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GOVERNMENT OF KARNATAKA

v.

C. DINAKAR AND ORS.

MAY 14, 1999

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[K. VENKATASWAMI AND A.P. MISRA, JJ.]

Service Law :

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Promotion—Retrospective promotion—High Court quashed promotion of employee—But held that since he was already promoted, he had acquired a right to be considered along with other eligible candidates—Effect of—Held : High Court's view, upheld—However, State Government may promote the said employee with retrospective effect after reconsideration in accordance with the guidelines then in force—In the meanwhile, the said employee permitted to continue to function in the same post.

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The first respondent filed a petition before the Central Administrative Tribunal challenging the promotion and appointment of the fourth respondent as Director General and Inspector General of Police (DG and IGP) by a Notification issued by the appellant-State. The Tribunal dismissed the petition. However, the High Court allowed the appeal and quashed the impugned Notification promoting and appointing the fourth respondent as DG and IGP. But the High Court made it clear that the fourth respondent having been promoted as DG and IGP had acquired a right to be considered along with other eligible candidates. Hence this appeal.

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Dismissing the appeal, this Court

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HELD : 1. The High Court was right in holding that the impugned Notification could not be sustained on the facts of this case. But the respondent has acquired a right to be considered along with other eligible candidates in view of his having been promoted as Director General and Inspector General of Police. Hence, in spite of the quashing of the impugned Notification, nothing stands in the way of the State Government from promoting the fourth respondent with retrospective effect from the date of the impugned Notification in accordance with the guidelines in force at the time of his reconsideration. In the meanwhile the fourth respondent who was already promoted and appointed as DG and IGP will continue to function in the same post.

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[718-B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3115 of 1999 A
Etc.

From the Judgment and Order dated 23.10.98 of the Karnataka High Court in W.P. Nos. 4264 of 1998.

S. Vijay Shankar, Advocate General, K.R. Nagaraja and K.K. Tyagi for the Appellant in C.A. No. 3115/99. B

P.R. Ramasesh for the Appellant in C.A. No. 3116/99.

C. Dinakar, Cav-in-person for the Respondent. C

N.Ganapathy for the Respondent in C.A. No. 3115/99.

The Judgment of the Court was delivered by

K. VENKATASWAMI, J. Special leave granted. D

Both the appeals arise out of the judgment dated 23.10.98 of the Karnataka High Court in W.P. No. 4264/98. Civil Appeal arising out of S.L.P. (C) No. 17043/98 was preferred by the Government of Karnataka while the other appeal arising out of S.L.P. (c) No. 17842/98 was preferred by the fourth respondent in the first mentioned appeal. E

The reference to the parties hereinafter will be as in the appeal filed by the Government of Karnataka. The first respondent in the appeal challenged the promotion and appointment of fourth respondent as DG and IGP by a Notification dated 6.3.97. by approaching the Central Administrative Tribunal by preferring O.A. No. 200/97. The Tribunal by its order dated 15.1.98 dismissed the O.A 200/97. Aggrieved by that, the first respondent preferred W.P. No. 4264/98. A Division Bench of the High Court accepted the appeal and quashed the impugned Notification promoting and appointing the fourth respondent as DG and IGP. F

Aggrieved by the judgment of the Division Bench, Both the Government of Karnataka and the Fourth respondent have preferred these appeals. G

The learned Advocate General for Karnataka extensively argued the matter to sustain the Notification impugned before the Tribunal and also before the High court. The learned counsel appearing for the appellant (fourth H

A respondent in the appeal filed by the Government) adopted the arguments advanced by the learned Advocate General. Hence, these appeals are disposed of by this common judgment.

B After carefully perusing the judgment under appeal and after hearing learned arguments of the counsel appearing in both the appeals and also the first respondent, who is appearing in-person, we are of the view that on the admitted facts as found by the High Court, no case is made out for interference with the judgment under appeal. We shall immediately give our reasons for the above conclusion.

C Let us set out the undisputed facts. The first respondent is an IPS officer of 1964 batch. The fourth respondent is a junior to the first respondent is an admitted fact. It is stated that there are in all four posts of Director General of Police in the State of Karnataka, which are designated as under:-

- D (i) Director General and Inspector General of Police
- (ii) Director General of Police, Commandant General, Home Guards and Director of Civil Defence and Fire Services.
- E (iii) Director General of Police, COD, Training Special Units and Economic Offence.
- (iv) Chairman and Managing Director of Police Housing Corporation.

