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MOHAMMED FAIZAL K.A.

v.

D. SALI AND ORS.

(Civil Appeal Nos. 10262-10263 of 2017)

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OCTOBER 04, 2017

[DIPAK MISRA, CJI AND A. M. KHANWILKAR, J.]

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Service Law – Promotion – Seniority – Respondent no.1 filed writ petition challenging his non-inclusion in the select list for promotion to the post of Deputy Superintendent of Police for the years 2000 and 2001 – High Court allowed the inclusion of respondent in select list for the year 2001 vide order dated 8th April, 2010 – Pursuant thereto, concerned authorities not only gave respondent no.1 notional promotion to the post of Deputy Superintendent of Police (non-IPS) w.e.f 19th March, 2001, but also, later on considered him for IPS cadre in 2010 – Appellant filed separate writ appeals challenging an earlier order dated 23rd June, 2004 of High Court (wherein the State authorities were directed to consider the case of respondent no.1 for inclusion in select list) and also said order dated 8th April, 2010 – Both writ appeals dismissed by the Division Bench of High Court – Contention of appellant that the decision to promote respondent No.1 against the vacancy in 2001 was illegal – Held: There is no infirmity in the judgment dated 23rd June, 2004, as it gave benign direction to the State authorities to consider the case of the respondent no.1 in accordance with law and nothing more – Thereafter, competent authorities, rightly, while considering the fact that respondent no.1 was awarded major punishment and which was still operating during check period, rejected his inclusion in select list for vacancies of 2001, however, decided to include him in the select list for the year 2003 vide order dated 20th November 2004 – However, High Court had wrongly quashed the order dated 20th November 2004 and directed inclusion of respondent in the select list for the year 2001 vide its judgment dated 8th April, 2010, which upgraded respondent no.1 and made appellant junior to him – Appellant justified in challenging the impugned decision dated 8th April 2010 as it directly affected his seniority – Therefore, order dated 20th November 2004

passed by the Government, revived and restored and all subsequent consequential orders/notifications issued in relation to the subject matter concerning the promotion and seniority of respondent no.1 stand effaced as non-est – Authorities directed to re-visit the case of respondent No.1 to allot him date of promotion and seniority to the post of Deputy Superintendent of Police w.e.f. 14th January, 2005 and thereafter to re-allocate fresh notional date of promotion to the next higher posts.

Allowing the appeals, the Court

HELD: 1. In the present case, it is indisputable that the punishment awarded to respondent No.1, vide order dated 5th November, 1997, is to withhold increments for two years with cumulative effect. That obviously was to operate beyond two years from 1997. As mentioned in the counter affidavit filed by the Additional Secretary of the State before the High Court that aspect was duly considered by the Departmental Promotion Committee (DPC) and the Competent Authority whilst passing the order dated 20th November, 2004. It is for that reason, the DPC examined the case of respondent No.1 and decided to include him in the select list only for year 2003 as per Notification dated 28th October, 2004. [Para 20] [253-A-C]

2. The said order dated 20th November, 2004, was assailed by respondent No.1 by way of Writ Petition. The High Court did not examine crucial aspects though specifically raised by the Department to oppose the writ petition. The Court instead was swayed away by the fact that consideration of punishment awarded in 1997 to respondent No.1, would be against the spirit of the earlier decision dated 23rd June, 2004 of the High Court and was impermissible. Having so held, the Single Judge proceeded to issue direction to the Competent Authorities on which the Competent Authorities acted upon without any demur. [Para 21] [253-C-E]

3. The fact that the Competent Authorities were ill-advised not to challenge such untenable direction of the Single Judge, would not preclude the aggrieved person from challenging the same. The consequence of allowing the second impugned decision of the Single Judge (dated 8th April, 2010) to remain in the field entailed in allocation of notional date of promotion and seniority

A to respondent No.1 as 19th March, 2001. As, the seniority position
of respondent No.1 was re-assigned on that basis, it directly
affected the appellant who was already promoted to the post of
Deputy Superintendent of Police in earlier point of time on 13th
B September, 2002. If the notional date of promotion allocated to
respondent No.1 as 14th January, 2005 in terms of the order dated
20th November, 2004, was to remain in force, respondent No.1
would remain junior to the appellant at serial No.285 as against
the seniority position of appellant at serial No.208 as per the
provisional seniority list published in 2012. The respondent No.1
C was upgraded in the Seniority List in terms of government orders
dated 27th June, 2012 and dated 7th January, 2013 respectively.
As a consequence of these orders, the appellant was shown as
junior to respondent No.1 in the cadre of Deputy Superintendent
of Police and Superintendent of Police (non-IPS), respectively.
[Para 22] [253-F-H; 254-A-C]

D 4. The appellant was justified in challenging the impugned
decision of the Single Judge dated 8th April, 2010 by way of subject
writ appeals, because of the consequential orders passed by the
Competent Authorities allocating notional date of promotion and
assignment of seniority to respondent No.1. The orders passed
E by the Competent Authorities are the product of direction given
by the Single Judge. That will have to be effaced as non-est
consequent to setting aside of the untenable decision of the Single
Judge dated 8th April, 2010. [Para 23] [254-C-E]

F 5. The fact that the subsequent decisions of the Competent
Authorities have not been specifically challenged by way of
substantive proceedings by the appellant, would not come in the
way of the appellant having succeeded in getting the order dated
20th November, 2004 issued under the signature of Additional
Chief Secretary/Principal Secretary to Government of Kerala,
revived and restored. The authorities may have to re-visit the
G case of respondent No.1 to allot him date of promotion in terms
of order dated 20th November, 2004 and restore his seniority
position in the cadre of Deputy Superintendent of Police as 14th
January, 2005 and correspondingly re-allocate the notional date
of promotion for the next promotion to the post of Superintendent
of Police (Non-IPS/IPS Cadres) respectively, if respondent No.1
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has completed the qualifying service period for being considered for promotion thereto. Merely because other officers similarly placed as appellant have not questioned the impugned decision, will also be no impediment in reviving and restoring the government order dated 20th November, 2014 – as no prejudice will be caused to them in so directing. [Para 24] [254-E-H; 255-A]

