

Before Rajbir Sehrawat, J.

RAJEEV CHANDRA—*Petitioner*

versus

BORDER ROADS ORGANIZATION AND OTHERS—
Respondent

CWP No.3348 of 2021

March 16, 2022

Constitution of India, 1950—Art. 226—Promotion—Punishment of censure—Effect—Petition filed to restore lost seniority on account of delayed promotion from Assistant Executive Engineer (Civil) to Executive Engineer (Civil) with consequential benefits—Petitioner has favourable record, but had been awarded punishment of censure—Departmental Promotion Committee promoted juniors—Clarification from Government of India—Censure not a ground to deny promotion—Petitioner later promoted—Petition disposed of—Direction to respondents to promote Petitioner from date of promotion of juniors and restore consequent seniority.

Held, that this Court finds substance in the arguments of counsel for the petitioner. It is not even in dispute that the petitioner was senior to the other persons, who were promoted through the first DPC held on 17.6.2011 for the vacancies of the year 2010-11. Admittedly, there was no other adverse record against the petitioner on the basis of which the DPC, or for that matter the Appointing Authority, could have denied the promotion to the petitioner on said date. Although counsel for the respondents has stressed that as on the date of consideration the Committee had found the punishment of 'censure' to be a valid ground for denial of the promotion, however, the respondents have failed to refer to any provision of law either under the service rules or the Instructions meant for the conduct of proceedings of DPC; under which the 'censure' could have been taken as a ground for denial of the promotion to the petitioner. The punishment of 'censure', as such, do not have any period of currency except in case where the service rule or the concerned regulations so prescribed. It is a onetime punishment. Therefore, the punishment of 'censure' as such, cannot be made any ground for denial of the promotion. This conclusion is fortified by two facts. Firstly, that in the same year in November 2011,

the respondents themselves promoted the petitioner against the vacancies of the year 2011-12, secondly, the Government of India itself has clarified by issuing Clarification which reads as under:

“2. Questions have been raised by the Ministries and Departments asking whether this is applicable in the case of 'Censure' also. In this regard, it is reiterated that paragraphs 7 (d), 7 (f) and 7 (g) cited above are applicable in all the recognized penalties under CCS (CCA) Rules including the minor penalty of Censure as well for which no currency has been prescribed, it would mean that as per para 7 (g), if the DPC considers the officer fit for promotion notwithstanding the award of 'censure', he/she can be promoted without referring to the currency of penalty.”

(Para 7)

Further held, that a perusal of the above said clarification leaves no doubt that notwithstanding the punishment of 'censure', the person is to be considered for promotion and to be promoted if there is no other material adverse to him. Although this clarification has come after the date of consideration of the promotion of the petitioner in the year 2011, however, since this is only a clarification of the existing law, therefore, the same has to be taken as relating back to the date of original instruction and therefore, can be taken as a relevant factor while deciding the dispute involved in the present case. Even as per the guidelines of UPSC; referred to by the respondents, the punishment of 'censure' per se, is not a ground for declining promotion to a person.

(Para 8)

S.A. Khemka, Advocate, *for the petitioner/applicant.*

Namit Kumar, Advocate, for respondents No.1 to 3.

RAJBIR SEHRAWAT, J. (ORAL)

(1) This is a petition filed under Article 226 of the Constitution of India seeking issuance of a writ of mandamus, directing the respondents to restore the lost seniority of the petitioner on account of delayed promotion from Assistant Executive Engineer (Civil) to Executive Engineer (Civil) along with consequential benefits and interest @ 12% per annum. Order dated 27.3.2017 (Annexure P-9) is also challenged in this petition.

