

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 104 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

MAHESH CHANDRA SHARMA

Versus

GENERAL MANAGER (OPERATIONS)

Appearance:

MR BP TANNA for Petitioner.

MR RAJNI H MEHTA for Respondents.

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 28/03/2002

CAV JUDGEMENT

The petitioner in this petition under Article 226 of the Constitution of India had challenged the action of the respondent authorities of non-continuation of promotion given to the petitioner as Assistant Engineer (P) with effect from 1-1-1991 on the ground that the said

action was perverse, arbitrary and suffered from the vice of non-application of mind. The petitioner has also prayed for quashing and setting aside the office order dated 3.7.1986 under which the petitioner's pay was fixed at Rs. 850/= with effect from 1-1-1986 as a Chargeman. The petitioner has also prayed for quashing and setting aside the memorandum dated 25-9-1992 and office order dated 9.11.1992. The petitioner has sought for declaration from this Court that the petitioner was entitled to get promotion to the post of Chargeman (P) with effect from 1.1.1983 instead of 1.1.1986 and for a declaration to the effect that petitioner was entitled to get promotion to the post of Assistant Engineer (P) with effect from 1.1.1986 instead of 1.1.1991 or 1.1.1992. The petitioner has further sought directions from this Court to the respondent authorities to prepare the seniority list of Chargeman as if the petitioner was promoted to the post of Chargeman (P) with effect from 1.1.1983 and further to prepare seniority list of the Assistant Engineer (P) as if the petitioner was promoted to the post of Assistant Engineer (P) with effect from 1.1.1986 instead of 1.1.1991 or 1.1.1992.

2. The petitioner has also prayed for interim relief against the respondent authorities restraining them from implementing the impugned memorandum dated 25.9.1992 and the impugned office order dated 9.11.1992. However, this Court has initially granted ad-interim relief against effecting any recovery from the salary payable to the petitioner on the basis of the order passed by the respondent authorities on 9.11.1992. The said ad-interim relief was made interim relief thereafter and it was continued all throughout during the pendency of this petition.

3. The brief facts, as are emerged from the petition, are that the petitioner had joined ONGC on 25.1.1969 as T.G.IV (Badli) and he was designated as a Production Operator in the grade of Rs. 440-758. On 24.11.1982 the petitioner was served with memorandum making certain allegations against him and the said allegations were refuted by him vide his reply dated 8/10.1.1983. The preliminary enquiry was held against the petitioner and vide memorandum dated 17/18.1.1983 penalty of stoppage of next two increments without cumulative effect was imposed upon the petitioner. Being aggrieved by this memorandum, the petitioner preferred an appeal on 22.2.1983 before the Deputy General Manager, ONGC, Sabarmati, Ahmedabad, and the said appeal came to be rejected on 19.4.1983. The petitioner thereafter preferred second appeal, inter alia, contending that he

was not at all responsible for the alleged incident and he therefore requested for a lenient view to be taken in the matter. The petitioner has also contended that the harsh punishment was imposed on him without any basis whatsoever. The petitioner was however informed on 20th August 1983 that there was no provision of second appeal in ONGC (CD & A) Regulations, 1976. The petitioner, therefore, preferred an appeal before the Director (Personnel), ONGC, Tel Bhavan, Dehradun which was also rejected on 24.3.1984 by holding that there were no grounds to interfere with the order passed by the disciplinary authority and the appellate authority.

4. The petitioner further submitted that the penalty of stoppage of two increments without cumulative effect was in violation of principles of natural justice and that it was illegal, arbitrary and malafide. It was further submitted by the petitioner that the order of penalty dated 17/18-1-1983 was to be implemented in the year 1983 but the same was implemented in the year 1984-85. It was further submitted by the petitioner that the increment should have been stopped for the year 1983-84 and not for the years 1984-85. It was further submitted that the petitioner's name in the provisional seniority list of Chargeman was at Serial No. 158 and that the petitioner was eligible for the post of Chargeman on 1.1.1983 but he was given promotion with effect from 1.1.1986. The petitioner has further submitted that the persons junior to him were promoted from 1.1.1983 and have been given effects in service accordingly.

5. The petitioner has further submitted that the petitioner was appointed as Junior Engineer (Production) vide Office Order dated 30-2-1984 but the said appointment was cancelled by memorandum dated 20-3-84. The petitioner thereafter made a representation before the respondent authorities for release of promotion. However, by memorandum dated 18.4.86 the petitioner was informed that the action for holding DPC for consideration for promotion to the post of Chargeman (P) was in hand as intimated by Regional Office, Baroda. The petitioner has further urged before the respondent authorities on 13-11-1984 that the double penalty cannot be imposed by withholding two promotions and also stoppage of two increments for an unproven charge.