6. A priori, these appeals must succeed. The impugned common judgment and order of the Division Bench of the High Court of Kerala dated 31st January, 2014 in Writ Appeals and the judgment and order of the Single Judge dated 8th April, 2010 in Writ Petition are set aside. As regards the impugned order dated 23rd June, 2004, it gives a benign direction to the State Authorities to consider the case of respondent No.1 in accordance with law and nothing more. As a result, the order issued by the Additional Chief Secretary, Government of Kerala, Home (A) Department, dated 20th November, 2004 is revived and restored and all subsequent consequential orders/notifications issued in relation to the subject matter concerning the promotion and seniority of respondent No.1 will stand effaced as non-est. As a consequence, the concerned authorities must re-visit the case of respondent No.1 and allot him the date of promotion and seniority to the post of Deputy Superintendent of Police w.e.f. 14th January, 2005 and thereafter to re-allocate fresh notional date of promotion to the next higher selection/posts, namely, Superintendent of Police (Non-IPS & IPS), as the case may be, if and upon respondent No.1 fulfilling the eligibility and qualifying service period therefor. [Para 27] [255-D-G]

Union of India and Ors. v. K.V. Jankiraman and Ors. (1991) 4 SCC 109 : [1991] 3 SCR 790 – relied on.

State of Uttaranchal and Anr. v. Madan Mohan Joshi and Ors. (2008) 6 SCC 797 : [2008] 8 SCR 591; *KM. Rashmi Mishra v. M.P. Public Service Commission and Ors.* (2006) 12 SCC 724 : [2006] 7 Suppl. SCR 708 ; *Suresh v. Yeotmal District Central Cooperative Bank Limited and Anr.* (2008) 12 SCC 558 : [2008] 3 SCR 1023 ; *State of T.N. v. Thiru K.S. Murugesan and Ors.* (1995) 3 SCC 273 : [1995] 2 SCR 386 ; *L. Rajaiah v. Inspector General of Registration & Stamps,*

- A *Hyderabad and Ors. (1996) 8 SCC 246 : [1996] 2 SCR 136; Collector of Thanjavur Disitt. and Ors. v. S. Rajagopalan and Ors. (2000) 9 SCC 145 ; Union of India and Ors. v. Vipin Chandra Hiralal Shah. (1996) 6 SCC 721: [1996] 7 Suppl. SCR 750 – referred to.*

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Case Law Reference

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|---|-------------------------|-------------|---------|
| | [2008] 8 SCR 591 | referred to | Para 15 |
| | [2006] 7 Suppl. SCR 708 | referred to | Para 15 |
| C | [2008] 3 SCR 1023 | referred to | Para 15 |
| | [1991] 3 SCR 790 | relied on | Para 18 |
| | [1995] 2 SCR 386 | referred to | Para 19 |
| | [1996] 2 SCR 136 | referred to | Para 19 |
| D | (2000) 9 SCC 145 | referred to | Para 19 |
| | [1996] 7 Suppl. SCR 750 | referred to | Para 25 |

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 10262-10263 of 2017.

- E From the Judgment and Order dated 31.01.2014 of the High Court of Kerala at Ernakulam in W. A. Nos. 953 & 1019 of 2013.

Jaideep Gupta, Sr. Adv., G. Prakash, Jishnu M. L., Mrs. Priyanka Prakash, Mrs. Beena Prakash, Advs. for the Appellant.

- F Dileep Pillai, Ajay K. Jain, Atul Shankar Vinod, M. P. Vinod, C. K. Sasi, Advs. for the Respondents.

The Judgment of the Court was delivered by

- G **A. M. KHANWILKAR, J. 1.** These appeals emanate from the common judgment and order dated 31st January, 2014 passed by the High Court of Kerala at Ernakulam in Writ Appeal Nos.953 of 2013 and 1019 of 2013 filed by the appellant. Writ Appeal No.953 of 2013 was filed against the judgment and order dated 23rd June, 2004 passed by the learned Single Judge in OP No.35398 of 2002, whereas Writ Appeal No.1019 of 2013 was filed against the judgment and order dated 8th April, 2010 passed by the learned Single Judge in Writ Petition (C) No.7801 of 2005.

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[A. M. KHANWILKAR, J.]

2. The former writ petition (No.35398/2002) was filed by respondent No.1 challenging the government order dated 4th October, 2002, bearing No. G.O. (Rt) No.1972/2002/Home Thiruvananthapuram, issued under the signature of the Principal Secretary to Government of Kerala, Home (A) Department. The said order was passed in compliance of the direction given by the High Court in the earlier writ petition filed by respondent No.1 being OP No.6684 of 2001, challenging his non-inclusion in the select list for promotion to the post of Deputy Superintendent of Police for the years 2000 and 2001 prepared by the Departmental Promotion Committee (Higher) (for short, 'DPC'), in its meeting dated 12th February, 2001 and 7th May, 2001. The High Court *vide* its judgment dated 13th March, 2002 had directed the Competent Authority to consider the representation of respondent No.1 and pass appropriate order in accordance with law. Accordingly, the government order impugned in OP No.35398/2002 was passed on 4th October, 2002, which reads thus:-

"ANNEXURE P-3**GOVERNMENT OF KERALA***Abstract*

Police Department-Establishment OP NO.6684/2001 filed by Shri D. Sali Circle Inspector of Police – Judgment-Implementation orders issued.

