

(2014) 11 MAD CK 0580

Madras High Court

Case No: Writ Appeal Nos. 2583 of 2012 and 1107 of 2014 and M.P. Nos. 1 and 2/2012 and 1/2014

S. Abdul Salam Sahib

APPELLANT

Vs

K. Parameswari

RESPONDENT

Date of Decision: Nov. 27, 2014

Hon'ble Judges: P.R. Shivakumar, J; N. Paul Vasantha Kumar, J

Bench: Division Bench

Judgement

P.R. Shivakumar, J.

1. S.Abdul Salam Sahib, who figured as 3rd respondent in W.P.No. 5665/2012 is the sole appellant in W.A.No. 1107/2014. The Secretary to the Government of Tamil Nadu, Housing and Urban Development Department, Chennai - 9 and the Directorate of Town and Country Planning, Chennai (Respondents 1 and 2 in the said writ petition) are the appellants in W.A.No. 1107/2014. Both the writ appeals have been preferred against the order of the learned single Judge dated 30.08.2012 made in W.P.No. 5665/2012, wherein the first respondent Parameswari (writ petitioner) had prayed for a writ of certiorari calling for the records relating to the proceedings of the first appellant in G.O.(D) No. 19 Housing and Urban Development Department dated 15.02.2012 and to quash the same.

2. S.Abdul Salam Sahib, the appellant in W.A.No. 2583/2012 (3rd respondent in W.P.No. 5665/2012) was initially appointed as Junior Assistant on compassionate ground on 15.03.1982 and he was posted to the office of the Directorate of Town and Country Planning, Chennai in 1986, more specifically, on 15.12.1986. He was temporarily promoted as Assistant under Rule 39(a)(i) of the Tamil Nadu Subordinate Services Rules and he joined as Assistant on 29.12.1986. K.Parameswari, the first respondent in both the writ appeals/writ petitioner was appointed in the same department as Junior Assistant through Employment Exchange on 06.04.1981 under Rule 10(a)(i) of the General Rules of Tamil Nadu Subordinate Services Rules. She was regularised with effect from 25.06.1984 by

G.O.Ms.No. 996 dated 22.09.1984 along with other 10(a)(i) candidates. However, Abdul Salam Sahib, the appellant in W.A.No. 2583/2012, having been appointed regularly on compassionate ground, was regularised in the post of Junior Assistant with effect from 15.03.1983 itself. In view of the same he was considered to be senior to Parameswari, the first respondent in both the writ appeals in the cadre of Junior Assistant. When vacancy in the promotional cadre, namely the cadre of Assistants arose, he was temporarily promoted under Rule 39(a)(i) of Tamil Nadu Subordinate Services Rules and he joined duty as Assistant on 29.12.1986. When regular promotions were sought to be made, panel for the year 1987 was prepared and the crucial date for the preparation of the panel was admittedly 01.03.1987.

3. In the regular panel prepared on 08.10.1987 in R.O.C.No. 128/A/1987/E4, Abdul Salam Sahib's name was not included, whereas the first respondent Parameswari's name and other juniors of Abdul Salam Sahib were included and promoted as Assistants. The same resulted in his reversion as Junior Assistant with effect from 14.10.1987. His name was omitted to be included in the panel for the year 1987 on the premise that he had been issued with a Charge Memo dated 18.08.1987 under Rule 17(a) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules. Of courses it is true that the said charge, at the end of enquiry, resulted in imposition of a punishment of stoppage of increment for six months without cumulative effect and such an order of punishment came to be passed in the proceedings of the Directorate of Town and Country Planning, Chennai vide Roc.No. 19870/1987/E4 dated 08.03.1988. In view of the punishment of stoppage of increment for six months, his name was not included in the panel for the year 1988 also. However, his name was included in the supplementary panel prepared for the year 1988 and he was promoted on regular basis as Assistant on 15.12.1988.

