

MAHARASHTRA ADMINISTRATIVE TRIBUNAL,

NAGPUR BENCH, NAGPUR

ORIGINAL APPLICATION NO.58/2019.

(D.B.)

Madan Akant Matey,
Aged about 53 years,
Occ-Superintending Engineer,
Krishna Water Disputes Tribunal,
(Special Cell), Central Building,
Pune-1,
R/o As above.

Applicant.

-Versus-

- 1) The State of Maharashtra,
Through its Principal Secretary,
Department of Water Resources,
Mantralaya, Mumbai-400 032.
- 2) The State of Maharashtra,
Through its Principal Secretary,
General Administration Department,
Mantralaya, Mumbai-400 032.
- 3) Vasant Gyandoe Gonnade,
Aged-Adult,
Occ-Service as Executive Engineer,
Small Scale Irrigation
(Water Resources Division),
Chandrapur.

Respondents

Shri S.P. Palshikar, the learned counsel for the applicant.
Shri D.M. Kakani, Ld. special counsel for respondent No.1.
Shri A.M. Ghogre, the learned P.O. for respondent No.2.
None for respondent No.3.

Coram:-Shri Shree Bhagwan, Vice-Chairman and
Shri Anand Karanjkar, Member (J)

JUDGMENT

(Delivered on this 1st day of July 2019.)

Per:- Member (J)

Heard Shri S.P. Palshikar, the learned counsel for the applicant, Shri D.M. Kakani, the learned special counsel for respondent No.1, Shri A.M. Ghogre, the learned P.O. for the respondent No.2. None for respondent No.3.

2. It is grievance of the applicant that, he was not considered for promotion twice by the Establishment Board and on third occasion though his name was recommended by the Establishment Board, but the respondent No.1 refused to promote the applicant on the post of Chief Engineer, therefore, for the relief the original application is filed.

3. It is case of the applicant that he was appointed in service in the year 1987 as Assistant Executive Engineer, he was promoted as Executive Engineer in the year 1991 and later on as Superintending Engineer in 2005.

4. In the year 2012, one crime was registered against the applicant under the Prevention of Corruption Act, for which the applicant was placed under suspension vide order dated 10.10.2012. After the investigation, the respondent No.1 refused to accord

sanction for prosecution and also decided not to conduct departmental enquiry and directed to treat the suspension period as duty period. In this background, the Anti Corruption Bureau directly filed charge sheet against the applicant in the special Court. This action of Anti Corruption Bureau was challenged by the applicant and thereafter the charge sheet was quashed on the ground that no sanction was accorded for prosecution.

5. It is submitted that the applicant was eligible for promotion as Chief Engineer, in the year 2015-16, there were 21 sanctioned posts of Chief Engineer, out of which 11 posts of Chief Engineers were vacant. Accordingly, name of the applicant was entered in the list of officers who were in the zone of consideration.

It is submitted that out of 11 vacant posts, two posts were reserved for SC, one was reserved for ST and eight were available to Open category. Applicant's name was at Sr. No. 13 in the list dated 9.3.2016. There was a meeting of Establishment Board on 2-4-2016. At the relevant time, one departmental enquiry under Rule 8 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 (in short "Discipline and Appeal Rules") and one enquiry under Rule 10 of the Discipline and Appeal Rules were pending against the applicant. The applicant was not considered suitable for promotion

on the ground that two enquiries were pending against him. The Establishment Board submitted report to respondent No.1 on 13.4.2016 and name of the applicant was not recommended for promotion. On the contrary, name of Mr. Londhekar, who was junior to the applicant was recommended. In this regard, it is grievance of the applicant that the Establishment Board recommended the name of one S.D. Kulkarni for promotion, though departmental enquiry under Rule 8 of the Discipline and Appeal Rules was pending against him . It is submission of the applicant that the action of Establishment Board not recommending his name for promotion was discriminatory. It is submitted that as name of S.D. Kulkarni was recommended, there was no reason for not recommending the name of the applicant, because he was sailing under the same boat.

