

HON'BLE SRI JUSTICE RAVI NATH TILHARI

WRIT PETITION Nos.19748, 19749 & 18672 OF 2021

COMMON JUDGMENT:

1. Heard Sri A. Kishore Kumar and Sri S. Satyanarayana Rao, learned counsels for the petitioners in the respective petitions; and Sri M. Srinivasa Rao, learned Government Pleader for Services-I for the official respondents.

2. W.P.No.19748 of 2021 and W.P.No.19749 of 2021 have been filed for direction to consider the petitioners for promotion to the post of Junior Assistant and Writ Petition No.18672 of 2021 has been filed to consider the petitioner for promotion to the post of Grade-I Hostel Welfare Officer (which is a non-selection post without being influenced by the pendency of the departmental proceedings initiated vide proceedings (1) No.X/438/2016-4, dated 06.02.2017, (2) No.X/438/2016-4, dated 06.02.2017, (3) Rc.No.B2/19/2019 dated 'nil'-05-2020 respectively.

3. In all the writ petitions, departmental proceedings are pending against the respective petitioners and on such ground the petitioners are not being considered for promotion to the next higher post. In two (2) writ petitions, the Enquiry Officers have submitted their respective reports dated 23.06.2020 and 28.11.2020 to the disciplinary authority that the charges were not proved, however, the disciplinary authority has not yet taken any final decision in the matter.

4. Learned counsels for the petitioners submits that mere pendency of the departmental proceedings is no ground to deny consideration for promotion to the next higher post. They further submit that the G.O.ms.No.257 dated 10.06.1999, providing for non consideration of promotion to the next higher post during pendency of departmental

proceedings, does not apply to a non selection post. They have placed reliance on Rule 5(b) of the State and Subordinate Service Rules, 1998 as the posts in question are said to be non-selection posts. They have also placed reliance upon the judgments of this Court in i) **Government of Andhra Pradesh and others vs. A. Rajeswara Reddy**¹, (ii) **P. Venkateshwara Rao vs. District Collector, East Godavari** (W.P.No.30336 of 2016 decided on 17.07.2017 and in W.P.No.12266 of 2020) decided on 27.01.2021, iii) **State of Andhra Pradesh vs. Motupalli Narasimha Raju** LAWS (APH) 2021-8-32 (W.P.No.3099 of 2017 dated 01.08.2022) and iv) **K. Nagaraju vs. State of Andhra Pradesh and another**²

5. Learned Government Pleader submits that the disciplinary proceedings are still pending against the petitioner before the disciplinary authority which has not taken any final decision on the Enquiry Officer's report. He submits that it is open to the disciplinary authority to accept or not to accept the findings of the Enquiry Officer, in which case, the disciplinary authority may direct for further enquiry under the rules and therefore merely because the Enquiry Officer has submitted report that the charges are not proved, it cannot be said that the disciplinary proceedings are not pending. He further submits that G.O.ms.No.257 dated 10.06.1999 applies to a non-selection post as well.

6. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

7. In view of the submissions advanced by the learned counsels for the parties, the points that arise for consideration are:

¹ 2010(3) ALD 501 (DB)

² 2017 (6) ALD 218 (DB).

- i) Whether the petitioners can be considered for promotion to next higher non-selection post pending departmental proceedings?
- ii) Whether G.O.Ms.No.237 dated 10.06.1999 applies to non-selection post also?

8. Rule 5 of the A.P. State and Subordinate Services Rules, 1996 (in short "Rules, 1996") provides as under:-

"5. SELECTION POSTS:-

(a) All first appointments to a State Service and all promotions / appointment by transfer in that service shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal, by the appointing authority as specified in the sub-rule (a) of rule 7 from the panel of candidates. Such panel shall be prepared as laid down in rule 6 by the appointing authority or any other authority empowered in this behalf.

(b) Non-Selection posts:- No non-gazetted post should be treated as selection post. Promotion and appointment by transfer to higher posts other than those mentioned in sub-rule (a) shall be made in accordance with seniority-cum-fitness, unless. (i) Such promotion or appointment by transfer of a member has been withheld as a penalty; or (ii) a member is given special promotion for conspicuous merit and ability"

9. Relevant portion of the G.O.Ms.No.257, dated 10.06.1999 is also reproduced:-

"ORDER:

In the G.O.s 1st to 3rd read above, orders were issued enunciating guidelines for consideration of employees who are facing disciplinary enquiries in regard to their appointment by promotion or transfer to higher categories.