F It is also stated that except the post of Director General of Police, Commandant General, Home Guards and Director of Civil Defence and Fire Services, which post the first respondent was holding at the relevant time, the other two posts were amenable to the supervisory jurisdiction of the DG and IGP. To sustain the promotion and appointment of fourth respondent, the stand taken by the appellant before the Tribunal was that in a much as the

G appointment is by selection the Officers eligible have only a right to be considered and have no right to appointment. It is further stated by the appellant before the Tribunal that while exercising the discretion of selection the Appointing Authority has had due regard to the seniority of all the eligible candidates. It was further claimed by the appellant before the Tribunal that the appointment to the post of DG and IGP has been done on very

H objective criteria and after a comparative assessment of the service records

of all the eligible officers. While so, before the High Court a different stand was taken contending that the appointment of respondent No.4 as DG and IGP was an order of simpliciter assignment of duties of DG and IGP to the fourth respondent in his capacity as DGP. This vital deviation in the stand was taken note of by the High Court and it came to the conclusion that the contention of the respondents (appellant herein) that such an appointment is a simpliciter assignment of duties to one of the Director Generals has to be noticed only to be rejected being contradictory in terms and devoid of any legal substance. Elaborating this aspect, the High Court observed as under;-

"Even the record produced by the Respondents does not justify their contentions raised before us. Note prepared by the Deputy Secretary, D.P.A.R.(Services) dated 1.3.1997 shows that after Sri A.P. Durai was approved for appointment as Director General of Railway Protection Force in the Central Government, the Ministry of Home Affairs, Government of India, had requested the State Government to relieve the officer immediately. As the post of DG & IGP held by Sri A.P. Durai was likely to fall vacant consequent upon his deputation to Government of India, proposal was made for filling up the same by appointing one of the officers in the grade of DGP by *selection*. The names including the name of the petitioner and Respondent No. 4 were submitted for consideration. It was specifically mentioned that Respondent no. 4 was in the rank of Additional Director General of police when he was in the State Government. However, the Government of India was reported to have appointed him as Special Director, IB in the pay scale of Rs. 7600-8000, which was the pay scale of DGP. The Secretary, DPAR in that behalf noted : "Normally the DG & IGP Karnataka is selected by the Government from among the eligible officers. The selection is done by the Chief Minister who incidentally, is the Home Minister also". The papers were thereafter submitted to the Chief Secretary, who on 3rd of March, 1997 further submitted the papers to the Chief Minister for his perusal with request to make *selection* after an over all assessment of the Officers eligible to be appointed to the post of DG & IGP. The consultation with the Minister of State for Home was recommended to be dispensed with on the ground of his being away abroad, The Chief Minister is shown to have considered the cases of all the eligible Officers. On the basis of the performance of Respondent No. 4, which was shown to him to have been graded as outstanding in his ACR for the last 5 years

A continuously, the Chief Minister opined that Sri T. Srinivasulu was the most suitable Officer for the post of DG & IGP. After ordering his appointment to the aforesaid post. He directed for sending message to the Government of India to place the services of Respondent No 4. at the disposal of the State Government. The Petitioner was directed

B to be transferred and appointed as Director General of Police & Commandant General, Home Guards & Ex-officio Director, Civil Defence & Director Fire Force, Bangalore. Strangely enough a letter dated 5th of March 1997 issued by the Ministry of Home Affairs indicates the repatriation of Respondent No. 4 to his parent cadre in the State of Karnataka. *This letter apparently shows that the Chief Minister was misled to believe on 6th of March, 1997 that Respondent No.4 was still on deputation with the Government of India, which persuaded him to request the Central Government for placing the services of Respondent No.4 at the disposal of the State Government. Certificate of transfer of Charge shows that Respondent No.4 had in fact made*

C over charge of his office as Special Director at IB Headquarters, New Delhi, on the afternoon of 5th of March 1997. The Services of Respondent No.4 are shown to have been placed at the disposal of the State Government by Order No.I (4)/97(16)-1119 dated 5th of March, 1997.