6. The applicant, thereafter made fresh representations dated 24.5.2016 and 30.7.2016. Thereafter again the applicant's name was under consideration, but he was not considered. So far as the second meeting of Establishment Board is concerned, it is contention of the applicant that this meeting was held on 19.9.2016 and on the same day, punishment was awarded to the applicant under Rule 10 of the Discipline and Appeal Rules. The order of punishment was awarded on 19.9.2016 and on the same

day, there was a meeting of Establishment Board and that intimation was given to the Board and consequently the applicant was not considered suitable for promotion. It is submitted that the Establishment Board did not consider the applicant suitable for promotion and recommended names of officers who were junior to the applicant and this was a violation of circulars issued by Govt. of Maharashtra on 22-4-1976 and on 22-4- 996.

7. It is case of the applicant that he preferred an appeal against the punishment awarded under Rule 10 of the Discipline and Appeal Rules, stopping one increment for three years. His appeal was allowed by his Excellency the Governor of Maharashtra on 8.11.2017. Thereafter again applicant's name was forwarded to the Establishment Board for consideration. There was a meeting of Establishment Board. The Establishment Board recommended the name of the applicant for consideration and promotion to respondent No.1. The Establishment Board forwarded the proposal to respondent Nos. 1 and 2 on 24.4.2017. It is submitted that this recommendation of Establishment Board was not considered by respondent No.1 for the reason that the enquiry was going on against the applicant for the offence under Prevention of Corruption Act i.e. possessing disproportionate assets. It is

submitted that only investigation was going on against the applicant, but charge sheet was not filed against him and consequently this material was not sufficient for refusing promotion in view of circulars dated 22.4.1976 and 22.4.1996. It is contention of the applicant that deliberately he was not considered for promotion and the officers like S.D. Kulkarni, Shri Swami and others were promoted, though they were facing inquiries under Rule 8 of the Discipline and Appeal Rules. It is grievance of the applicant that this action of the respondents not promoting him was in violation of Government Circulars and the law laid down by the Hon'ble Bombay High Court, Bench at Aurangabad in case of **Prabhakar Jagguji Rangari V/s Minister of Industries and others, 2016 (1) Mh.L.J. 827.**

It is submitted that as per circular of 1976, there was a hurdle in promoting the applicant, so in view of circular dated 22.4.1996, undertaking was given by the applicant that he was ready to undergo punishment, but it was not considered. It is submitted that the treatment given to the applicant is discriminatory and there was no sound or cogent reason for not promoting the applicant. In this background, the applicant is claiming deemed date of promotion from

the date on which Shri S.D. Kulkarni was promoted. The applicant is also claiming other consequential benefits.

8. The respondents have submitted their reply (P.312). The respondents have justified their action. It is submitted that when the first meeting of Establishment Board took place, name of the applicant was not considered, as enquiry under Rules 8 and 10 of the Discipline and Appeal Rules were pending against the applicant, therefore he was rightly not considered suitable for promotion. It is submitted that when the second meeting of Establishment Board took place, punishment was awarded to the applicant under Rule 10 of the Discipline and Appeal Rules, consequently the applicant was held not suitable for promotion. It is contention of the respondents that that circular dated 22.4.1976 is directory, it is not mandatory and the Government has taken a conscious decision to examine the case of the applicant. In addition, stand is taken by the respondents that the applicant was involved in crime under Prevention of Corruption Act, as he was found in possession of disproportionate assets and regarding this crime, investigation was going on. The respondents have placed reliance on the order dated 13.8.2015 passed by the Additional Chief Secretary to the Government of Maharashtra. By this order, the Dy. Superintendent of Police, Anti Corruption Bureau,

Nagpur was permitted to initiate appropriate proceedings under Sub-section (i) of Section 3 of Criminal Law Amended Ordinance 1944, (Ordinance No. 38 of 44) for attachment of movable and immovable property specified in schedule annexed with this letter. It is submitted that the applicant was found in possession of property worth Rs. 69,86,900/- which was disproportionate to his income and this was additional material which was considered by the Government for refusing promotion to the applicant.