4. Aggrieved by the non-inclusion of his name in the panel for the year 1987, he submitted a representation to the Director of Town and Country Planning on 22.10.1987 and a further representation on 07.01.1996 claiming promotion on par with his juniors. Based on such representations, the Commissioner of Town and Country Planning, Chennai, addressed a letter to the Secretary in his letter dated 04.06.1999 in Na.Ka.No. 37063/96/J3 recommending the inclusion of his name in the panel for the year 1987 and for placing his name above Mrs.Lenah. Thereafter, the Government issued a clarification in letter No. 17389/Na.va(2-1)/87-15 dated 08.07.1999 addressed to the Commissioner of Town and Country Planning rejecting the representation of Abdul Salam Sahib, the appellant in W.A.No. 2583/2012 (3rd respondent in W.P.No. 5665/2012). Thereafter Abdul Salam Sahib submitted a detailed representation on 22.11.1999 addressed to the Secretary to Government. The Director of Town and Country Planning chose to issue a notice to those persons who were juniors to Abdul Salam Sahib in the feeder category and promoted earlier, calling for their objections, if any, for the inclusion of the name of Abdul Salam Sahib in the panel for the year 1987. Some of them raised objections and some of them expressed no objection. The first respondent Parameswari (writ petitioner) also

expressed no objection for the inclusion of the name of Abdul Salam Sahib in 1987 panel and according him appropriate seniority in the said panel. The Special Commissioner of Town and Country Planning considered the objections and rejected the objections of others except Lenah. When the same was communicated to the Secretary to the Government, the Government held that there was nothing wrong in overlooking S.Abdul Salam Sahib in the list of assistants and there was no mistake to be corrected. Such a communication came to be issued in Letter No. 16771/UD2.2/2003-14 dated 26.04.2004. Once again Abdul Salam Sahib submitted an application on 06.10.2004 for the re-consideration of the entire matter, but the same was rejected by the Government vide letter No. 25050/UD2(2)05-1 dated 20.09.2005.

5. Challenging the said order Abdul Salam Sahib approached this court with a writ petition in W.P.No. 18661/2006 praying for the inclusion of his name in the panel for the year 1987 and restoration of his seniority. This court, by order dated 05.11.2009, set aside the order of the government dated 20.09.2005 issued in its letter No. 25050/UD2(2)05-1 and directed the Government to reconsider the case of the appellant in W.A.No. 2583/2012, namely Abdul Salam Sahib and pass a reasoned order in accordance with law. The said order passed in W.P.No. 18661/2006 has become final.

6. Since the direction was not complied with, Abdul Salam Sahib initiated contempt proceedings in Contempt Petition No. 50/2011. By the time when the matter came up for hearing, the Government had passed G.O.(D) No. 19 Housing and Urban Development Department dated 15.02.2012 directing inclusion of the name of Abdul Salam Sahib in the panel for the post of assistants for the year 1987 placing his name above the name of Mrs.B.Lenah and directing the Commissioner of Town and Country Planning to allow all service and other benefits, including restoration of his seniority at appropriate place.

7. The said order made in G.O.(D) No. 19 Housing and Urban Development Department dated 15.02.2012 was challenged by the first respondent Parameswari (writ petitioner) in W.P.No. 5665/2012 contending that Abdul Salam Sahib, the appellant in W.A.No. 2583/2012 (3rd respondent in WP No. 5665/2012) was not entitled to the relief, as there was laches on his part and also on the ground that she was not given opportunity before passing such order. Though the said W.P.No. 5665/2012 was admitted, no stay order was passed and the stay petition was dismissed on 12.03.2012. However, in a further miscellaneous petition seeking injunction not to affect the order of seniority pending disposal of the writ petition, an interim direction was given on 18.06.2012 not to revert Parameswari (writ petitioner). Finally, the learned single Judge, by order dated 30.08.2012 allowed the writ petition and set aside the order of the Government issued in G.O.(D) No. 19 Housing and Urban Development Department dated 15.02.2012 holding that there was laches on the part of Abdul Salam Sahib, the appellant in W.A.No. 2583/2012

and he was yawning a gap between 1988 to 1996. The said order of the learned single Judge is challenged in W.A.No. 2583/2012 by Abdul Salam Sahib and by the Government and the Directorate of Town and Country Planning in W.A.No. 1107 of 2014.