(2) It is submitted by counsel for the petitioner that the petitioner was working on the post of Assistant Executive Engineer

(Civil) with the respondent organization. Under the rules, the next promotion from the post of Assistant Executive Engineer (Civil) is to the post of Executive Engineer (Civil). Since the petitioner was having all other favourable records, therefore, he was required to be considered for the vacancy of the year 2010-11. Although, the petitioner was, considered for the vacancy of the year 2010-11 on 17.6.2011 but was not promoted only on the ground that on 23.7.2009 he had been awarded a punishment of 'censure'. Through these proceedings of the Departmental Promotion Committee (for short the 'DPC'), the persons who were otherwise admittedly junior to the petitioner, were promoted by the respondents against the vacancies of the year 2010-11. Once again, the respondent department conducted the proceedings of selection for vacancies of the year 2011-12. This time, the DPC considered the case of the petitioner and found him eligible for promotion. Accordingly, the petitioner was promoted as Executive Engineer (Civil) vide order dated 5.10.2011. Accordingly, it is submitted by counsel for the petitioner that the petitioner was wrongly ignored in the DPC for the vacancies of the year 2010-11. There is no provision in the rules applicable to the post or under any Instructions governing the promotion to the post of Executive Engineer (Civil), under which the respondents could have denied the promotion to the petitioner on the ground of existence of a punishment of 'censure' against the petitioner. Referring to the clarification dated 21.11.2016 (Annexure P-7), issued by the Government of India, the counsel for the petitioner has submitted that the Government of India itself had clarified that an employee can be promoted notwithstanding the existence of the punishment of 'censure'. Even before this clarification, the UPSC had clarified the procedure adopted by it qua conduct of DPC, wherein it was said that 'censure' is not a ground to deny the promotion; as such. Even if there exists a punishment of 'censure' against a person, the matter has to be considered individually on case to case basis after taking into consideration the charge sheet and background material etc. Hence, it is submitted by counsel for the petitioner that despite the existence of the punishment of 'censure', the petitioner was entitled to be promoted to the post of Executive Engineer (Civil). Counsel has further submitted that criteria for promotion is 'seniority- cum-merit'. Therefore, it is the seniority which would be the prevalent factor unless the petitioner is otherwise found not crossing the threshold of merit. Mere existence of a punishment of 'censure' can neither be interpreted to be a disqualification, nor has the same been prescribed as such under any rule or regulations, applicable

to the department. Counsel has relied upon the judgment rendered by a Division Bench of Madras High Court in *The Secretary to Government and another versus R. Murugesan*¹ judgments rendered by the Rajasthan High Court in *Rajendra Singh Rao versus. State of Rajasthan & others*² and *Ram Khilari Meena versus State of Rajasthan and others*³ to buttress his arguments. Accordingly, it is prayed by the counsel that the present petition be allowed. The respondents be directed to rectify the mistake by granting the promotion to the petitioner from the date his juniors were promoted. Further, the consequential steps qua correction of the seniority list be also ordered to be taken.

(3) On the other hand, counsel for the respondents has submitted that undisputedly, the process of promotion had been completed way-back in the year 2011. The petitioner was even promoted in the year 2011 in the second DCP against the vacancies of the year 2011-12. Despite that, the petitioner has filed the present petition only in the year 2021. Even the representations raising his grievance filed by the petitioner, stood rejected in the year 2012 and in 2017. Hence, the present petition is hopelessly, suffering from delay and laches. The same deserves to be dismissed on this ground alone.

(4) The counsel has relied upon the judgment rendered in *Union of India & others versus Durairaj (Dead) by LRs*⁴, *State of Uttar Pradesh & others versus Arvind Kumar Srivastava & others*⁵, *Karnataka Power Corporation Ltd. Through its Chairman & Managing Director and another versus K. Thangappan and another*⁶ and *Shyam Lal Gupta and others versus State of Punjab and others*⁷. Counsel has further submitted that even in the present petition the petitioner has not challenged the seniority as such. Not only that; the petitioner has not even implead the persons who would be affected by any change in the seniority list, if the request of the petitioner is to be accepted by this Court. Hence, the petition is bad for non-joinder of necessary parties as well.

¹ 2010 SCC OnlineMad 4285

² 2010 SCC Online Raj 4065

³ 2010 SCC Online Raj 4690

⁴ 2011 (1) SCT 822

⁵ 2006 (2)SCT 417

⁶ 2006 (2)SCT 417

⁷ 1998 (1) SCT 670

(5) Qua merits, counsel for the respondents has submitted that the DPC has considered the relevant service record of the petitioner. Therefore, that has to be taken as a final assessment of the petitioner. The punishment of 'censure' had rightly been taken as ground to deny promotion to the petitioner. The Court is not even to sit in appeal over the assessment of the Committee. Hence, the present petition deserves to be dismissed.