9. It is contention of the respondents that as per law laid down by the Apex Court in case of **Union of India V/s K.V. Jankiraman**, as the applicant was punished and the punishment was awarded, therefore, he was rightly not promoted, then second meeting of Establishment Board was held. It is contention of the respondents that the circular dated 22.4.1976 was directory in nature and examining all factors, a conscious decisions were taken by the Government. It is contended that the Establishment Board meetings which were held twice, did not recommend the applicant considering all these material and there is no illegality in it. It is submission of the respondents that, though Mr. S.D. Kulkarni, Mr. Swami were promoted, but there was only one enquiry against them and case of the applicant was altogether different and, therefore,

decision taken by the respondents is not arbitrary or discriminatory and consequently, there is no illegality in the action of the Government not promoting the applicant.

10. So far as 3rd meeting of Establishment Board is concerned, it is contention of the respondents that the Board recommended name of the applicant for appointment, but he was not considered. In this regard, it is submitted that entire material was not placed before the Establishment Board for consideration. It is contention of the respondents that the applicant was found in possession of property which was more than his legitimate income and for which investigation was going on and this material was never placed before the Establishment Board for consideration. It is submitted that Crime No. 3217/2014 U/s 13 (1) (e) r/w section 13 (2) of the Prevention of Corruption Act was already registered, in view of this, it was necessary for the officers who were supplying material to the Establishment Board to supply information to the Establishment Board, but this information was never submitted. It is submission of the respondents that the investigation was completed in this matter and final report was submitted before the Special Judge, Anti Corruption Bureau on 1.6.2018 and considering this report of the Investigating Officer U/s 173 (2) of Cr. P.C., the Special Judge

passed final order on 18.3.2019. It is submitted that as this material was against the applicant, it was serious in nature and, therefore, the respondent No.1 rightly denied promotion to the applicant. There is no illegality in it.

11. We have heard the submissions on behalf of the applicant and on behalf of the respondents. The circular dated 2.4.1976 on which reliance is placed by the applicant is as under:-

Promotion: Procedure to be followed in the cases of persons whose conduct is under investigation or against whom departmental enquiries are pending.

Government of Maharashtra,
General Administration Department,
Sachivalaya, Mumbai, dt. 2nd April 1976.

Circular of Government

According to the existing practice, Govt. servants whose conduct is under investigation or against whom a departmental enquiry is pending, are ordinarily not considered for promotion. This practice is, however, likely to cause hardship in the case of Govt. servants who are otherwise fit for promotion and the charges against whom may not be so serious as to disqualify them for provisional promotion during the pendency of the investigation or enquiry. The question has been examined. There are three stages at which action will have to be taken viz.

1. The stage of preparing the select list.
2. Interim promotion during the pendency of proceedings, and
3. Final action to be taken after the conclusion of investigations and the departmental enquiry if any. Action as below should be taken in respect of these three charges.

2. The stage of preparation of select list.

- (a) At the time of drawing up of the select list, the case of a person facing an investigation or departmental enquiry should be considered in the same manner in which the cases of other persons are considered, i.e. on the basis of his previous record of service. If on the basis of his record, he is found fit for promotion, his name should be included in the select list at the appropriate place; but this inclusion should be considered to the purely provisional to be reviewed after the conclusion of the departmental enquiry or investigation if on conclusion of the investigation. It is decided that a departmental enquiry is not necessary. This position will apply to all persons irrespective of whether they are under suspension or not.
- (b) If the state of his record is such that because of his suspension, his record for the past 2/3 years is not available and so no decision either way can be taken then the

Selection Committee should keep his case "open" i.e. to be considered at the later date without prejudice to him because of the delay.

- (c) If, on the basis of his record, he is not found fit for promotion, no further question arises.

3. Interim promotion during the pendency of the proceedings.

If the person is found fit and his name is provisionally included in the select list;

- (a) During the pendency of proceedings, the question of promoting a person under suspension does not arise, such a person shall not be promoted.
- (b) In respect of a person who is not under suspension, the competent authority should take a conscious decision, after taking into consideration the nature of the charges levelled whether the person should be promoted without waiting for the conclusion of the enquiry. If it is decided that he should be so promoted such promotion will be provisional and will be reviewed on the conclusion of the investigation or enquiry.

4. On conclusion of investigations and/ or departmental enquiry:

(a) If a person is completely exonerated the following consequences should follow:

(i) If he was provisional promoted, his provisional promotion should be treated as regular.