2. In the reference fourth read above, the Ministry of Personnel, Public Grievance and Pensions, Government of India have issued guidelines in regard to consideration of Government Servants against whom disciplinary or court proceedings are pending or whose conduct is under investigation for promotion to next higher categories. Keeping in view the said guidelines, orders have been issued in the G.O. fifth read above for consideration of employees for adhoc promotion. Where the disciplinary case/ criminal prosecution against the Govt. employees is not concluded even after the expiry of two years from the date of the meeting of the first Departmental promotion committee, in which the employee was considered, in case the employee is not under suspension.

3. It has come to the notice of Government, that the guidelines issued in the said orders are not being strictly adhered to in, several departments and adhoc promotion is being considered on the simple ground, that two years period has elapsed after institution of disciplinary proceedings against the employee without going into the desirability of making adhoc promotion in such cases. The Government have carefully reviewed the issue and accordingly has been decided to cancel the orders issued in the G.O. fifth read above and issue suitable guidelines on the subject.

4. Accordingly, orders issued in the G.O.Ms.No. 74, Genl. Admn. (Service) Department, dated the 24th February, 1994 are hereby cancelled with immediate effect. Government also order that with immediate effect the following procedure and guidelines, be followed to consider employees against whom disciplinary cases or criminal execution are pending or whose conduct is under investigation appointment by promotion or transfer. to next higher categories.

The details of employees in the zone of consideration for Promotion falling under the following categories should be specifically brought to the notice of the Departmental promotion committees or screening committees:-

officers under suspension:-

officers in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending;

Officers in respect of whom prosecution for a criminal charge is pending.

Officers who are facing enquiry. Trial or investigation can be categorized into the following groups based on the nature of the allegations or charges pending against them or about to be instituted namely:-

An officer with a clean record, the nature of charges or allegations against whom relate to minor lapses having no bearing on his integrity or efficiency, which even if held proved, would not stand in the way of his being promoted;

An officer whose record is such that he would not be promoted, irrespective of the allegations or charges under enquiry, trial or investigation; and

An officer whose record is such that he would have been promoted had he not been facing enquiry, trial or investigation in respect of charges which, if held proved, would be sufficient to supersede him.

The suitability of the officers for inclusion in the panel should be considered on a overall assessment based on the record which should include namely:-

Adverse remarks recorded in the Annual confidential reports, the penalties awarded and the had reputation of the officer as vouchsafed by the Head of the Department and the Secretary to Government of the Department concerned;

The above cases should be considered as falling under category (i) of item (B) above.

The officers who do not have any adverse entry in the Annual confidential Report, and who have no penalties awarded against them in the entire duration of the post and not merely in the past five years and whose reputation is vouchsafed by the Head of the Department and secretary to Government of the Department concerned should be considered as falling under category (iii) of item (B) above.

The Officers categorized as under item (iii) of above only should be considered for adhoc promotion after completion of two years from the date of the Departmental promotion Committee or Screening committee Meeting in which their cases were considered for the first time.

(6) The appointing authority should consider and decide that it would not be against public interest to allow adhoc promotion to the officer concerned and those shall be decided with reference to the charge under enquiry. If the charge is open of moral turpitude, misappropriation, embezzlement and grave dereliction of duty then the appointing authority should consider as not in the public interest to consider adhoc promotion to such charged officer, but, however, if the charge is not a grave one but is a minor one, not involving moral turpitude, embezzlement and grave dereliction of duty then only in such cases the appointing authority should consider that it would not be against public interest to allow adhoc promotion because till then his record is clean with reference to ACRs, past punishment and reputation in the department as vouchsafed by the Head of the Department and secretary to Government. The appointing authorities should strive to finalize the disciplinary cases pursuing them vigorously so that within two years the proceedings are concluded and final orders issued:

(7). If the officer concerned is acquitted, in the criminal prosecution on the merits of the cases or is fully exonerated in the departmental proceedings, the adhoc promotion already made may be confirmed and the promotion treated as a regular one from the date of the adhoc promotion with all attendant benefits. In case the officer could have normally got his regular promotion from a date prior to the date of his adhoc promotion with reference to his placement in the Departmental promotion committee proceedings and the actual date of promotion of the person ranked

immediately junior to him by the Departmental promotion committee, he would also be allowed his due seniority and benefit of notional promotion.