HOME (A) DEPARTMENT

*G.O.(Rt) No.1972/2002/Home Dated Thiruvananthapuram
04.10.2002*

Read: 1 Judgment dated 13.03.2002 in OP No.6684/2001 filed by Shri D. Sali Circle Inspector of Police.

2. Representation dated 06.04.2002 from Shri D. Sali Circle Inspector of Police addressed to the Convener Departmental Promotion Committee (Higher)

ORDER

The Hon'ble High Court I the judgment read as 1st paper above has ordered as follows:

A *"The petitioner has not an efficacious remedy of filing a representation before the Convener of Departmental Promotion Committee against his supersession under Rule 28(b) (i) (8) (a) of the General Rules of the KS & SSR. If the*
B *petitioner files a representation before the Convener of the Departmental Promotion Committee, the second respondent herein, within one month from today, the said respondent shall consider the same and pass appropriate orders thereon threatening that the same has been passed within the prescribed time limit. The second respondent shall pass orders as directed above within three months from the date of receipt of a copy of this judgment"*

C *In obedience to the above judgment, the representation from Shri D. Sali Circle Inspector of Police read as 2nd paper above was placed before an Ad-hoc Departmental Promotion Committee (Higher) on 30.04.02 for consideration. The*
D *committee considered the case in detail with relevant records.*

By virtue of seniority in the cadre of CI of police Shri D. Sali CI of Police was considered for inclusion I the select list of CIs of Police fit for promotion as Deputy Supdt of Police for the year 2001 (both main and supplementary). He was superseded from the above select lists in view of the
E *following:*

(i) *Punishments of increment for 2 years with cumulative effect vide PHQ Order No. G5/73089/93 dated 06.11.97*

(ii) *Two vigilance enquiries pending*

F (iii) *An oral Enquiry pending*

The oral Enquiry has ended up in his exoneration vide G1/95453/99 dated 20.05.2001. The Departmental Promotion Committee (Higher) which met on 09.04.2002 considered his case and decided to include him in the select list of CIs of Police fit for promotion as Deputy Supdt of Police for the year 2002 conditionally subject to exoneration in the 2 vigilance enquiries pending. One of the above vigilance enquiries has ended in his exoneration. But the vigilance enquiry of allegation of acceptance of bribe and assessment of wealth is still pending.
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The select list prepared by the Departmental Promotion Committee (Higher which met on 12.02.2001 and 07.05.2001 were for filling up the vacancies in 2001. As per Rule 28(b) (i) (4) of KS & SSr the select list have to be prepared during the Calendar year for the vacancies anticipated in the next Calendar year. Hence the Departmental Promotion Committee (Higher) ought to have been convened in 2000. Hence the check period under consideration is 1997, 1998 and 1999. Hence for assessing the suitability of an officer the punishment/disciplinary action, vigilance cases/enquiries and ACR for the above period are taken into consideration. Since, D. Sali CI of Police was awarded punishment of increment bar for 2 years with cumulative effect during the check period, the committee found that the request of Shri D. Sali CI of Police deserves no consideration.

The request is hereby rejected.

*By order of the convener
N. Ramakrishnan
Principal Secretary to Govt."*

(emphasis supplied)

3. The State of Kerala resisted the said writ petition (No. 35398/2002) and justified the Government order dated 4th October, 2002. However, the arguments put-forth by the State did not find favour with the learned Single Judge who by his judgment dated 23rd June, 2004 held that the punishment awarded to respondent No.1 in the year 1997 of stoppage of two increments, could not form the basis for considering respondent No.1 for promotion in the year 2001. For, the relevant years for considering the entitlement for promotion to be made in the year 2001 would be 1998, 1999, and 2000. Accordingly, the learned Single Judge was pleased to quash the Government order dated 4th October, 2002 and allowed the writ petition in the following terms:-

"6. In the above view of the matter, Ext. P3 order is liable to be quashed. I do so. There shall be a direction to the third respondent to convene an ad hoc D.P.C. for the purpose of considering the case of the petitioner for the year 2001.

A *The merit of the petitioner vis-a-vis others who were eligible to be considered for the year 2001 shall be assessed on the basis of the confidential records of the petitioner for the years 1998, 1999 and 2000 and any other relevant material pertaining to the select list for 2001. If the petitioner is found*
 B *entitled for inclusion on the basis of such assessment of merit his name shall be included in the select list for the year 2001 in the appropriate place among officers who were included in the year 2001. This shall be done within four months from the date of receipt of a copy of the judgment. If the petitioner finds a place in the select list for 2001 his claim*
 C *for promotion on that basis shall be considered in accordance with law.*

Original Petition is disposed of accordingly."

(emphasis supplied)

D 3. Pursuant to the aforesaid direction issued by the High Court, the case of respondent No.1 was re-examined by the Department. After considering all aspects of the matter, the Department issued order dated 20th November, 2004, bearing G.O. (Rt) No. 2527/04/Home, under the signature of Additional Chief Secretary and Principal Secretary to Government, Home (A) Department, which reads thus:-

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"ANNEXURE P-6

GOVERNMENT OF KERALA

Abstract

F *Home Department – Establishment OP No.35398/02 filed by Shri D. Sali, Circle Inspector of Police-Judgment implementation Orders issued.*

HOME (A) DEPARTMENT

G. G.O. (Rt) No 2527/04/Home dated Thiruvananthapuram, 20.11.2004

Read: 1) Judgment dated 23.06.2004 in O.P. No.35398/02

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2) Representation dated 24.07.2001 submitted by Shri D. Sali A