(ii) If such a person had become due for promotion but was not promoted, he should be promoted at the first opportunity. He should retain the seniority of the position in the select list. His pay should also be fixed at a stage which he would have reached had he been actually promoted according to his rank in the select list, but he should not be entitled to any arrears of pay on this account.

(b) If he is not completely exonerated, then his case should be examined and fresh decision should be taken as to whether, in view of the result of the investigations of enquiry, he is fit to be promoted.

(i) If he is not found fit in such a re-examinations and he was provisionally promoted earlier, the provisional promotion should come to an end. If he was not so promoted, no further question arises.

- (ii) If he is found fit, the competent authority should indicate his revised place in the select list. This revised place is expected to be lower than original provisional place in most cases because of the inter-resulting from the proceedings. If such a person was already provisionally promoted earlier, he should be deemed to be promoted accordingly to his revised position in the select list and the period his earlier promotion should be treated as fortuitous. If such a person was not already promoted, he should be promoted according to his revised position in the select list and the same consequence as in clause (a) (ii) above should follow.

- (c) Cases which are kept open should be decided expeditiously.”

12. After reading paragraph 3 (b), it seems that where a Government servant not in suspension, the competent authority should take conscious decision after taking into consideration the nature of charges levelled, to see whether such person should be

promoted without waiting for the conclusion of enquiry or the investigation. If it is decided that he should be so promoted, such promotion will be provisional and will be reviewed on the conclusion of investigation or enquiry.

13. After reading the above provision, it seems that the language is directory in nature, it is not mandatory. It is the discretion of the Government to examine the material available against a Government servant and to decide whether he is suitable for promotion or not and in clause (b), the language used, "*The Government has to take decision on the basis of material evidence collected in investigation or enquiry.*" contemplates that if investigation is in progress in relation to criminal charge against a Government servant, the Government is bound to make enquiry as mentioned in para (3) and (b) and to take conscious decision after weighing the evidence available.

14. The learned counsel for the applicant is placing reliance on circular dated 22.4.1976 and 22.4.1996. It is contention of the applicant that only enquiries under Rule 8 and 10 of the Discipline and Appeal Rules were pending against him, when the first meeting of Establishment Board was held. In this regard, it must be remembered that the crime under Prevention of Corruption Act

regarding disproportionate asset was registered against the applicant and investigation was going on, this material was not placed before the Establishment Board. Similarly, the Establishment Board was never informed about the sanction given by the Additional Chief Secretary to the Government of Maharashtra, Home Department to the Anti Corruption Bureau, Nagpur attaching the property alleged to be disproportionate to the income of the applicant. After perusing the documents relating to the second meeting of Establishment Board, it seems that this material was never placed before the Establishment Board. Similarly, this material was never brought to the notice of the Establishment Board when its third meeting took place in the year 2017. If these facts are examined, then it must be said that cases of Shri S.D. Kulkarni or Shri Swami were altogether different than the case of the applicant as Shri S.D. Kulkarni and Shri Swami were not involved in any criminal case under Prevention of Corruption Act. So far as Shri S.D. Kulkarni and Shri Swami are concerned, they were facing departmental enquiry under Rule 8 of the Discipline and Appeal Rules.

15. The learned counsel for the applicant submitted that the applicant was Member of Scheduled Caste and, therefore, it was mandatory for the Government to forward his case to the concerned

Ministry and as it was not done, therefore, there is illegality. It is submitted that as per G.R. dated 7.1.1961, it was the duty of the Government to submit report to the Administrative Department of the Secretariat, where the Government servant who is Member of Backward Class is superseded. It is further submitted that circular dated 3.3.1977 says that the proposal involving the officers of Class-I and Class-II cadre belonging to Backward Class, likely to be adversely affected in respect of confirmation, promotion or retirement should be placed before the Minister of Social Welfare. It is submitted that the respondents have also committed breach of this circular and, therefore, injustice is caused to the applicant. In reply, it is contention of the respondents that so far as G.R. dated 7.1.1961 is concerned, it is the special provision to show sympathy to the Government servant belonging to Backward Class. It is submitted that integrity criteria is must for all the Government servants, even though they are belonging to Backward Class. We have perused the appointment orders of Shri S.D. Kulkarni and Shri R.P. Landekar, it is at page No.226. Vide this order dated 30.8.2016, Shri S.D. Kulkarni and Shri Landekar were promoted. It is specially mentioned in their promotion orders that the order in favour of Shri S.D. Kulkarni was subject to final decision of departmental enquiry which was

