental test within a period of two years of probation. This issue again throws light on the lack of bona fides on the part of the respondents. Opting for and posting an unqualified person as against the claims of a qualified person who ought to have been promoted in 1993 itself reflects badly on the action of the respondents. It is clear that as on date of the impugned order, the petitioner was qualified whereas the fourth respondent had not passed the Departmental test.

11. Therefore, the petitioner is entitled to succeed. Though this Court will not generally order promotion by issuing a writ, this is a case in which such a direction deserves to be issued. Even so, I refrain myself from doing so.

12. In the result, the transfer and posting of the fourth respondent as Office Manager Grade III, will stand set aside and the respondents are directed to consider the claims of the petitioner to be promoted on the basis of his qualification and confidential reports as on 29.10.1993 on which date the proposals were initiated and if found fit for promotion, to promote him with effect from the said date with all the consequential benefits. In the event of the respondents choosing not to disturb the fourth respondent, the petitioner has to be fitted in at least by creating a supernumerary post and lack of vacancy cannot be an excuse. The writ petition is allowed subject to the above observations. No costs. Connected miscellaneous petition is closed as unnecessary.