(6) Responding to the arguments of counsel for the respondents, the counsel for the petitioner has submitted that it is not necessary to implead the perceived affected persons, in case the petitioner is seeking to redress his own grievance and the changed seniority is only a consequence arising there from. The counsel has relied upon the judgment rendered in *Ram Khilari Meena versus State of Rajasthan and others*⁸. On the point of delay and laches, counsel for the petitioner has submitted that the ground of delay and laches is not for the respondents to avail. It is a point which could have been taken into consideration by the Court at the motion stage if at all it could have been any relevant consideration. But this is not a defence, as such, in the proceedings if the claim of the petitioner is otherwise found to be justified under the law. Counsel has also relied upon the judgment rendered in *Jagdish Kumar versus Municipal Corporation of Delhi*⁹ in this regard.

(7) Having heard counsel for the parties, this Court finds substance in the arguments of counsel for the petitioner. It is not even in dispute that the petitioner was senior to the other persons, who were promoted through the first DPC held on 17.6.2011 for the vacancies of the year 2010-11. Admittedly, there was no other adverse record against the petitioner on the basis of which the DPC, or for that matter the Appointing Authority, could have denied the promotion to the petitioner on said date. Although counsel for the respondents has stressed that as on the date of consideration the Committee had found the punishment of 'censure' to be a valid ground for denial of the promotion, however, the respondents have failed to refer to any provision of law either under the service rules or the Instructions meant for the conduct of proceedings of DPC; under which the 'censure' could have been taken as a ground for denial of the promotion to the petitioner. The punishment of 'censure', as such, do not have any period

⁸ 2010 SCC Online Raj 4690

⁹ ILR (2002) II Delhi 730

of currency except in case where the service rule or the concerned regulations so prescribed. It is a one time punishment. Therefore, the punishment of 'censure' as such, cannot be made any ground for denial of the promotion. This conclusion is fortified by two facts. Firstly, that in the same year in November 2011, the respondents themselves promoted the petitioner against the vacancies of the year 2011-12, secondly, the Government of India itself has clarified by issuing Clarification which reads as under :

“2. Questions have been raised by the Ministries and Departments asking whether this is applicable in the case of 'Censure' also. In this regard, it is reiterated that paragraphs 7 (d), 7 (f) and 7 (g) cited above are applicable in all the recognized penalties under CCS (CCA) Rules including the minor penalty of Censure as well for which no currency has been prescribed, it would mean that as per para 7 (g), if the DPC considers the officer fit for promotion notwithstanding the award of 'censure', he/she can be promoted without referring to the currency of penalty.”

(8) A perusal of the above said clarification leaves no doubt that notwithstanding the punishment of 'censure', the person is to be considered for promotion and to be promoted if there is no other material adverse to him. Although this clarification has come after the date of consideration of the promotion of the petitioner in the year 2011, however, since this is only a clarification of the existing law, therefore, the same has to be taken as relating back to the date of original instruction and therefore, can be taken as a relevant factor while deciding the dispute involved in the present case. Even as per the guidelines of UPSC; referred to by the respondents, the punishment of 'censure' per se, is not a ground for declining promotion to a person. It has to be a consideration coupled with and cumulatively with other records of the petitioner, by having particular reference to the charge-sheet involved in the matter where this 'censure' has emerged, as well as, the background of the person. This is not even the case of the respondents that any such consideration qua the charge or any other background of the petitioner was ever the deciding factor for the DPC while denying promotion to the petitioner. As per the record and pleadings taken by the respondents in the written statement, it is obvious that the petitioner was denied promotion only for the reason that he was having punishment of 'censure'. The fact that background was not adverse is shown by the fact that the respondents themselves

had promoted the petitioner subsequently in the same year. Accordingly, this Court finds the reliance of the counsel for the petitioner upon judgment in **R. Murugesan'** case (*supra*) and the other cases to be well placed.