pending against him. Similarly, it is mentioned in the appointment order that it was subject to final decision in **W.P. No. 2796/2015 between the State of Maharashtra V/s Vijay Ghogre**. We have also perused the promotion orders of Executive Engineer Shri J.D. Tale, Shri D.B. Pohekar, Shri R.R. Pawar, Shri H.A. Dhangare, Shri A.P. Parate, Shri S.M. Apte, Shri M.S. Amle, Shri P.M. Abnabe and Shri S.A. Swami. It is pertinent to note that in all the orders, it is specifically mentioned that those officers were promoted subject to final decision in the departmental proceedings. We have already observed that besides the departmental enquiries, crime under Prevention of Corruption Act was under investigation against the applicant. We have also discussed about the order passed by the n Additional Chief Secretary to the Government of Maharashtra, Home Department dated 13.8.2015, thereby according sanction to the Dy. Superintendent of Police, ACB, Nagpur to take steps for attachment of property belonging to the applicant and his family members as described in the schedule. As a matter of fact, this material was additional material. There were no allegations of corruption against other officers who were promoted that they had property disproportionate than their legitimate income. It is rightly pointed out by learned Sp.P.O. that this material was never placed before the 3rd

meeting of the Establishment Board, which considered the suitability of the applicant. In 2nd meeting, decision was taken not to recommend any promotion and in the 3rd meeting, name of the applicant was recommended, because at that time appeal preferred by the applicant was allowed by the Governor of Maharashtra and minor punishment barring his one increment for a period of three years, was set aside. It is submitted that had the concerned officer of the respondents placed the evidence collected in the criminal investigation in offence, Crime No. 3217/2014 for the offence punishable U/s 13 (1) (e) r/w section 13 (3) of the Prevention of Corruption Act, the Establishment Board would not have recommended his name for promotion. It is submitted by the respondents that when the matter was referred to the Establishment Board after 3rd meeting recommending the name of the applicant for promotion, the Government examined the entire record of the applicant and considering the evidence collected in Crime No. 3217/2014 under the Prevention of Corruption Act, found the applicant not suitable for promotion. It is submission of the respondents that as investigation of the crime was going on and there was *prima facie* material collected in the investigation, therefore, the applicant was not found suitable for promotion. At a later stage i.e.

on 1.6.2018, final report was submitted by the Investigating Officer and on the basis of it, the Special Court passed the order dated 18.3.2019 and decided to close the matter.

16. We have perused the order passed by the Special Court on 18.3.2019 which is at last page of the final report form. This document is produced by the applicant. We have perused the order passed by the Government regarding taking decision not to promote the applicant, though he was recommended by the Establishment Board. It seems that the officers who prepared note-sheet, did not consider all the evidence which was available against the applicant for arriving at the conclusion that it was not suitable to promote the applicant. It seems that the evidence collected while investigation in Crime No. 3217/2014 was not examined by the respondents and only because this investigation was going on, the applicant was thrown away.

17. Facts on record speak that initially also, crime under Prevention of Corruption Act for demanding and accepting illegal gratification was registered against the applicant, the evidence collected in the investigation was forwarded to the Government, but the Govt. of Maharashtra refused to accord sanction for prosecution and inspite of it, the ACB authorities filed chargesheet against the

applicant. The applicant challenged that the charge sheet, by filing Writ Petition in the Hon'ble High Court and thereafter that proceedings was quashed. On the basis of this, we can draw inference that the ACB authorities were highly prejudiced against the applicant. The over enthusiasm shown by the A.C.B. in filing charge sheet against the applicant in absence of sanction is very suspicious factor. The A.C.B. did not *suo motu* inform the Special Court that the charge sheet was filed without sanction but remained silent till the charge sheet was was quashed by the Hon'ble High Court. It appears from the final order of the Special Judge that the Investigating Officer admitted that there was duplication of entries and, therefore, value of disproportionate assets was swelled. Ultimately, it was submitted by the Investigating Officer before the Special Judge that it was not a case that the applicant was possessing disproportionate assets. It also appears from the facts and circumstances of the case that Shri S.D. Kulkarni was promoted, at that time, the crime under Prevention of Corruption Act was reported to the Government and the Government refused to accord sanction for prosecution. Not only this, it was decided by the Government to treat the suspension period as duty period and refused permission to initiate departmental enquiry against the