6. The petitioner has also alleged in the petition that vide office order dated 13.7.1983 the petitioner was promoted to the post of Chargeman (P) with effect from 1.1.1983 but the said order was not handed over to the

petitioner as his two increments were withheld without cumulative effect. The petitioner has seriously urged in the petition that in accordance with the order dated 17/18.1.1983, two increments were to be stopped but there was no stoppage of promotion. The petitioner was promoted to the post of Chargeman (P) only with effect from 1.1.1986 instead of 1.1.1983. The petitioner should have been promoted to the post of Assistant Engineer (P) from 1986 but instead of this the petitioner has been given promotion to the post of Assistant Engineer (P) from 1.1.1991. The petitioner has further submitted that by memorandum dated 7.7.1992, the petitioner was informed that he should have been promoted to the post of Assistant Engineer (P) actually from 1.1.1992 instead of 1.1.1991. The said order is under challenge in this petition before this Court. The petitioner has raised the contention that he should not have been reduced in rank except after an inquiry and that too after an opportunity of hearing was given to him. The petitioner was put to the post of Assistant Engineer (P) with effect from 1.1.1992 instead of 1.1.1991, when the probation period was over, which would operate as penalty. According to the petitioner he would lose his emoluments and privileges. The petitioner therefore submitted that it would lead to a situation that though he was actually working as Assistant Engineer (P) he would be taken as a Chargeman (P). It is further contended by the petitioner that he had completed the probation period successfully on the post of Assistant Engineer (P) and after 22 months, reverting him back to his old post was nothing but on the face of it illegal and the promotion of the petitioner with effect from 1.1.1991 could not therefore be withdrawn. The petitioner has further submitted that denial of promotion to the petitioner was based on the illegal and improper action of the ONGC and that the petitioner was entitled to be promoted because he was senior to many employees working with the respondent authorities whose names were mentioned in Annexure "U" to the petition. The petitioner has further reiterated that deprivation of the promotion was in effect a double punishment because due to the office memorandum dated 17/18.1.1983, the promotion at the appropriate time was not given to the petitioner and such double punishment was unheard of in the history of service jurisprudence. The petitioner has further elaborated this contention by stating that according to the punishment inflicted upon the petitioner, two next increments without future effect were to be stopped. The date of increment due to the petitioner was 1st January every year and the punishment was awarded on 17.1.1983. Thus, according to the petitioner, the increments ought to have been stopped on

1.1.84 and 1.1.85 respectively and except this stoppage of two increments, no other damage could have been caused to the petitioner by the respondent authorities. Increment as on 1.1.1983 was released by the respondents and the petitioner could not have been denied promotion for a period prior to 1.1.1984 since the effect of stoppage of increment was to be given on 1.1.84 and 1.1.85 respectively and the penalty was to be in the calendar year 1984-85. On the basis of these facts, the petitioner has urged that the petitioner has not only been done injustice in terms of getting promotion in the calendar year 1983 but when the question came up for his further promotion from Chargeman to Assistant Engineer (P) the consequential effect took place because he was not given due promotion in the post of Chargeman during the calendar year 1983. The petitioner, therefore, suffered from both the ends. The petitioner therefore submitted that the action of the respondent-authorities was in violation of the provisions contained in Articles 14 and 16 of the Constitution of India.

7. After service of the notice, the respondents had appeared in the matter and an affidavit-in-reply was filed opposing the admission of the petition. The petition was opposed on the ground of delay and laches. It was stated by the respondent-authorities that the petitioner has sought to challenge the order of penalty of stoppage of two increments imposed in January 1983 by way of the present petition at this belated stage in 1992. The order was passed long back in January 1983 and it was too late for the petitioner to agitate the same before this Court in 1992. It was further stated that no legal right, much less any fundamental right of the petitioner has been violated and therefore this Court should not exercise its discretionary jurisdiction under Article 226 of the Constitution of India and should not entertain this petition at such belated stage.