(8). If the officer is not acquitted on merits in the criminal prosecution but purely on technical grounds and government either proposes to take up the matter to higher court or to proceed against him departmentally or if the officer is not exonerated in the departmental proceedings, the adhoc promotion granted to him should be brought to an end.

(9) All the departments of secretariat and Heads of Departments should follow the above instruction scrupulously and bring it to the notice of all the concerned.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

V. ANANDARAJU
CHIEF SECRETARY TO GOVERNMENT.”

10. A bare reading of Rule 5(b) of the Rules, 1996 shows that promotion and appointment by transfer to higher posts, the non-selection post, shall be made in accordance with seniority-cum-fitness unless (1) such promotion or appointment by transfer of a member has been withheld as a penalty. Sub Clause (ii) of Clause (b) of Rule 5 is not for consideration in the present case. Therefore, *prima facie* it appears that unless the promotion to a non-selection post of a member has been withheld ‘as a penalty’ consideration for such promotion cannot be denied on mere pendency of the departmental proceedings, irrespective of the findings of the enquiry officer’s report.

11. G.O.Ms.No.257 dated 10.06.1999, however, provides, that pending departmental enquiry promotion cannot be considered for a specified period subject to other conditions as mentioned in the said Government Order.

12. *Prima facie*, this court is of the view that if G.O.Ms.No.257 dated 10.06.1999 is applied to non-selection posts; and in view thereof, pending departmental enquiry consideration of promotion of a member to non selection post is withheld on that ground, the same shall be contrary to Rule 5(b) of the Rules, 1996. Rules, 1996 are framed under Article 309 of the Constitution of India. G.O.Ms.No.257 dated 10.06.1999 is issued under Article 166 of the Constitution of India. As

such the G.O.Ms.No.257 dated 10.06.1999 can be supplementing but not supplanting Rule 5(b) of the Rules, 1996.

13. *Prima facie* the non consideration pending departmental enquiry even for a limited period and even if a member falls within the zone of consideration against whom there is no penalty of withholding such promotion and thus depriving him of timely consideration of promotion on the ground of pendency of the departmental proceedings, appears to be contrary to rule 5(b)(1) of the Rules, 1996. The G.O.Ms.No.257 dated 10.06.1999 cannot be said to be supplementing the rule, *prima facie*. There cannot be such deprivation, pending departmental enquiry under Rule 5(b)(i), which prohibits promotion only in case there is penalty of withholding the promotion. I am therefore of the view *prima facie* that G.O.Ms.No.257 dated 10.06.1999 cannot be applied to promotion for a non-selection post.

14. A Co-Ordinate Bench, in **E.V.S.N. Kishore vs. the State of Andhra Pradesh represented by its Principal Secretary Home Services-I, Department Secretariat Velgapudi Guntur District and three others** in Writ Petition No.12266 of 2020 has taken a view that G.O.Ms.No.257 dated 10.06.1999 did not discriminate the selection and non selection post, but it applied to employees of all cadres. The relevant part of the judgment dated 27.01.2021 passed by this Court in W.P.No.12266 of 2020, is being reproduced as under:-

“The main endeavour of the learned counsel for the petitioner is that G.O.Ms.No.257 General Administration (SER.C) Department dated 10.06.1999 cannot be applied to the non-selection post in view of Rule 5(b) of A.P. State and Subordinate Service Rules.

G.O.Ms.No.257 dated 10.06.1999 is placed on record by the petitioner. It did not discriminate the selection and non-selection post. But, it applied to employees of all cadres.”