8. The arguments advanced by Mrs.A.Sri Jayanthi, learned Additional Government Pleader for the appellant in W.A.No. 1107/2014/respondents 2 and 3 in W.A.No. 2583/2012, by Mr.R.Muthukumaraswamy, learned senior counsel representing Mr.G.Elanchezhiyan, counsel on record for the appellant in W.A.No. 2583/2012/2nd respondent in W.A.No. 1107/2014, by Mr.S.Vijayakumar, learned counsel for 1st respondent in W.A.No. 1107/2014 and by Mr.N.G.R.Prasad, learned counsel for the first respondent in W.A.No. 2583/2012 were heard. The materials placed in the form of typed set of papers were also perused.

9. Though factually the first respondent Parameswari (writ petitioner) joined as a Junior Assistant in the Directorate of Town and Country Planning much earlier than the appointment of Abdul Salam Sahib, the appellant in W.A.No. 2583/2012 (3rd respondent in W.P.No. 5665/2012) as Junior Assistant in the said department, admittedly she was appointed through Employment Exchange temporarily under General Rule 10(a)(i) of the Tamil Nadu Subordinate Services Rules, whereas Abdul Salam Sahib joined as regular Junior Assistant on 15.03.1982 as his appointment was made on compassionate grounds. The same was the reason why he was regularised as junior assistant with effect from the date of his initial appointment, namely 15.03.1982, much before the regularisation of the writ petitioner Parameswari, first respondent in both the appeals. Like other 10(a)(i) appointees, Parameswari, the first respondent in both the appeals (writ petitioner) was regularised with effect from 25.06.1984 by virtue of Special Regularisation Rules vide G.O.Ms.No. 996 dated 22.09.1984. As per the Regularisation Rules, the regularised 10(a)(i) Junior Assistants should take their seniority below the Junior Assistants who had already been regularised and also below the Junior Assistants appointed on the basis of the selection made by the Service Commission in the Examination held in November 1983 irrespective of their date of appointment. That is the reason why the claim of seniority of Abdul Salam Sahib over and above writ petitioner Parameswari in the cadre of Junior Assistant has not been resisted.

10. Further, it is an admitted fact that in the cadre of Junior Assistants, Abdul Salam Sahib was senior to the writ petitioner Parameswari and even her senior Mrs.Lenah. However, while moving to the next category, namely the category of Assistants, the name of the writ petitioner Parameswari was included in the panel for the year 1987, whereas the name of the appellant in W.A.No. 2583/2012, namely Abdul Salam Sahib, was omitted to be included in the said panel even though he had been temporarily promoted as Assistant under Rule 39(a)(i) on 15.12.1986 itself and he joined duty as Assistant on 29.12.1986. Due to the non-inclusion of his name in the panel for the post of assistants for the year 1987, he was reverted. The non-inclusion

of his name in the panel for promotion as Assistant for the year 1987 was on the ground that, a charge under Rule 17(a) of Tamil Nadu Civil Services (Discipline and Appeal) Rules, was pending against him when the panel for promotion of Assistants was prepared.

11. It cannot be disputed and it is also admitted by the parties that as on the crucial date, namely 01.03.1987, no charge memo had been issued and only thereafter, but before the publication of the regular panel dated 18.10.1987, he was issued with a charge memo dated 18.08.1987. As rightly contended by the learned counsel for the appellant in W.A.No. 2583/2012, since no charge was pending on the crucial date, his name ought not to have been omitted and he should have been included in the panel for the year 1987. Even though a person's name is included in the panel for promotion, if a punishment is imposed before the actual date of promotion, there can be no infirmity in denying promotion, because during the currency of the punishment and during the check period, one cannot claim to be promoted even though his name appears in the panel for promotion.

12. In the case on hand, even by the date on which promotions were given on regular basis to his juniors, the disciplinary proceedings had not ended and only on 08.03.1988, a punishment of stoppage of increment for six months without cumulative effect came to be imposed. Admittedly, on the date of actual promotion of his juniors only a charge under Rule 17(a) was pending and the pendency of charge under Rule 17(a) is not a disqualification for being promoted. Hence the claim of the appellant in W.A.No. 2583/2012 for the inclusion of his name in the panel for promotion as Assistant for the panel year 1987 and thereby grant promotion with effect from the date on which his juniors were promoted, is justified. Denial of such claim shall be unjustified.