8. The respondents have further submitted that the petitioner was serving as a Production Operator in 1983 and at that time by chargesheet dated 24.11.82 the petitioner was proceeded with departmental inquiry and ultimately by an order dated 17/18.1.83 the punishment of stoppage of two increments without cumulative effect was imposed on the petitioner. It was further submitted that the petitioner was facing the departmental inquiry and thereafter undergoing the punishment and hence the petitioner could not have been rewarded with the promotion. The petitioner was therefore promoted with effect from 1.1.86 as Chargeman (P). It was also submitted that since the conduct of the petitioner was

under investigation and the proceedings were culminated into imposition of penalty the petitioner could not be promoted to the post of Chargeman (P) with effect from 1.1.83/1.1.85 and was also not further promoted to the post of Assistant Engineer (P) with effect from 1.1.1986 as claimed by the petitioner. The respondents have further submitted that since departmental proceedings were initiated or pending against the delinquent employee, sealed cover procedure was required to be followed and if he was fully exonerated as having been found fit for promotion, he was given promotion from due date, otherwise he was to be considered at a later stage as and when he became eligible or fell due for promotion, subject to the penalty imposed on the delinquent employee. Since the petitioner's conduct was under investigation, which ultimately resulted into imposition of penalty, he could not have been promoted during the period, i.e., till 1.1.1986. The respondents have further submitted that the order dated 17/18-1-1983 imposing the penalty of stoppage of next two increments without cumulative effect made it clear that the said order remained in effect till January 1986 and hence the petitioner could only be considered for promotion at that stage and the petitioner would be eligible for consideration for further promotion to the post of Assistant Engineer (P) only on completion of 6 years of service, i.e., with effect from 1.1.1992. Since by inadvertence the order of promotion of the petitioner to the post of Assistant Engineer (P) was issued with effect from 1.1.1991, the same was required to be withdrawn for which the petitioner could not make any grievance.

9. I heard the learned advocate, Mr. appearing on behalf of Tanna Associates for the petitioner and Mr. R.H. Mehta, learned advocate appearing on behalf of the respondents. Both the parties have raised the same arguments and contentions which were made in the petition. As far as the petitioner's challenge to the orders passed on 17/18-1-1983 and 3-7-1986 are concerned, I find considerable substance in the ground raised by the respondents in their affidavit-in-reply, as the challenge against this order is made by the petitioner after a period of more than 6 years and no sufficient cause is shown by the petitioner. The order passed in January 1983 cannot be agitated before this Court in 1992 without showing any justifiable reason for such a long delay. I, therefore, reject the petitioner's challenge made against the orders dated 17/18-1-1983 and 3-7-1986 passed by the respondent authorities.

10. So far as the Office Orders dated 25-9-1992 and

9-11-1992 are concerned, it is found that the respondents have made it clear that the petitioner's request for maintenance of status-quo for continuation of promotion given to him with effect from 1-1-1991 was untenable, since he was not covered under the relevant policy for promotion to the post of Assistant Engineer (P) with effect from 1-1-1991 as his name had been deleted from the seniority list of Chargeman (P) as per Office Order No. 6/289/84-95/Per, dated 20-11-1985 and he was undergoing penalty imposed on him vide office order No. Amd/Prodn/25(24)/82, dated 17/18-1-1983, for which he was promoted to the post of Chargeman (P) only with effect from 1-1-1986 instead of 1-1-1985. It was also made clear in the Office Order dated 25-9-1992 that the promotion was not admissible during the currency of any penalty. The respondents have, therefore, rectified their mistake committed vide Order dated 31.7.1992 whereby the petitioner was promoted to the post of Assistant Engineer (P) with effect from 1-1-1991. If the mistake committed earlier is rectified by the respondent authorities after considering the explanation tendered by the petitioner, it cannot be said that the respondent authorities have acted illegally, improperly, unlawfully or in violation of any principle of law, equity or justice. I am also of the view that the petitioner was to undergo the punishment in the year 1985 and he would be entitled for further increment with effect from 1-1-1986 and hence the contentions raised by the petitioner, with regard to juniors to the petitioner having been promoted, were not based on any sound footing. I find sufficient force in the submissions of the respondent authorities that the punishment and the promotion during the period when the petitioner was undergoing the punishment were two different factors based on different considerations and if the petitioner undergoing punishment was rewarded during the same period with promotion, it would be futile and the very effect/purpose of punishment would be frustrated and no useful purpose could be served for a better and clean administration and that if on the one hand punishment was awarded and on the other hand the petitioner was rewarded with the promotion, the entire purpose of undergoing the exercise of inquiry for rewarding the punishment was frustrated.

11. This leads me to consider the petitioner's challenge against the order passed on 25-9-1992 and 9.11.1992 on the ground of double jeopardy. Mr. R.H. Mehta, the learned advocate appearing for the respondents have brought to my notice and placed his reliance on the following decisions of the Hon'ble Supreme Court :

(A) A decision of the Hon'ble Supreme Court in the case of Union of India and Others Vs. K.V. Jankiraman and Others, reported in (1991) 4 SCC 109, was relied on for the proposition that it is not correct to hold that when an officer is found guilty in the discharge of his duties, an imposition of penalty or all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. An employee found guilty of misconduct cannot be placed on par with other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. [Page 112-113 Para (3)].