ORDER

Shri D. Sali, Circle Inspector of Police was superseded from the select list of Circle Inspector fit for promotion as Dy.Sps for the year 2000 and 2001 (i.e. for the vacancies in 2000 & 2001) by the Departmental Promotion Committee (Higher) held on 12.07.2001 in view of the penalty for Increment Bar for 2 years with cumulative effect awarded to him vide PHQ Order No.G5/73080/93 dated 05.11.97 and a Vigilance Case, Vigilance Enquiry and an Oral Enquiry pending against him during the check period. He was subsequently included in the select lists for the years 2002 & 2003 conditionally subject to exoneration in the 2 Vigilance Enquiry and a non Oral Enquiry pending against him. Though he was awarded a penalty of Increment Bar of 3 months without cumulative effect on 02.07.2001 considering the nature and gravity of the charges against him the committee included him in the select list conditionally. One of the Vigilance Enquiries has been dropped by Government. But he was not cleared the promotion since a Vigilance Tribunal enquiry has been ordered against him vide GO(MS) No.4/04/Vig dated 25.02.04 based on the other Vigilance Enquiry. B C D E

2. Based on the directions contained in the judgment dated 13.03.2002 in OP No.6684/01 filed by him the ad-hoc Departmental Promotion Committee (Higher) filed on 30.04.02 examined his case and rejected his request for inclusion in the select list. A reply in the matter was given to him vide GO (Rt) No. 1972/Home dated 01.10.02. F

3. In the judgment dated 23.06.04 in OP No.35398/02 filed by him the Hon'ble High Court have quashed the above Government order rejecting his request for inclusion in the select list and directed the Conyener, Departmental Promotion Committee (Higher) to convene an Ad-hoc Departmental Promotion Committee (Higher) for the purpose of considering the case of the petitioner for year 2001. In the G

A judgment it is also ordered that the merit of the petitioner
vis-à-vis others who were eligible to be considered for the
year 2001 shall be assessed on the basis of the Confidential
Reports of the petitioner for the years 1998, 1999 & 2000
and any other relevant material pertaining to the select list
for 2001. If the petitioner is found entitled for inclusion on
B the basis of such assessment of merit his name shall be
included in the select list for the year 2001 in the appropriate
place among officers who were included in the year 2001.

C 4. In the light of the above facts, the Adhoc Departmental
Promotion Committee held on 24.09.2001 examined his case
in detail with all the relevant records. As per Rule 28(b) (i)4(a)
of KS & SSRs select list has to be prepared during a calendar
year for the vacancies anticipated in the next calendar year.
Accordingly, select list for the vacancies in 2001 has to be
prepared in 2000 (i.e. during September/October 2000) for
D which the check period will be 1999, 1998 & 1997. But while
preparing the select list the year was wrongly mentioned as
2001 instead of 2000. But the Departmental Promotional
Committee had taken the check period as 1997, 1998 & 1999
in respect of all the officers included in the filed of choice.
E The punishments awarded, adverse entries in Confidential
Report and the disciplinary proceedings etc during the years
from 1997 were taken into account while assessing suitability
of the officers for inclusion in the select list for the year
2000 (for the vacancies in 2001).

F 5. The committee found that the petitioner was awarded a
major punishment (i.e. increment bar for 2 years with
cumulative effect vide PHQ order No.G5/73080/93 dated
05.11.97) during the check period which is still pending.
The review petition against the above punishment was
rejected by Government vide GO(Rt) No.3220/01/Home
dated 18.09.2001. The Committee therefore found that the
G petitioner is not entitled for inclusion in the select list of Circle
Inspector list for promotion as Dy.SPs for the year 2000 i.e.
for the vacancies in 2001.

H The Departmental Promotion Committee (Higher) which held
on 24.09.2004 examined his case and decided to include

[A. M. KHANWILKAR, J.]

him in the select list for the year 2003 and the select list was issued accordingly as per notification No. 44663/A2/04/ Home dated 28.10.2004. A

In the circumstances stated above the request contained in the representation read as 11 paper above is hereby rejected.

(By Order of the Governor) B

N. Ramakrishnan

Additional Chief Secretary and

Principal Secretary to Government."

(emphasis supplied) C

5. The respondent No.1 assailed the aforementioned order by filing another writ petition, bearing Writ Petition (C) No.7801 of 2005. The State resisted the said writ petition and justified its decision considering the fact that the punishment awarded to respondent No.1 on 5th November, 1997 of stoppage of increment for two years with cumulative effect, was in force during the check period. For which reason, the DPC decided to include the name of respondent No.1 in the select list for the year 2003 and the list was issued accordingly as per notification No.44663/A2/04 dated 28th October, 2004. The learned Single Judge of the High Court, however, opined that in view of the direction issued by the Court vide order dated 23rd June, 2004 in OP No.35398 of 2002, it was not open to the Competent Authority to consider the punishment imposed on respondent No.1 in the year 1997 to deny his inclusion in the select list for the year 2001. The relevant portion of the judgment of the High Court dated 8th April, 2010, reads thus:- D E

"5. I am of opinion that Ext. P4 judgment, which has become final, concludes the issue squarely in favour of the petitioner. In Ext. P4 judgment, this Court has considered all aspects of the matter and decided that, for the purpose of considering the petitioner for inclusion in the select list for the year 2001, his confidential records for the years 2000, 1999 and 1998 only could have been considered. But in Ext. P5, the very same punishment imposed in 1997 relied upon earlier to deny him inclusion in the select list, has been relied upon, which was found to be unsustainable in Ext. P4 judgment. Therefore, I have no hesitation to hold that Ext. F G

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A P5 order is in total disregard to Ext. P4 judgment of this
 Court. In the above circumstances, Ext. P5, to the extent the
 petitioner has been excluded from the select list for 2001 is
 quashed. In so far as despite Ext. P4 judgment from this
 Court, the respondents have not chosen to consider the
 B matter in the right perspective as directed therein, I am not
 inclined to leave it again to the respondents to pass fresh
 orders. The respondents have no case that without relying
 on the punishment of 1997, the petitioner can be validly
 denied inclusion in the select list for the year 2001. In fact
 he was included in the select list for the year 2003 and
 C promoted also.