13. Thereafter, the panel for the next promotion, namely promotion to the post of Superintendent, in which his juniors were included came to be prepared on 05.04.2005 for the panel year 2005-2006. In the said panel, the name of the appellant in W.A.No. 2583/2012 was not included. Had he been given promotion as Assistant on the date when his juniors were promoted, namely 1987 itself, his name would not have been omitted to be included in the panel for promotion as Superintendent for the year 2005-2006. In fact he was imposed a punishment of stoppage of increment for six months without cumulative effect by order dated 08.03.1988. The currency of the punishment would have come to an end by 07.09.1988. The check period of five years would have ended by 07.09.1993. Since the next promotion to his juniors to the cadre of Superintendents was made in 2005-2006, there was no disqualification for him to be accorded such promotion. However, he was given promotion only on 11.03.2008, because of the non-inclusion of his name for the post of Assistant in the panel year 1987. Before that, the appellant in W.A.No. 2583/2012 had been making representations and the same were not disposed of by the authorities.

14. Even after his belated promotion as Superintendent, he reiterated his earlier stand by submitting a further representation. All along his representations were pending consideration. Though the representation for his inclusion in the panel year for 1987 for the post of Assistants came to be rejected by the Government by order dated 26.04.2004, thereafter he submitted a further application on 06.10.2004 for reconsideration of the entire matter and the same was also rejected by the government on 20.09.2005. As against the said order of the government dated 20.09.2005 he invoked the jurisdiction of this court by filing W.P.No. 18661/2006. Since the rejection order dated 20.09.2005 was considered to be a non-speaking order, a learned single judge of this court, by order dated 05.11.2009 set aside the same and directed the Government to reconsider the case of the appellant in W.A.No. 2583/2012 and pass a reasoned order in accordance with Law, as expeditiously as possible.

15. Similarly, the appellant in W.A.No. 2583/2012, namely Abdul Salam Sahib, filed another writ petition in W.P.No. 14557/2011 seeking for a writ of mandamus directing the Government to re-fix his seniority in the post of assistant as per the order of this court dated 05.11.2009 made in W.P.No. 18661/2006. This court, by an order dated 24.06.2011 passed the following order:

"The grievance of the petitioner is that till date the said order is not complied with and therefore the petitioner is seeking a direction to pass orders in accordance with the earlier order. If the earlier order is not complied with by the first respondent, the remedy open to the petitioner is to initiate contempt proceedings against the officer, who is not implementing the earlier order. As this court has already directed to re-consider the issue as expeditiously as possible in the writ petition filed by the very same writ petitioner, no fresh writ petition is maintainable. Hence, the writ petition is dismissed."

16. Pursuant to the said order, the appellant in W.A.No. 2583/2012 was constrained to file a contempt petition in Contempt Petition No. 50/2011 for the non-implementation of the earlier order of this court dated 05.11.2009 made in W.P.No. 18661/2006. Only after receiving notice in the contempt petition, the Government chose to pass the impugned order in G.O.(D) No. 19 Housing Urban and Development Department dated 15.02.2012 re-fixing the seniority of S.Abdul Salam Sahib in the cadre of Assistants above the name of Mrs.B.Lenah, who had been placed above the first respondent Parameswari (writ petitioner), with all service benefits. The first respondent Parameswari (writ petitioner), when asked to state whether she had any objection for the inclusion of Abdul Salam Sahib's name in the panel for the year 1987 for the post of assistant and for consequential benefits, she chose to express no objection for accepting the request of Abdul Sahib Salam to include his name in the panel of Assistants for the year 1987 and give retrospective promotion. The same is reflected in the communication of the Deputy Director of Town and Country Planning in Na.Ka.No. 2497/2001 Co.Ma-2 dated

08.08.2001 addressed to the Special Commissioner for Town and Country Planning, Chennai. From the proceedings of the Special Commissioner, it is obvious that only Lenah, Ekambaram, Thanikachalam, Kalaivani and Manivelu had raised objections. In the said proceedings their objections were considered. Except Lenah's, all others' objections were rejected holding that they became eligible for promotion only subsequently. Lenah's objection alone was sustained and her seniority was not disturbed, as the appellant's name was sought to be fixed in between Lenah and the writ petitioner Parameswari.