(B) A decision of the Hon'ble Supreme Court in the case of Union of India and Others Vs. K. Krishnan, reported in 1992 Supp. (3) SCC 50, was relied on for the proposition that Rule 157 of the Post and Telegraph Manual Vol.III forbidding the promotion of an employee during currency of the penalty does not result in a second punishment. There is only one punishment visiting the respondent as a result of the conclusion reached in the disciplinary proceeding leading to the withholding of increment, and the denial of promotion during the currency of the penalty is merely a consequential result thereof. The view that a government servant for the reason that he is suffering a penalty or a disciplinary

proceeding cannot at the same time be promoted to a higher cadre is a logical one and no exception can be taken to Rule 157. It is not correct to assume that Rule 157 by including the aforementioned provision is subjecting the government servant concerned to double jeopardy. It cannot, therefore, be said that there is no justification or rationale behind the policy; nor can it be said to be unjustified, arbitrary and violative of Arts. 14 and 16. On the other hand, to punish a government servant and at the same time to promote him during the currency of the punishment may justifiably be termed as self-contradictory. [Page 51].

(C) A decision of the Hon'ble Supreme Court in the case of State of T.N. Vs. Thiru K.S. Murugesan And Others, reported in (1995) 3 SCC 273 was relied on for the proposition that when promotion is under consideration, the previous record forms the basis and when the promotion is on merit and ability, the currency of punishment based on previous record stands as an impediment. Unless the period of punishment gets expired by efflux of time, the claim for consideration during the said period cannot be taken up. Otherwise, it would amount to retrospective promotion which is impermissible under the Rules and it would be a premium on misconduct. Under these circumstances, the doctrine of double jeopardy has no application and non-consideration is neither violative of Article 21 nor Article 14 read with Article 16 of the Constitution. [Page 273].

(D) A decision of the Hon'ble Supreme Court in the case of Chairman, State Bank of India and Others Vs. Golak Bihari Dehury, reported in (1996) 7 SCC 63, was relied on for the proposition that the action of the appellant-Bank in not considering the respondent for promotion to MMGS-II during the currency of the penalty of reduction in basic pay that was imposed on him cannot be held to be violative of his right guaranteed under Article 16 of the Constitution of India and the High Court was not justified in interfering with the said decision of the appellant-Bank on that ground. The directions given by the High Court for considering the case of the respondent for promotion to MMGS-II with

effect from 1-8-1986 cannot be sustained and are, therefore, set aside. [Page 65-66].

(E) A decision of the Hon'ble Supreme Court in the case of Collector of Thanjavur Dist. and Others Vs. Rajagopalan and Others, reported in (2000) 9 S.C.C. 145 was relied on for the proposition that the denial of promotion would not amount to penalty and that it would be open to the authorities to take into account the fact that some punishments were imposed on the employees during the relevant period. [Page 148].

12. The learned advocate appearing for the petitioner could not persuade me to take any different view than the view taken by the Hon'ble Supreme Court in the above referred cases by pointing out any distinguishing feature or by citing any authority. I am, therefore, of the view that the doctrine of double jeopardy cannot be invoked in the case of the petitioner when he was granted promotion, firstly on 1-1-1986 and thereafter on 1-1-1992, even after inflicting the punishment of stoppage of 2 increments without any future cumulative effect. I, therefore, find no substance in the submissions of the petitioner.

13. Mr. R.H. Mehta, the learned advocate appearing for the respondent has drawn my attention to the fact that the petitioner was granted two promotions subsequent to filing of this petition, i.e., firstly the promotion to the post of Assistant Executive Engineer (Production) with effect from 1.1.1996 and secondly, further promotion was granted to the post of Executive Engineer (Production) with effect from 1-1-2001. He has further submitted that the promotions so granted itself suggests that there was no prejudice against the petitioner and as and when the petitioner was due for promotion, the said promotions were granted to the petitioner.

14. Before parting with this judgment, I am, however, of the view that the petitioner has worked as an Assistant Engineer (P) with effect from 1-1-1991, pursuant to the order passed by the respondent authorities on 31-7-1992 and the said promotion was revoked by another office order dated 25.9.1992 and consequent upon the reversion of the petitioner to the post of Chargeman (P), the petitioner's pay-scale was refixed by an order dated 9-11-1992. Since the petitioner has worked on the promoted post and has drawn

the salary as per the pay-scale of Assistant Engineer (P), and since the stay was granted by this Court against the recovery of the enhanced salary given to the petitioner for the work so done by the petitioner on the promoted post, it is not desirable for the respondent authorities to recover the said amount from the petitioner. With these observations, the petition is rejected. Rule is discharged with no order as to costs.

rmr. [K.A. Puj, J.]