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E From the pleadings of the parties, the submissions made before the Tribunal and the findings returned by it in this behalf it cannot be said the appointment of Respondent No.4 as DG & IGP was an order of simpliciter assignment of duties of DG & IGP to him in his capacity as DGP. The Respondents 1 & 2 are shown and proved to

F have appointed Respondent No.4 by selection purportedly after perusal of the comparative service record of all concerned. *The plea of mere assignment of duties of DG & IGP to Respondent No.4 appears to have been carved out purposely perhaps upon conceiving doubt that such a selection could not be justified before a Court of Law; as selection is admittedly distinct from nomination. We shall therefore*

G assume that the appointment of Respondent No.4 has been made on the basic of the selection and determine the legality of Annexure-A in that context.”

H The High Court, after referring to certain decisions of this Court, further observed as follows:-

"It is evident, therefore, that the appointment of Respondent No.4 to the post of DG & IGP is shown and claimed to have been made on the basis of the selection out of the four Director. Generals eligible to be appointed to the said post. If the selection is made fairly and upon consideration of the service record of the persons eligible for appointment by selection to the post, this Court has no jurisdiction to either interfere with the order of appointment or substitute its own opinion for the opinion of the appointing authority. If the selection is however found to be not made objectively upon consideration of the relevant record and appears to be made mechanically, the interference of the Court becomes necessary for the purpose of protecting the rights of the civil servant ensuring the prevalence of the Rule of law. It is worth nothing at this stage that the selection contemplated for the post of Police Chief is required to be made keeping in view the observations made by Supreme Court in VINEET NARAIN'S case (supra). Some mechanism is required to be set up for making the selection/appointment, tenure. transfer and posting of the Chief of the Police in the State, In the instant case, the selection is shown to have been made only by the Chief Minister on the basis of the information furnished to him. The Chief Minister is claimed to have perused the service record of all the eligible Director Generals for making appointment to the post of DG & IGP. *As noticed and elaborately dealt with herein above, it is evident that Respondent No. 4 was not a Director General on any date prior to 6th March, 1997.* He is shown to have been promoted and appointed as DG & IGP vide Annexure-A dated 6th of March, 1997. The respondents have specifically submitted that making composite order of promotion and appointment was permissible. Such a course is shown to have been resorted to in the instant case as well. *If Respondent No.4 was not a Director General prior to 6th of March, 1997, then there was, no material before Respondent No.2 to consider him for appointment by selection to the post of DG & IGP because admittedly only a person substantively holding the cadre of Director General of Police could be considered for appointment to the post of DG & IGP. The Petitioner, therefore, appears to be genuine in complaining that as unequals were treated alike, the action of Respondent No. 2 in appointing Respondent No.4 as DG & IGP in the State of karnataka was discriminatory and thus unconstitutional.* The Respondent-Tribunal in this behalf found that according to the fax message dated 10.1.1997, stated to be available on the record, indicated that

A Respondent No. 4 had been appointed in the pay scale of Rs. 7600-8000, which has permissible only to the Director General of Police under the Pay Rules applicable in the case. The fax message relied upon by the Respondent-Tribunal only indicated that the Central Government had approved the appointment of Respondent No. 4 as

B Special Director in pay scale of Rs. 7600-8000 as an interim measure because the said order granting the aforesaid pay scale was to remain in force till further orders. In other words, it meant the grant of pay scale to Respondent No.4 at best for the time he remained posted as

C Special Director in the Intelligence Bureau with the Central Government. The fax message cannot be stretched to mean that Respondent No.4 had substantively been promoted to the post of

D Director General. If that was so, there was no cause or occasion for the official Respondents to again propose Respondent No.4 to be promoted "to the cadre of DG & IGP carrying the pay scale of Rs. 7600-8000 per month "as was done vide impugned Notification-Annexure-A. Even assuming that Respondent No.4 was repatriated to the State on 5th of March, 1997 and was likely to be promoted on the basis of the empanelment already made, there was no occasion for the Respondent No.2 to appoint him by selection allegedly on the basis of merit as was done by him on 3rd of March, 1997. *The action of the Respondent apparently appears to be unconstitutional, as admittedly, Respondent No.4 being not a Director General of police on 3rd of March, 1997 was not eligible to be considered for such appointment by selection.*

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F Respondent No.2 has also tried to justify the selection of Respondent No.4 on the basis of the merit allegedly noticed from the service record of the claimants. Admittedly, the process of selection of Respondent No.4 had been completed by Respondent No.2 on 3rd of March, 1997 concededly when Respondent No.4 was not in the State service. The latest performance of Respondent No.4 apparently not being in the knowledge of Respondent No.2 could not be considered a circumstance in his favour. It appears that Respondent