17. The injustice caused to the appellant while making promotions to the cadre of Assistant continued for the second time, when the promotions to the cadre of Superintendents were also made. In the light of the proceedings of the Special Commissioner of Town and Country Planning in Na.Ka.No. 39579/99/J-3 dated 23.01.2003, his name ought to have been included in the panel for the year 2005-2006 for promotion as Superintendent and his seniority should have been fixed in between Lenah and Parameswari. The denial of his promotion even after punishment period as well as the check period was over, cannot be justified. The same was the reason why the appellant had to approach this court with W.P.No. 18661/2006 and this court directed the Government to reconsider the case of the appellant in W.A.No. 2583/2012 and pass a reasoned order in accordance with Law, as expeditiously as possible. Even after issuance of a direction by this court to re-consider the case and pass a reasoned order, nothing was done for a number of years and only when contempt proceedings came to be initiated, the Government passed G.O.(D) No. 19 Housing and Urban Development Department dated 15.02.2012, which was impugned in W.P.No. 5665/2012. Meanwhile Lenah retired on 31.05.2009 on attaining the age of superannuation.

18. The first respondent Parameswari, who did not express any objection for accepting the request of the appellant to include his name in the panel for the year 1987 for the post of Assistants and also re-fixing the seniority in accordance with his seniority in the feeder category by giving retrospective promotion, as she did not aspire or expect further promotion from the post of Superintendent. However, after Mrs.Lenah retired, the position changed. If the appellant is not given his original seniority, then Parameswari would have been promoted as Deputy Director of Town and Country Planning, as it was a promotional post and a unique post in the department and in case the original seniority of the appellant is restored, she would lose the chance of occupying the post of Deputy Director, as she would attain the age of superannuation before the appellant would reach the age of superannuation. The same was the reason why the first respondent Parameswari has chosen to challenge the impugned order on the basis of her contention that there was laches on the part of the appellant in W.A.No. 2583/2012 in seeking restoration of original seniority and that she was not given an opportunity to make her representation.

19. The learned single Judge seems to have accepted the contention of the first respondent Parameswari that there was laches on the part of the appellant from 1988 to 1996 and that therefore, he ought not to have been granted the relief by the government by the impugned order. It is a well known fact that the Government has the general power of revision under Rule 35(f) of Tamil Nadu State and Subordinate Services Rules to correct the mistakes at any time. In addition, it shall not be correct to assume that the appellant was yawning gap from 1988 to 1996. At the cost of repetition, it is worthy to point out that on 22.10.1987 itself he had submitted a representation and no order came to be passed. Even after he was promoted as Assistant on regular basis in 1988, he made a representation on 07.01.1996 for retrospective promotion and for re-fixation of his seniority above his juniors in the feeder category as claimed in his representation dated 22.10.1987. All along he had been pursuing the matter by sending reminders, based on which the Special Commissioner on 23.04.2001 had submitted a proposal before the government and called for objections on 30.07.2001 and the first respondent expressed her No objection on 08.08.2001 and then the Government rejected the claim of the appellant in W.A.No. 2583/2012 only on 10.09.2005. Thereafter, without wasting time, he approached this court with W.P.No. 18661/2006 and challenged the order dated 10.09.2005. In the said writ petition no plea of laches was raised and this court, by an order dated 05.11.2009 set aside the said order and directed the government to pass a reasoned order as expeditiously as possible. Even thereafter the Government was sitting on the file and he had to approach this court with a further writ petition and a contempt petition and only on receipt of contempt notice, the present impugned order came to be passed. The question of laches, if any, prior to the passing of the order dated 20.09.2005 would be deemed to have been taken into consideration in the earlier writ petition in W.P.No. 18661/2006 when this court has passed an order giving direction to the Government to reconsider the case of the appellant in W.A.No. 2583/2012 and pass a reasoned order in accordance with Law, as expeditiously as possible and the Government having passed an order without reference to alleged laches, it is not proper to harp on the plea of laches and the learned single Judge was not right in holding that there was laches even before the filing of the earlier writ petition, in which the direction came to be given. As stated earlier, there is no delay on the part of the appellant in pursuing the matter. Considering the clear facts and circumstances, we are not in a position to agree with the view of the learned single judge that the request of the appellant was bound to be rejected on the ground of laches. As we have factually found that there is no laches on the part of the appellant, the decisions cited by the learned counsel for the first respondent have no application in this case.