applicant. In this background, question arises why name of the applicant was not recommended when first meeting of Establishment Board was held. Because at that time, the applicant was facing one enquiry under Rules 8 and 10 of the Discipline and Appeal Rules. He was standing on the same footing as that of Shri S.D. Kulkarni. Secondly, it seems that the second meeting of Establishment Board was held on 19.9.2016. The Disciplinary Authority awarded punishment vide order dated 19.9.2016 i.e. on the same day. This material was reported to the Establishment Board. Why this information was forwarded to the Establishment Board very promptly and hastily, about this no explanation is given. It also appears that the Governor of Maharashtra allowed appeal preferred by the applicant and set aside the punishment awarded under Rule 10 of the Discipline and Appeal Rules. The department was not satisfied this order, but filed review petition before the Government which was turned down by the Government. This conduct of the respondents in fact shows that there was someone who was very much interested in creating hurdles in the way of the applicant. Therefore, the conduct of the officers of the respondents not bringing the material collected against the applicant in the crime u/s 13 (1) (e) r/w section 13 (2) of the Prevention of Corruption Act is highly suspicious. On the

contrary, when concerned officer was duty bound to place this material for perusal and consideration of the Establishment Board avoided to do so and after considering the final decision taken by the ACB authorities, it seems that there was nothing against the applicant to say that he was involved in that crime. On the basis of this material one may draw the inference that only with a view to defeat the claim of the applicant to the promotion, this action was taken though there was no foundation to take such action. In view of this entire situation, we are compelled to say that injustice is caused to the applicant due to all these lapses.

18. In view of above discussion, now we would like to consider the conduct of the respondents not referring the file of the applicant for consideration to the Minister of Social Welfare. This provision was made to protect the Backward Class Government servants from being a victims of illegality or suppression. As a matter of fact, the respondents should have respected their own circular and should have forwarded the entire material available against the applicant for consideration to the Minister of Social Welfare, but it was not done. If these facts are examined collectively then irresistible inference is to be drawn that there was some design to keep away the applicant from promotional post. In view of this

background, before turning down the recommendation of the Establishment Board to promote the applicant, it was necessary for the competent authority to consider, what evidence was collected by A.C.B. which was prima facie disclosing that the applicant was possessing disproportionate assets. It seems that this exercise was never done by the competent authority, no attempt was made to see that what evidence was collected against the applicant. It seems that the material was camouflaged and correct facts were not placed before the authorities, the authorities did not examine the evidence collected during investigation, did not make scrutiny of that evidence before taking decision and, therefore, we accept that grave injustice is caused to the applicant. Thus it appears that there was no substance in the inquiry under Rule 10 and the case that the applicant was involved in crime under the Prevention of Corruption Act, therefore, the material available against Mr. S.D.Kulkarni and the applicant was same. In view of this discussion, we hold that the Original Application is to be partly allowed. Hence, we proceed to pass the following order:-

ORDER

- (i) The O.A. is partly allowed.

- (ii) The respondents are directed to consider the case of the applicant for promotion to the post of Chief Engineer, keeping in view this background and if found suitable, shall promote the applicant since the date Shri S.D. Kulkarni was promoted.
- (iii) The Government is directed to take decision within a period of six months from the date of this order.
- (iv) No order as to costs.

(A.D.Karanjkar)
Member (J)

(Shree Bhagwan)
Vice-Chairman

Dt. 1.7.2019.

pdg.

I affirm that the contents of the PDF file Order are word to word same as per original judgment.

Name of Steno/PA : P.D. Girhale, Personal Assistant

Court Name : Court of Hon'ble VC and Member (J)

Judgment signed on and pronounced on date : Pronounced on 1st July 2019 and Signed on 3rd July 2019.

Uploaded on date : 5th July 2019.