(9) Counsel for the respondents has highlighted the fact that the petitioner has not even challenged the seniority list as such. However, this is not even factually correct. The petitioner has made a due prayer for correction of the seniority list after granting the promotion to him. Therefore, it cannot be said that the petitioner has not questioned the factum of fixation of the seniority after the promotion of the petitioner and his juniors. Moreover, the seniority of the promotional cadre is a consequence of the fact of promotion. Therefore, the said factor cannot be permitted to stand in the way of the claim of the petitioner which relates to promotion from the feeder cadre to the promotional cadre. If the petitioner is otherwise successful in establishing his claim qua promotion, then the seniority has to be only the necessary statutory consequence. Therefore, this argument of counsel for the respondents is not sustainable in the eyes of law.

(10) Counsel for the respondents has also raised another objection that the present petition is suffering from extreme delay and latches. However, on this aspect also, this Court is of the considered opinion that the said aspect cannot be pleaded against the petitioner. It is the mistake, deliberate or otherwise, of the respondents only. The respondents cannot be permitted to raise the plea of delay and latches because that would tantamount to giving premium to the respondents upon their own fault. Otherwise also, the issue of delay and latches is for the Court to consider and is not a defence for the respondents themselves, unless the delay had already resulted in other consequences which cannot be remedied without further complications or which creates unforeseen complications; as such. However, in the present case, there is no further consequence of promotion of the petitioner from the date his juniors are promoted and correction of the consequent seniority. The petitioner and the other junior persons who were promoted by superseding the petitioner, all are still in the promotional cadre of Executive Engineer (Civil). Therefore, there is no further consequence of correction of the seniority list as such. The employees who earlier superseded the petitioner have no vested right to claim the seniority, as such, in ignorance or in violation of the right of the petitioner to get his seniority fixed after getting his promotion from the due date. Moreover, the aspect of delay in raising dispute cannot be

permitted to damage even the future prospectus of the petitioner. If the Court does not interfere to protect the petitioner at this stage, then the petitioner would again be suffering prejudice for the purpose of next promotion. This would be a treversity of justice and would tantamount to denial of right to equity to the petitioner. In view of these facts, this Court does not find that anyone of the judgments being relied upon by counsel for the respondents rendered in *Durairaj case (supra)*, *Arvind Kumar Srivastava's case (supra)*, *K. Thangappan (supra)* and *Shyam Lal Gupta;s case (supra)*, to be of any help. Rather, the reliance of counsel for the petitioner upon the judgments rendered in '*R. Murugesan's case (supra)*, *Rajendra Singh Rao's case (supra)*, *Ram Khilari Meena's case (supra)* and *Jagdish Kumar's case (supra)*, are found to be relevant to the case of the petitioner.

(11) So far as the non-joinder of the alleged persons affected and its effect upon the present petition is concerned, this Court does not find any substance in the argument of counsel for the respondents even on that aspect. The petitioner, as such, is not claiming anything against the persons who earlier superseded him. The petitioner is before the Court only to enforce his statutory right of consideration, in accordance with law. If he succeeds in his attempt, that would only remedy the wrong done earlier to the petitioner. Any effect upon anyone else, is only a consequence of this reversal of wrong doing qua the petitioner. Therefore, the persons who earlier superseded the petitioner are not even the necessary party; keeping in view the particular facts and circumstances of the case. Needless to say, that none of those persons would be in a position to say anything except what the official respondents have pleaded qua superseding the petitioner in the first DPC. Furthermore, there is no estoppel against a statute. Whatever rights the petitioner had under the statutory provisions, have to be granted to him irrespective of any perceived objection of any other persons. The petitioner is not praying for withdrawing of the promotion from either of those persons or for change of their own seniority. The petitioner is concerned only with his promotion and his consequent seniority as per the rules. Hence, this argument of counsel for the petitioner is also liable to be noted only to be rejected. Although the counsel for respondents has submitted that the rights of the persons earlier promoted to get further promotion shall be adversely affected if the petitioner is made senior now, however, even this aspect is totally irrelevant. The promotion is not a condition of service. No one has a right to get promotion. Right is only to be considered for promotion as per the rules. Rules are the same for petitioner and for

other persons, and the same has to be applied to all equally.

(12) In view of the above, the respondents are directed to grant promotion to the petitioner from the date his juniors were promoted and to restore the consequent seniority in favour of the petitioner.

(13) Let the necessary exercise be carried out within a period of three months from the date of receipt of certified copy of this order.

(14) Disposed of.

(15) Pending application, if any, also stands disposed of accordingly.

Shubreet Kaur