20. So far as the other ground is concerned, as pointed out supra, the first respondent Parameswari did not have any objection for re-fixation of the seniority of Abdul Salam Sahib in the cadre of Assistant. Only after giving an opportunity to raise an objection and based on her reply that she did not have any objection, the

re-fixation of seniority came to be made. The first respondent Parameswari cannot go back from the same and contend that the order came to be passed without giving an opportunity to make a representation. Even otherwise, when admittedly the appellant was senior in the feeder category and the denial of his right to be included in the panel is found to be unjustified, the interference with the impugned order by the learned single Judge in so far as re-fixing seniority in the writ petition should not have been made and we are unable to agree with the view of the learned single Judge. As far as promotion claim of the appellant is concerned, the first respondent in both the writ appeals (writ petitioner), had been temporarily promoted as Deputy Director (Administration), Directorate of Town and Country Planning with effect from 04.01.2012 and only to continue in the said temporarily promoted post she has chosen to challenge the order impugned in the writ petition.

21. In this regard, it has been brought to the notice of this court that the writ petitioner cannot claim any right to be retained in the post of Deputy Director (Administration) in the Directorate of Town and Country Planning, as her promotion has been made under Rule 39(a)(i) of the General Rule of Tamil Nadu State and Subordinate Services Rules by G.O.Ms.No. 5 Housing and Urban Development (UD II-1) Department dated 04.01.2012. In the said order, it has been clearly mentioned that the promotion was purely temporary and it was liable to be terminated at any time without any notice and without assigning any reason. The operative portion of the said government order containing three paragraphs reads as follows:

"2. The temporary promotion ordered above is subject to the following terms and conditions:-

(i) The person, who has been temporarily promoted as Deputy Director (Administration) is not entitled by reason of such temporary promotion to any preferential claim to future promotion to the post of Deputy Director (Administration) as laid down in General Rule 39(e) of the Tamil Nadu State and Subordinate Services Rules.

(ii) The person cannot claim any seniority in the regular panel to be drawn subsequently for the post of Deputy Director (Administration) based on the temporary promotion now given. The seniority fixed at the time of drawal of regular panel shall be final.

(iii) The services of the Deputy Director (Administration) so promoted temporarily shall be liable to be terminated at any time without notice and without any reason being assigned as laid down in General Rule 39(e) of the above said general rule of Tamil Nadu State Subordinate Services Rules.

In view of the clear language employed in the promotion order, the first respondent in both the writ appeals/writ petitioner, cannot complain that her accrued right should not be defeated because of the restoration of the original seniority of Abdul Salam Sahib (the appellant in W.A.No. 2583/2012) and while effecting regular

promotion, the Government is bound to consider the claim of all concerned in accordance with Rules.

22. In so far as the grant of monetary benefits granted by the Government to the appellant is concerned, the learned senior counsel appearing for the appellant in W.A.No. 2583/2012 fairly submitted that there is an error in the Government Order and the appellant may be given notional benefits. As the appellant's seniority and promotion is ordered based on the Government Order issued on 15.02.2012, the consequential benefits can be given only notionally and the Government is not justified in granting the monetary benefits except notional benefits and to that extent the Government Order is bound to be modified.

23. For all the reasons stated, we are of the considered view that the order passed in the writ petition is liable to be interfered with and the impugned order of the learned single judge dated 30.08.2012 made in W.P.No. 5665/2011 has got to be set aside.

In the result, both the writ appeals are allowed in part. The order of the learned single Judge dated 30.08.2012 made in W.P.No. 5665/2012 is set aside. The first respondent is directed to implement G.O.(D) No. 19 Housing and Urban Development Department (UD II-2) dated 15.02.2012 directing inclusion of the name of Abdul Salam Sahib (appellant in W.A.No. 2583/2012) in the panel for the post of assistant for the year 1987 below the name of B.Lenah and above the name of Parameswari in the office of the Directorate of Town and Country Planning and directing restoration of his service and other notional benefits, including restoration of his seniority at appropriate place. The promotion claim of the appellant should be considered in accordance with law as regular promotion to Deputy Director (Administration) is yet to be made. The official respondents are directed to implement this order within eight weeks. No costs. Consequently, all the connected miscellaneous petitions are closed.