Therefore, there would be a direction to the respondents to
 include the petitioner in the select list for the year 2001 in
 the appropriate place in accordance with his seniority. All
 D promotions for the year 2001 shall be reviewed on the basis
 of such inclusion of the petitioner in the select list for the
 year 2001 and fresh dates of promotion as Dy. Superintendent
 of Police shall be assigned to him accordingly. The petitioner
 would consequently be entitled to all service benefits and
 seniority arising there from including monetary benefits
 E thereof. Orders in this regard shall be passed and monetary
 benefits disbursed to the petitioner as expeditiously as
 possible, at any rate, within two months from the date of
 receipt of a certified copy of this judgment.

The writ petition is allowed as above."

F 5. The concerned authorities acting upon the said decision issued
 order on 27th June, 2012 and placed respondent No.1 in the select list as
 per notification dated 12th February, 2001 at Serial No.6(a) and gave
 him notional promotion to the post of Deputy Superintendent of Police
 with effect from 19th March, 2001. The said order reads thus:-

G **"ANNEXURE P-11**
GOVERNMENT OF KERALA
Abstract
Home Department-Police Establishment – Sri D. Sali, Deputy
Superintendent of Police – Notional Promotion to the cadre
of Deputy Superintendent of Police, granted – Orders issued

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HOME (A) DEPARTMENT

G.O.(Rt) No.1934//2002/Home Dated Thiruvananthapuram
27.06.2012

Read: (1) Notification No. 44702/A2/2001/Home dated
22.02.2001

(2) Notification No. 85137/A2/2010/Home dated
09.02.2001

(3) G.O. (Rt) No. 825/2001/Home dated 03.03.2001

(4) Letter No. A2-70300/10 dated 04.05.2011 from
the State Police Chief, Kerala,
thiruvananthapuram

ORDER

Sri D. Sali, Deputy Superintendent of Police was superseded
from the select list of Circle Inspectors of Police fit for
promotion as Deputy Superintendent of Police for the year
2001 vide Notification read as 1st paper above. The Ad-hoc
Departmental Promotion Committee (Higher) held on
12.02.2001 decided to include him as shown below in the
above select list as per the Notification read as 2nd paper
above.

Sl. No.6 Sri D. Madhu

Sl. No.6(a) Sri. D. Sali

Sl. No. 7 Sri K. Manoharan Kumar

The State Police Chief, in his letter read as 4th paper above,
has reported that Sri K. Manohara Kumar, who is the
immediate junior to Sri D. Sali as per the notification read
as 1st paper above, was promoted to the cadre of Deputy
Superintendent of Police as per the Government Order read
as 3rd paper above and he took charge of the post of Deputy
Superintendent of Police on 19.03.2001 FN. Hence the State
Police Chief has requested to sanction notional promotion
to Sri D. Sali, Deputy Superintendent of Police in the cadre
of Deputy Superintendent of Police with effect from the FN
of 19.03.2001.

A (3) Government have examined the matter in detail and they
 are pleased to order that Sri. D.Sali is notionally promoted
 to the cadre of Deputy Superintendent of Police with effect
 from the FN 19.03.2001, i.e., the date of assumption of
 B charges by Sri K. Manoharan Kumar, Deputy Superintendent
 of Police, who is the immediate junior to Sri D. Sali, subject
 to the condition that he will not be eligible for back arrears
 of pay and allowance.

By order of the Governor
 N.B. BALAKRISHNAN

Under Secretary to Government"

C 7. Not only that, the Department considered the respondent No.1
 for further promotion to the post of Superintendent of Police (non-IPS)
 but also, later on, for IPS cadre in 2010. The appellant then assailed the
 decisions of the High Court dated 23rd June, 2004 and 8th April, 2010 by
 filing two separate writ appeals before the Division Bench of the High
 D Court. For the present, it may not be necessary to advert to the events
 that unfolded after the decision of the learned Single Judge of the High
 Court in the third writ petition dated 8th April 2010. Inasmuch as, the
 matter in issue in the writ appeals is in respect of the correctness of two
 decisions dated 23rd June, 2004 and 8th April 2010, respectively.

E 8. The writ appeals were opposed by respondent No.1, *inter alia*,
 on the ground that the same were barred by limitation and suffered from
 laches. Further, the appellant has no locus to challenge the inclusion of
 respondent No.1, in the select list for 2001 because the appellant became
 eligible for inclusion in the select list for promotion to the post of Deputy
 Superintendent of Police only in 2002. Even on merits, it was contended
 F by respondent No.1 that the Competent Authority committed no error in
 including him in the select list of 2001 and to consider him for promotion
 to the post of Deputy Superintendent of Police against the vacancies of
 2001. Since, his claim for promotion was being considered against the
 vacancies of 2001, the check period would necessarily be 1998, 1999
 G and 2000 and for which reason punishment awarded to him in the year
 1997 cannot be reckoned or used against him to deny him promotion in
 the year 2001.