G No.2 had made up his mind to select Respondent No.4 as DG & IGP in pursuance of which action was taken for repatriation of his services to the State even though Respondent No.4 was not eligible to be considered as at that time he was not a Director General being in the selection grade as mandated by Rule 3 of the pay Rules. *It further appears that after making up the mind to appoint Respondent No.4 as DG & IGP by ignoring the claim of the Petitioner and others, the*

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Respondents tailored the grounds to suit their jackets. The contradictory objections filed and pleas raised by the Respondents clearly demonstrate that the proclaimed selection process was merely a hoax and not actually resorted to or adopted.

It has been further claimed by Respondent No.2 that the selection was made on the basis of relevant records including the annual confidential reports of the Petitioner and Respondent No.4, which are claimed to have been considered objectively before arriving at the conclusion of appointing Respondent No.4 as DG & IGP. The record produced before us, which is stated to be made the basis of making the selection reflects that only the brief summary of gradings obtained by the officers eligible for selection during the last 5 years were taken into account by Respondent No.2. According to the aforesaid summary, the service of the Petitioner had been adjudged as 'outstanding' for the years 1991-92, 1994-95 and 1995-96. He was adjudged as 'very good' for the year 1992-93 and 1993-94. Similarly, Respondent No. 4 was adjudged as 'outstanding' for the year 1991-92, 1993-94 and 1994-95. He was adjudged as 'very good' for the years 1992-93 and 1995-96. Both the claimants were, therefore, having similar ACRs with three 'Outstandings' and two 'very good'. There was nothing on record to show that Respondent No.4 was in any way better adjudged than the Petitioner. It is not the case of the Respondents that any other record of the claimants was taken into account while making the appointment by selection. Merit being equal between the rival claimants, the seniority of the Petitioner could not have been ignored by Respondent No.2. It is further evident that the selection of Respondent No.4 was the result of non-application of mind and the decision was arrived at in a casual manner. No record has been shown to us on the basis of which it could be prima facie assumed that Respondent No.4 had any better merit than the Petitioner. We are aware of the limitation of not substituting our opinion for the opinion of Respondent No.2 in making the selection, but as Respondent No.2 has relied only upon the record referred to herein in above, we have no hesitation to hold that either Respondent No.2 was misled by his subordinate staff or he had casually dealt with the matter without noticing the fact as pointed out by us.

The Respondent No.4 having not been appointed by proper application of mind and apparently the decision arrived at in a casual

A manner cannot be allowed to be sustained when it admittedly affects the rights of the Petitioner, who is much senior than Respondent No.4. As the decision making process by which Respondent No.4 was selected for appointment as DG & IGP by Respondent No.2 has been found to be not fair and arrived at in a most casual manner ignoring all the settled norms pertaining to the appointment by selection, we feel no fetter on our power to declare such process and consequent decision to be unconstitutional and illegal.”

The High Court on the aspect of non-application of mind elaboraged further by observing as follows:-

C “Both the Petitioner and Respondent No.4 have claimed to be in possession of various letters of appreciations, medals and awards which according to them make the one meritorious’ than the other. Admittedly, such letters of appreciation, the record about medals, awards etc. as noticed hereinabove were not placed before Respondent D No.2 for his consideration at the time of making the selection of Respondent No.4 as DG & IGP, which makes his selection illegal on the ground of non-consideration of the material record while making the selection for appointment to the post of Police Chief of the State.

E It is also worth noticing that while making the appointment of Respondent No.4 to the post of DG & IGP, the official Respondents were aware of the fact that it was likely to create embarrassing position so far as the Petitioner was concerned because the post of Director General of Police, COD, Training Special Units and Economic offence and Chairman and Managing Director of Police Housing Corporation was considered to be amenable to the supervisory jurisdiction of DG F & IGP. The only post treated as not amenable to supervisory jurisdiction of Respondent No.4 was the post Director General of Police, Commandant General, Home Guards and Director of Civil Defence & Fire Services. To save the Petitioner from the humiliation of subordination the Chief Minister himself directed his transfer and G appointment as Director General of Police & Commandant General, Home Guards & Ex-Officio Director, Civil Defence & Director, Fire Force Bangalore. Continuance of the Petitioner as DGP, COD Training Special Units and Economic offences was considered to be derogatory to him. Despite holding that the post of DGP, COD Training Special H Units and Economic offences and Chairman and Managing Director

of Police Housing Corporation was subject to the supervisory control of Respondent No.4 the Petitioner has admittedly been transferred to one of the aforesaid post during the pendency of this litigation. What necessitated his transfer and posting as Chairman and Managing Director of the Police Housing Corporation is a mystery shrouded with doubts and not explained by the Respondents. The Petitioner has referred to a number of documents, which are stated to have been addressed by the Respondent No.4 to him allegedly with the motive of humiliating him despite his seniority in the service.

