

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI

ORIGINAL APPLICATION NO.909 OF 2015

DISTRICT : PUNE

Laxmikant Shridharrao Joshi.)
Age : 54 years, Occu.: Service as)
Executive Engineer at PWD Project)
Division, Camp, Pune, Residing at 496,)
Flat No.2, Rivera Apartment, Model)
Colony, Shivaji Nagar, Pune 411 016.)...**Applicant**

Versus

1. The State of Maharashtra.)
Copy to be served through the)
Presenting Officer, MAT, Mumbai.)
2. The Additional Chief Secretary.)
Public Works Department,)
Mantralaya, Mumbai 400 032.)
3. The Additional Chief Secretary.)
General Administrative Department,)
Mantralaya, Mumbai 400 032.)...**Respondents**

Shri A.S. Deshpande, Advocate for Applicant.

Ms. N.G. Gohad, Presenting Officer for Respondents.



CORAM : RAJIV AGARWAL (VICE-CHAIRMAN)
R.B. MALIK (MEMBER-JUDICIAL)

DATE : 29.01.2016

PER : R.B. MALIK (MEMBER-JUDICIAL)

JUDGMENT


1. The issue at the heart of this Original Application (OA) is as to whether the consideration for promotion of an Officer (Executive Engineer to Superintending Engineer) can be indefinitely held up because of pending prosecution and the Departmental Enquiry (DE) on same set of facts by reason only of the said pendency and no other reason despite the provisions of GAD Circular No.SRV-1075/X Sachivalaya Bombay, dated 2nd April, 1976 (1976 Circular). In this OA, in fact, the Enquiry Officer (EO) has exonerated the Applicant in the DE. The issue hangs fire due to the pending prosecution.

2. We have perused the record and proceedings (R & P) including a really bulky departmental record submitted by the Respondents as per the directions of this Bench and heard Shri A.S. Deshpande, the learned Advocate for the Applicant and Ms. N.G. Gohad, the learned Presenting Officer (PO) for the Respondents.

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3. If the OA is juxtaposed with the Affidavit-in-reply sworn on behalf of the Respondent No.1 - State of Maharashtra by an Under Secretary in Public Health Department Mrs. Mridula Sanjeev Deshpande, certain vital facts will emerge as too solidified to brook any dispute. We shall notice them presently. But before we did that, let us record that the Respondent No.2 is Additional Chief Secretary, PWD and the 3rd Respondent is Additional Chief Secretary, GAD. There is no other Respondent hereto. We are, therefore, at a complete loss to understand as to how an Under Secretary of Public Health Department in Mantralaya could have been authorized at all to swear the Affidavit-in-reply. How could she have been authorized to file such an important Affidavit ? and by whom ? and why? And how she in the Public Health Department could have been given access to PWD documents ? Were there no responsible officials in the entire PWD in Mantralaya to do this little bit of work ?

4. But most importantly, the said Under Secretary and those who "authorized" her to file the Affidavit-in-reply must explain how could they take the process of MAT that lightly in fact almost disdainfully. The adjudication in the Administrative Tribunals is done on the basis of Affidavits only. Therefore, the one that files the said Affidavits must

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inspire confidence that they are conversant with the facts. If that confidence cannot be found, then it is a very serious matter. Here, in fact, we could have relegated the Respondents to the position of an ex-parte litigant. But if we also did that, then there may not be any difference between us and a callous and negligent party. Therefore, we will decide this OA by giving full reasoning. But the Under Secretary Mrs. Deshpande will have to appear before us with an explanation in the form of answers to our posers in Para 3 above on the next working day, even if this OA will have been disposed of because we may have to decide if we should take appropriate actions including action in contempt and any other action against her and others including those who "authorized" her and whose name/s she must disclose and whether an adverse note be recommended for being taken in their ACRs.

5. Let us now return to the OA. From 30.8.1995, the Applicant has been working as an Executive Engineer (Ex. Er.). During 2002-05, he was posted as Ex.Er., PWD, Pune. At that time, it so happened that a proposal duly sanctioned by Superintending Engineer / OSD in the office of Revenue Divisional Commissioner, Pune for disposal by sale of construction material especially excavation material was pending for about fifteen years. It occupied a large

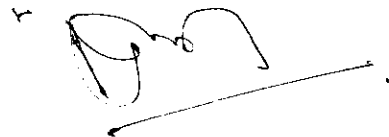


area whereby that portion lay in a state of disuse. That was due also to the snail paced decision making process. Reading Paras 6 and 7 of the OA alongside one line Paras 7 and 8 (admission) Page 26 of the paper book, it would be found that the Applicant undertook that job. There were two ways to go about doing the same-viz auction or floating of tenders. He opted for auction. The terms, etc. were finalized and forwarded to the District Information Officer, Pune for getting it published. Shri R.N. Raskar of Raskar Industrial Services, Pune registered protest and alleged malpractice. There was a somewhat acrimonious exchange of correspondence between Shri Raskar and the Applicant. However, by a communication of 4.6.2005 (Ex. D, Page 13 of the P.B.), the Applicant conveyed to Raskar Industries about cancellation of the auction. Let us reproduce it in Marathi.