H 9. The Division Bench after considering the rival submissions held
 that no error was committed by the learned Single Judge in the

interpretation or the application of Rule 28 of the Kerala State and Subordinate Service Rules. The Division Bench also upheld the opinion of the learned Single Judge that the punishment awarded to respondent No.1 in the year 1997 could not be reckoned for considering his claim for promotion against vacancies of 2001. Further, the Division Bench noted that the appellant was not entitled to be considered nor was eligible to be included in the select list of 2001 and that the direction given by the learned Single Judge was in relation to considering the eligibility and entitlement of respondent No.1, for promotion to the post of Deputy Superintendent of Police against the vacancies of 2001. The Division Bench held that the directions issued by the learned Single Judge were not to interdict the seniority list or adjudicate the inter-se seniority dispute which may have necessitated the presence of other officers who were likely to be affected by such adjudication. Therefore, the appellant was neither a necessary nor proper party to the writ petition. Thus, the Division Bench rejected the challenge to the impugned decisions of the learned Single Judge because of non-impleadment of the appellant in the writ petitions. The Division Bench also held that the appeals have been filed belatedly and without challenging the promotion of the first respondent or the re-assigned seniority position to him, which inevitably resulted in pushing down the appellant and making him junior to respondent No. 1. The Division Bench was of the view that the consequential orders issued by the Competent Authorities were relatable to two judgments and there was no infirmity in those judgments. Resultantly, both the writ appeals came to be dismissed by the common impugned judgment and order dated 31st January, 2014.

10. Aggrieved, the appellant has taken recourse to the present appeals. The arguments, as were canvassed before the Division Bench of the High Court have been reiterated by both the sides.

11. We have heard Mr. Jaideep Gupta, learned senior counsel appearing for the appellant and Mr. Dileep Pillai and Mr. C.K. Sasi, learned counsel appearing for the respondents.

12. The moot question is: whether the appellant had locus to challenge the decisions of the learned Single Judge dated 23rd June, 2004 and 8th April, 2010, respectively? Indeed, from the indisputable facts emerging from the record, the appellant was appointed as Sub Inspector of Police on 12th October, 1981 in the 13th batch after the respondent

A No.1 was already appointed on that post on 22nd June, 1981, in the 12th batch. It is also noticed that the appellant was promoted to the post of Circle Inspector on 1st June, 1994 after respondent No.1 was already promoted on the said post in January, 1992. Since, respondent No.1 was promoted in earlier point of time, he became eligible for being considered for promotion to the post of Deputy Superintendent of Police in February, 2001 at which point of time the appellant was not eligible in that regard. The appellant became eligible to be considered for such promotion only in 2002.

C 13. In the backdrop of these events we will examine the challenge that we must address in the present appeals. The lis commenced at the behest of respondent No.1 because of his non-inclusion in the select list for the years 2000-2001 prepared by the DPC in February 2001. We will analyse the reasons for such non-inclusion and the justness thereof a little later.

D 14. Be that as it may, the appellant, as aforementioned, was not eligible to be included in the said list. So understood, it must follow that the appellant cannot be an aggrieved party if any order was to be passed in favour of respondent No.1. However, the appellant asserts that he is aggrieved because of the illegality in the decision to promote respondent No.1 against the vacancy in 2001 on two counts. Firstly, because the appellant was already selected and promoted to the post of Deputy Superintendent of Police on 13th September, 2002 and, thus, became senior to respondent No.1 in that cadre which was a selection post. Secondly, because of the wrongful inclusion and moreso, promotion of respondent No.1 to the post of Deputy Superintendent of Police and also re-assigning notional seniority position as 19th March, 2001 in furtherance of the impugned decision rendered by the learned Single Judge, dated 8th April, 2010, inevitably, it has resulted in making the appellant junior to respondent No. 1 in the cadre of Deputy Superintendent of Police and also affected his prospects of further promotion and seniority. That has given rise to the cause of action for the appellant to challenge the decisions of the High Court but for which the respondent No. 1 could not have entered the stated cadre before 14th January, 2005. We find force in this submission. It is true that the appellant may not be eligible to be included in the select list for the year 2001, but it is open to him to point out that respondent No.1 could never have been legitimately included in the select list until 2003 and before which date the appellant

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was already promoted to the post of Deputy Superintendent of Police and had been assigned seniority on that basis. The respondent No.1, however, was promoted to the post of Deputy Superintendent of Police and joined that cadre later only on 14th January, 2005. As these just reasons have been glossed over or discarded as a result of the decision of the learned Single Judge, in particular dated 8th April, 2010, the appellant is directly affected by the outcome of such decision in the matter of his seniority. Hence, he can be said to be an aggrieved person to challenge the High Court decision; and if that challenge succeeds, all the consequential steps taken by the Competent Authority on the basis of such decision must stand effaced as non-est. In that, the appellant had already been selected and prompted to the post of Deputy Superintendent of Police on 13th September, 2002. It is because of the decision of the High Court dated 8th April, 2010 the Competent Authorities gave notional date of promotion to respondent No.1 in that cadre as 19th March, 2001 and re-assigned the seniority to him making the appellant junior to respondent No.1, even though selected and promoted in earlier point of time.

15. Indeed, the Division Bench has rightly distinguished the decisions of this Court in the case of *State of Uttaranchal and Anr. Vs. Madan Mohan Joshi and Ors.*¹; *KM. Rashmi Mishra Vs. M.P. Public Service Commission and Ors.*²; and *Suresh Vs. Yeotmal District Central Cooperative Bank Limited and Anr.*³; having held that the lis before the learned Single Judge was not in relation to adjudication of inter-se seniority position of the parties but was for determination of eligibility and entitlement of respondent No.1 to consider him for promotion to the post of Deputy Superintendent of Police.

16. Be that as it may, the appellant could still challenge the decision of the learned Single Judge dated 8th April, 2010, for the reasons indicated hitherto. The appellant, however, will have to point out the manifest illegality or error committed in the matter of giving promotion to respondent No.1 against the vacancy of 2001 and succeed in that behalf.