15. In **A. Ramulu** (supra), which was a case of selection post, with respect to G.O.Ms.No.257 dated 10.06.1999, the Division Bench of this Court held that when there are no guidelines it is open to the Government to issue executive instructions, not contrary to or covered by the Rules, 1996 and it cannot be said that the procedure and guidelines issued in G.O.Ms.No.257, dated 10.06.1999 are not applicable. It was held that in view of pendency of disciplinary proceedings the applicant therein was not entitled to be considered for promotion. Paragraph Nos.19 and 22 of **A. Ramulu** (supra) as under:

“19. When there are no guidelines in the Andhra Pradesh State and Subordinate Service Rules, we are of the opinion that it is open for the Government to issue executive instructions which are not contrary or covered by the Rules and which are general in nature and such power is traceable under Article 162 of the Constitution of India. Therefore, it cannot be said that the procedure and guidelines issued in G.O.Ms.No.257 dated 10.06.1999, are not applicable.

22. Therefore, we are not inclined to express any opinion on the merits of the case so far as the disciplinary proceedings are concerned. **However, in view of the pendency of the aforesaid disciplinary proceedings and the enquiry was already completed and show cause notice was also issued and final orders are yet to be passed, the applicant is not entitled to be considered for promotion to the post of Assistant Commissioner of Prohibition and Excise.”**

16. In **A. Rajeswar Reddy** (Supra), the proposition of law laid down in **A. Ramulu** (supra) was not disputed. It was however held that the subsequent G.O.Ms.No.659 dated 01.11.2008, which directed for the departmental enquiries to be conducted within a specified period was not placed for consideration of the Division Bench in **A. Ramulu** (supra). In **A. Rajeswar Reddy** (Supra), the Tribunal had directed for consideration of promotion inspite of the pendency of the disciplinary proceedings, which direction of the Tribunal was affirmed by the Division Bench in **A. Rajeswar Reddy** (supra).

17. The G.O.Ms.No.659 dated 01.11.2008 is on the subject of concluding the departmental proceedings within a specified period. It does not provide for the consequences on the pending departmental enquiries if the same is not completed within the period specified.

18. In **Motupalli Narasimha Raju** (supra), the post of Head Constable was a non-selection post to the purposes of promotion. The Division Bench, referring the Rule 5(b) of the Rules, 1996, held that only upon the imposition penalty as specified therein an employee would be denied for promotion to a non selection, but, in this case the G.O.Ms.No.257 dated 10.06.1999 was not under consideration.

19. In **A. Nagaraju** (supra), Rule 5(b) of the Rules, 1996 and the applicability of G.O.Ms.No.257 dated 10.06.1999 was not under consideration.

20. Though this Court is of the view, *prima facie*, that the G.O.Ms.No.257 dated 10.06.1999 would not be applicable to the promotion for non selection post under Rule 5(b) of the Rules, 1996 but this view would be contrary to the clear view taken by another Coordinate Bench in Writ Petition No.12266 of 2020, that the G.O.Ms.No.257 dated 10.06.1999 applies to employees of all the cadres and does not discriminate the selection and non selection posts.

21. Depending upon the applicability or non applicability of G.O.Ms.No.257 dated 10.06.1999 for promotion to non selection post, would depend the applicability of the judgments by the Division Bench of this Court referred to above.

22. Keeping in view the judicial discipline, decorum and propriety the matter needs to be referred to the Larger Bench for an authoritative pronouncement on the point in issue to be framed hereinafter.

23. The following question is hereby referred for consideration by the Larger Bench

“Whether the G.O.Ms.No.257 dated 10.06.1999 applies to promotion cases in respect of non selection posts under Rule 5(b) of the A.P. State and Subordinate Services Rules, 1996 and whether the view taken by a Co-ordinate bench in **E.V.S.N. Kishore vs. the State of Andhra Pradesh represented by its Principal Secretary Home Services-I, Department Secretariat Velgapudi Guntur District and three others** in W.P.No.1266 of 2020 that it applies to non-selection posts as well, is correct in law?

24. The Registry to place necessary papers before the Hon’ble the Chief Justice for necessary orders.

25. The writ petitions be listed after the reference is answered.

RAVI NATH TILHARI, J

Date:25.03.2022,
Scs/Gk

HON'BLE SRI JUSTICE RAVI NATH TILHARI

WRIT PETITION Nos.19748, 19749 & 18672 OF 2021

25.03.2022

Scs/Gk