“उपरोक्त संदर्भान्वये या विभागाचे हत्यारे व संयंत्रे निविदा प्रक्रिया योग्य असल्याचे आपणांस कळविण्यात आले आहेच.

२. तसेच निविदा आता रद्द करण्यात आली असून सदर साहित्य विक्रीचा मे. क्रियेशन सर्व्हिसेस, नाशिक या शासकीय लिलाव धारणास दि.१७.०६.२००५ रोजी या कार्यालयाचे भंडारगृह प्रांगणात सायंकाळी ४.२० वाजता लिलाव घेण्यास कळविले आहे.”

6. What was decided and conveyed to the said Shri Raskar was that the tender advertised and objected to was



cancelled and a fresh one will be held involving Government approved bidder.

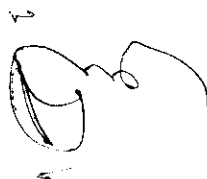
7. We must at this state make it clear that the scope of this OA is limited to the promotion aspect and neither to the prosecution nor D.E. If we refer to the facts thereto germane, it is only to reason out our findings in this OA. But still we make it clear that none of our observations herein should be taken even as expression of opinion much less a finding on the facts at issue in the DE or prosecution. But we must hasten to add that the EO has already exonerated the Applicant and the final order awaits the outcome of the prosecution. This fact becomes clear from the Affidavit-in-reply itself (Para 11, Page 27).

8. With the above cautious preface, let us observe that as far as the action publicized at the behest of the Applicant, it was cancelled by him only. If it continues to haunt him even thereafter, we need not say anything about it. But the fact remains that the auction that generated Raskar's Ire was cancelled by the Applicant.

9. The contents of Para 9 of the OA are admitted in the reply (Para 9), "I say that contents are admitted". Let us quote Para 9 of the OA :

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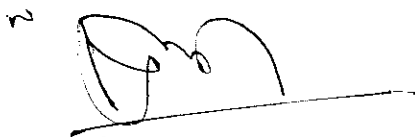
“9. The applicant says that, it is with this background, a criminal case under the provisions of Sec. 13(1)(b)(d) read with Sec.13(2) and Secs.120(b), 420, 465,467,468 & 471 of IPC came to be lodged against the applicant and others on 19.4.2007 with Bund Garden Police Station, being Crime No.156 of 2006. The applicant was arrested by the Police and was produced before the learned Special Judge, Pune and a Magisterial Custody Remand (MCR) of 14 days was sought, however, the applicant was immediately released on bail by the learned Special Judge, Pune and the learned Judge specifically observed in the bail order itself that, ‘...From it, prima-facie, it appears that, because of his actions, offence under Sec.420 IPC did not taken place and it turned into an attempt only...’. For ready reference, a copy of the order of granting bail to the applicant is being placed on record at Exh. ‘E’. The applicant understands that, no reliance as such is capable of being placed on the said order and still in order to apprise this Hon’ble Tribunal about the prima-facie expression of the learned Special Judge, the



order granting him bail has been placed on record.”

10. It is, therefore, very clear that the facts pertaining to the criminal prosecution as set out in Para 9 of the OA have been clearly admitted by the Respondents. In the meanwhile, as the matter was closed for orders, the learned Advocate for the Applicant has placed on record a copy of the evidence of the I.O. in Special Sessions Case No.23/2013 (PI S.V. Darekar) which was recorded as recently as on 21st January, 2016. We have perused the same. We have already made it clear that the scope hereof does not permit us to express any opinion about either the facts or facts at issue befalling the scope of the criminal prosecution. We would refrain from making any detailed observation save and except that the allegations made by the IO, for all one knows could not stand the test of the cross examination and rest the Court of criminal jurisdiction would deal with.

11. Now, another aspect of the matter pertained to the allegations that the goods were sold out and in that connection, high sounding amounts were mentioned. The details in that behalf need not be gone into and it would be sufficient to mention that the fact that no sale took place is

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borne out from prosecution's own record including a Panchnama and that fact is now clearly admitted by the IO in the above referred cross-examination in the criminal trial against the Applicant. The Applicant is the 1st accused therein.

12. Now in the set of the above circumstances, it is quite clear that even while granting sanction to prosecute the authorities concerned did not apply their mind properly, but again we need not go into the finer details thereof.