17. We may, therefore, without dilating on any other contention, straightaway advert to the background in which the two decisions were

¹ (2008) 6 SCC 797

² (2006) 12 SCC 724

³ (2008) 12 SCC 558

A passed by the learned Single Judge of the High Court. The first impugned
decision was rendered by the learned Single Judge on 23rd June, 2004.
The relevant portion of this decision has been extracted in paragraph 6,
above. The crux of the direction issued by the Court was to consider the
claim of respondent No.1 for promotion against the vacancy of 2001 on
B the basis of his Confidential Records for the years 1998, 1999 and 2001
“in accordance with law”. We find no infirmity in the direction so issued
by the High Court. For, the nature of direction given by the learned
Single Judge vide judgment dated 23rd June, 2004, provided full play to
the DPC to select or not to select respondent No.1 against the vacancies
C of 2001 after considering the Confidential Records of respondent No.1
for three preceding years, i.e. 1998, 1999 and 2000 “in accordance with
law”. This is how the DPC as well as the Competent Authority of the
State understood the direction and after due deliberations issued an
order on 20th November, 2004. As a result, the Competent Authority
while considering the claim referred to the fact that major punishment
D (i.e. increment bar for two years with cumulative effect vide PHQ Order
No.G5/73080 dated 5th November, 1997) was still operating against
respondent No.1. That punishment was to operate for two years with
cumulative effect from 1997.

18. The question is: whether consideration of punishment awarded
in 1997, for promotion of respondent No.1 against the vacancy of 2001
E was permissible? True it is that the check period for selection against
vacancies of 2001, would be 1998, 1999 & 2000. However, as the
punishment awarded in 1997, transcended beyond 1997, as it was to
operate for a period of two years, the argument of respondent No.1 that
the punishment given in 1997 could not be reckoned is untenable. The
F learned Single Judge whilst considering the third writ petition of respondent
No.1 decided on 8th April, 2010, however, observed that taking that
punishment into account was against the spirit of the decision dated 23rd
June, 2004 [rendered in the second writ petition (No.35398/2002) filed
by respondent No.1]. In our opinion, the learned Single Judge as well as
G the Division Bench of the High Court committed palpable error and
misread the previous decision dated 23rd June, 2004 rendered in the second
writ petition. As aforementioned, on a plain reading of the said judgment
dated 23rd June, 2004, it is crystal clear that the Competent Authorities
were directed to reconsider the claim of respondent No.1 by taking into
account the check period as 1998, 1999 & 2000 “in accordance with

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[A. M. KHANWILKAR, J.]

law”, for promotion to the post of Deputy Superintendent of Police against the vacancies in the year 2001. From the entire judgment dated 23rd June, 2004, we are unable to discern any opinion recorded by the learned Single Judge that the punishment even if it were to operate beyond 1997 and during the check period, cannot be taken into account by the DPC for determining the merit and ability of the candidate concerned. The legal position on this issue is no more *res integra*. In the case of *Union of India and Ors. Vs. K.V. Jankiraman and Ors.*⁴, in paragraph 29 the Court observed thus:

“29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. 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. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the 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 presentii. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised,

⁴ (1991) 4 SCC 109

A *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.
In fact, while considering an employee for promotion his
B whole record has to be taken into consideration and if a
promotion committee takes the penalties imposed upon the
employee into consideration and denies him the promotion,
such denial is not illegal and unjustified. If, further, the
C promoting authority can take into consideration the penalty
or penalties awarded to an employee in the past while
considering his promotion and deny him promotion on that
ground, it will be irrational to hold that it cannot take the
D penalty into consideration when it is imposed at a later date
because of the pendency of the proceedings, although it is
for conduct prior to the date the authority considers the
promotion. For these reasons, we are of the view that the
Tribunal is not right in striking down the said portion of the
second subparagraph after clause iii) of paragraph 3 of
the said Memorandum. We, therefore, set aside the said
findings of the Tribunal.”

(emphasis supplied)

E 19. This decision has been followed in the case of *State of T.N.*
Vs. Thiru K.S. Murugesan and Ors.,⁵ which is directly on the point.
Although this decision was brought to the notice of the Division Bench,
to say the least, the same has not been analysed by it in proper
perspective, as is clear from paragraph 21 of the impugned judgment
dated 8th April, 2010. There is yet another decision which has taken the
F same view in the case of *L. Rajaiah Vs. Inspector General of*
*Registration & Stamps, Hyderabad and Ors.*⁶ The Court has
unambiguously noted that if the incumbent is undergoing punishment
during the relevant check period he will not be eligible for promotion for
the relevant period. Similar view is taken in the case of *Collector of*
G *Thanjavur Disitt. and Ors. Vs. S. Rajagopalan and Ors.*⁷.

⁵ (1995) 3 SCC 273

⁶ (1996) 8 SCC 246

⁷ (2000) 9 SCC 145

20. In the present case, it is indisputable that the punishment awarded to respondent No.1, vide order dated 5th November, 1997, is to withhold increments for two years with cumulative effect. That obviously was to operate beyond two years from 1997. As mentioned in the counter affidavit filed by the Additional Secretary of the State before the High Court dated 19th January, 2004 in O.P. No.35398 of 2002, that aspect was duly considered by the DPC and the Competent Authority whilst passing the order dated 20th November, 2004. It is for that reason, the DPC held on 24th September, 2004 examined the case of respondent No.1 and decided to include him in the select list only for year 2003 as per Notification dated 28th October, 2004.