We are of the opinion that the Tribunal did not take into account the circumstance noticed by us herein above while dismissing the application filed by the Petitioner. The Order of the Respondent-Tribunal is therefore not sustainable, as it has failed to take note of the position of law applicable in the case and arrived at the conclusion by reference to circumstances, which were not warranted. The Tribunal also did not notice the contradictory pleas raised by the Respondent and the fact that the impugned order had been passed in a casual manner and without application of mind by keeping into account the various considerations requisite for making appointment by selection. The casual manner in which the fate of a senior most Police Officer in the State was decided appears to have not been properly presented before the Tribunal and appreciated by it. The impugned Notification-Annexure-A which has been found by us to be against all the Service Rules and ethics despite being illegal and unconstitutional could not be upheld as was done by the Tribunal. The impugned Notification-Annexure-A and the order of the Respondent-Tribunal is therefore liable to be set aside and the Petitioner held entitled to grant of appropriate relief."

On the basis of the above conclusion on facts which cannot be disputed, the High Court set aside the impugned Notification and directed to make fresh appointment by selection to the post of DG & IGP by considering the cases of all the eligible Director Generals and keeping in mind observations made by it.

As noticed earlier, the learned Advocate General extensively argued the case by reiterating the stand taken before the High Court that the appointment of the fourth respondent as DG & IGP was an order simpliciter assigning the duties attached to that post. In the light of the elaborate discussion and findings of the High Court set out above, we are unable to persuade ourselves

A to agree with the contention of the learned Advocate General. It was amply demonstrated before the High Court that the impugned Notification was not a mere act of assignment of duties attached to the post of DG & IGP and the High Court was right in holding that the impugned Notification cannot be sustained on the facts of the case. The High Court, however made it clear that the fourth respondent having been promoted as Director General has acquired a right to be considered along with other eligible candidates. A doubt was raised that in view of the quashing of the impugned Notification whether the Government could make an order promoting the fourth respondent with retrospective effect from the date of the impugned Notification. We make it clear that nothing stands in the way of the Government from so doing. It is also brought to our notice that the direction of the High Court to constitute a Committee as per G.O. No. DPAR 72 SPS 94 dated 20.3.95 has to be modified as the said G.O. has been superseded by a subsequent Government Order No. DPAR 70 SENENI 96 dt. 23.12.1996. If that be so, the appellant is at liberty to constitute a Committee as per the relevant G.O. in force.

D Before parting with this judgment, we must observe that the judgment under appeal has not said anything about the vacancy in the post of DG & IGP as a result of quashing the impugned notification till it is filled up in accordance with law. This Court has therefore to give appropriate directions. Accordingly, we direct that the appellant shall fill up the vacancy caused by the judgment under appeal in the post of DG & IGP within two months from this date. In the meanwhile the 4th Respondent who was promoted and appointed as DG & IGP on 6.3.1997 will continue to function in the same post. Pending preparation of this judgment, the learned counsel appearing for the appellant has circulated an affidavit stating that the Government have framed new guidelines for filling up the post of DG & IGP and the appellant may be permitted to fill up the post on the basis of the new guidelines. A draft guideline was also enclosed. We do not propose to say anything on the validity or legality of the proposed guidelines. However, we make it clear that if the proposed guidelines are to supersede the present guidelines framed under G.O. No. DPAR 70 SENENI 96 dated 23.12.1996 the appellant can fill up the post of DG & IGP on the basis of the draft guidelines after making the draft a final one by passing appropriate Government Order. We also make it clear that anyone aggrieved by the selection under the proposed guidelines is not debarred from challenging the same in accordance with law.

Subject to the above observations, these appeals are dismissed with no order as to costs.

H V.S.S.

Appeals dismissed.