13. The above discussion would clearly show that for all practical purposes, the DE and the prosecution against the Applicant at least present a picture of what can aptly be described as much ado about nothing and in any case, the issue would be that the seriousness of the alleged offence also forming the basis of both the proceedings was the reason for refusing to consider the Applicant's case for promotion. That was a little out of proportion kind of approach. If the underlying idea was that a mere pendency of the prosecution should be held sufficient to deny the right to the concerned Government servant even for being considered for promotion, then that is quite clearly erroneous which will be borne out by the 1976

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Circular already referred to at the outset. Pertinently, this Circular is the last document in the large compilation submitted by the Respondents themselves and one only wishes the authorities had read it. For the sake of facility, we would reproduce the entire Circular whereafter nothing more would be necessary for us to add of our own.

"Promotion

Procedure to be followed in The cases of persons whose conduct as under investigation or against whom departmental enquiries are pending:-

GOVERNMENT OF MAHARASHTRA
GENERAL, ADMINISTRATION DEPARTMENT,
Circular No.SRV-1075/X, Sachivalaya, Bombay-400 032.
Dated the 2nd April, 1976.

CIRCULAR OF GOVERNMENT

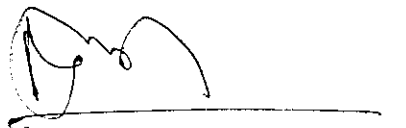
According to the existing practice, Government servants whose conduct is under investigation or against whom a departmental enquiry is pending, are ordinarily not considered for promotion. This practice is however, likely to cause hard-ship in the case of Government servants who are otherwise fit for 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 the proceedings, and
3. The final action to be taken after the conclusion of the investigations and the departmental enquiry if any.

Action as below should be taken in respect of these three stages.

2. The State 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

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cases of other person 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.

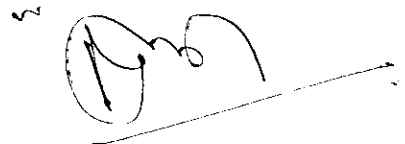
If the person is found fit and his name is provisionally included in the select list;

(a) During the pendency of the proceedings, the question of promotion a person under suspension does not 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 leveled 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 provisional and will be reviewed on the conclusion of the investigation or enquiry.

4. On conclusion of the investigations and ' or departmental enquiry :

- (a) If a person is completely exonerated the following consequences should follows :
 - (i) If he was provisionally 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 his position in the select list. His pay should also be fixed at a stage which he would have reached had he seen 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 re-examine and a 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-examination and if 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 contempt authority should indicate his revised place in the Select List. This revised place is expected to be lower than the original provisional place in most cases because of the intersecting 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 consequences as in clause (a) (ii) above should follow.
- (c) Cases which are kept 'Open' should be decided expeditiously.

By order and in the name of the Governor of Maharashtra.

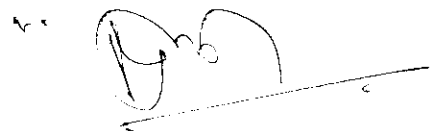
Sd/-
(K.P. Nadkarni)
Joint Secretary to Government."

14. It is, therefore, very clear that the authorities erred in not considering the case of the Applicant for



promotion. Consideration for promotion is a constitutional right though promotion itself may not be the one and that being the state of affairs, we are quite clearly of the opinion that the case for relief is made out. The Applicant seeks a direction to the 2nd Respondent to promote him to the post of Superintending Engineer by giving him a deemed date of promotion as 8.6.2015 which was the date on which those juniors to him came to be promoted. Now, as to this aspect of the matter, we find that we cannot straightaway direct the promotion of the Applicant. The net result of this determination is that the mere pendency of prosecution and DE should not come in the way of consideration of the case of the Applicant for promotion. That direction will be given and depending upon the outcome thereof, the Applicant would be free to make an appropriate application for deemed date.

15. The Respondents are directed to consider the case of the Applicant for being promoted to the post of Superintending Engineer, if necessary, even by convening a Special Departmental Promotion Committee within three months from today and if found fit, to promote him, subject to the outcome of the pending DE and prosecution. Depending upon its outcome, the Applicant shall be free to make an appropriate application for deemed date, if so

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advised. If the Applicant were to make such an application, then the Respondents shall take an appropriate decision thereon within a period of three months from the receipt of the said representation in their office. This Original Application is allowed to this extent with no order as to costs.

The Registrar to issue notice to the Deponent of Affidavit-in-reply Under Secretary Mrs. Deshpande for which reference could be made to Paras 3 and 4 above directing her to appear before us on 01.02.2016 at 11.00 a.m.

Sd/-

(R.B. Malik)
Member-J
29.01.2016

Sd/-

(Rajiv Agarwal)
Vice-Chairman
29.01.2016

Mumbai

Date : 29.01.2016

Dictation taken by :

S.K. Wamanse.

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