21. Indeed, the said order dated 20th November, 2004, was assailed by respondent No.1 by way of Writ Petition (Civil) No.7801 of 2005. But, unfortunately, the learned Single Judge of the High Court did not examine these crucial aspects though specifically raised by the Department to oppose the writ petition. The Court instead was swayed away by the fact that consideration of punishment awarded in 1997 to respondent No.1, would be against the spirit of the earlier decision dated 23rd June, 2004 of the High Court and was impermissible. Having so held, the learned Single Judge proceeded to issue direction to the Competent Authorities on which the Competent Authorities acted upon without any demur. Whereas, it is amply clear that the learned Single Judge whilst deciding writ petition OP No.35398/2002 nor the subsequent writ petition No.7801/2005 adjudicated, much less answered, the issue of permissibility or otherwise of taking note of the effect of punishment awarded to respondent No.1 operating for two years beyond 1997 and overlapping with the check period for vacancy of 2001.

22. The fact that the Competent Authorities were ill-advised not to challenge such untenable direction of the learned Single Judge, would not preclude the aggrieved person from challenging the same. As noticed earlier, the consequence of allowing the second impugned decision of the learned Single Judge (dated 8th April, 2010) to remain in the field entailed in allocation of notional date of promotion and seniority to respondent No.1 as 19th March, 2001. As, the seniority position of respondent No.1 was re-assigned on that basis, it directly affected the appellant who was already promoted to the post of Deputy Superintendent

A of Police in earlier point of time on 13th September, 2002. If the notional
date of promotion allocated to respondent No.1 as 14th January, 2005 in
terms of the order dated 20th November, 2004, was to remain in force,
the respondent No.1 would remain junior to the appellant at serial No.285
as against the seniority position of appellant at serial No.208 as per the
provisional seniority list published in 2012. The respondent No.1 was
B upgraded in the Seniority List in terms of government orders dated 27th
June, 2012, bearing No. G.O. (Rt) No.1934/2012/Home and dated 7th
January, 2013 bearing No.G.O. (Rt) No.43/2013/Home, respectively. As
a consequence of these orders, the appellant was shown as junior to
respondent No.1 in the cadre of Deputy Superintendent of Police and
C Superintendent of Police (non-IPS), respectively.

23. Thus; the appellant was justified in challenging the impugned
decision of the learned Single Judge dated 8th April, 2010 by way of
subject writ appeals, because of the consequential orders passed by the
Competent Authorities allocating notional date of promotion and
assignment of seniority to respondent No.1. The delay in filing writ appeals,
D in our view, has been duly explained by the appellant. Further, the orders
passed by the Competent Authorities are the product of direction given
by the learned Single Judge. That will have to be effaced as non-est
consequent to setting aside of the untenable decision of the learned
Single Judge dated 8th April, 2010.

E 24. The fact that the subsequent decisions of the Competent
Authorities have not been specifically challenged by way of substantive
proceedings by the appellant, would not come in the way of the appellant
having succeeded in getting the order dated 20th November, 2004 issued
under the signature of Additional Chief Secretary/Principal Secretary to
F Government of Kerala, revived and restored. The authorities may have
to re-visit the case of respondent No.1 to allot him date of promotion in
terms of order dated 20th November, 2004 and restore his seniority position
in the cadre of Deputy Superintendent of Police as 14th January, 2005
and correspondingly re-allocate the notional date of promotion for the
G next promotion to the post of Superintendent of Police (Non-IPS/IPS
Cadres) respectively, if respondent No.1 has completed the qualifying
service period for being considered for promotion thereto. We have no
hesitation in holding that merely because other officers similarly placed

⁸ (1996) 6 SCC 721

as appellant have not questioned the impugned decision, will also be no impediment in reviving and restoring the government order dated 20th November, 2014 – as no prejudice will be caused to them in so directing. A

25. Having said this, it may not be necessary for us to dilate on other issues raised by the appellant, including about the interpretation of Rule 28 by the learned Single Judge and upheld by the Division Bench of the High Court - that it is mandatory to prepare a select list on year-to-year basis, as expounded in the case of *Union of India and Ors. Vs. Vipin Chandra Hiralal Shah*.⁸ We leave that and all other contentions raised before the High Court or this Court, not specifically answered in this judgment open. For, it is not necessary for us to dwell upon the same and also to obviate prolixity of the judgment. B C

26. Accordingly, we hold that the Division Bench has completely glossed over the aforementioned legal position regarding the efficacy of the punishment awarded to respondent No.1 in 1997, which transcended to subsequent years, overlapping with the check period of 1998, 1999 & 2000. D

27. A priori, these appeals must succeed. The impugned common judgment and order of the Division Bench of the High Court of Kerala dated 31st January, 2014 in Writ Appeal Nos.953 and 1019 of 2013, and the judgment and order of the learned Single Judge dated 8th April, 2010 in Writ Petition (C) No.7801 of 2005 are set aside. As regards the impugned order dated 23rd June, 2004, in our view, it gives a benign direction to the State Authorities to consider the case of respondent No.1 in accordance with law and nothing more. As a result, the order issued by the Additional Chief Secretary, Government of Kerala, Home (A) Department, dated 20th November, 2004 is revived and restored and all subsequent consequential orders/notifications issued in relation to the subject matter concerning the promotion and seniority of respondent No.1 will stand effaced as non-est. As a consequence, the concerned authorities must re-visit the case of respondent No.1 and allot him the date of promotion and seniority to the post of Deputy Superintendent of Police w.e.f. 14th January, 2005 and thereafter to re-allocate fresh notional date of promotion to the next higher selection posts, namely, Superintendent of Police (Non-IPS & IPS), as the case may be, if and upon respondent No.1 fulfilling the eligibility and qualifying service period therefor. E F G

A 28. We direct the concerned authorities of the State Government to complete the necessary formalities in furtherance of this order within three months from today and issue appropriate notification(s) as may be required in that regard.

B 29. The appeals are allowed in the above terms. No order as to costs.

Ankit Gyan

Appeals allowed.