A

STATE OF MYSORE

V.

C. R. SESHADRI & ORS.

January 10, 1974

[V.R. KRISHNA IYER AND R.S. SARKARIA, JJ.]

B *Civil Service—Promotion—Duty of Executive and Courts in relation thereto.*

The respondent came into Class I post from October 27, 1946. From that day till July 23, 1954, he was Private Secretary to three ministers. Without giving credit for his service as Private Secretary his immediate junior was promoted as Deputy Secretary. The respondent filed a writ petition in the High Court praying that the order denying him credit for service as Private Secretary may be quashed and for a C direction for payment of such amounts as he would have got had his due *inter se* seniority and promotion been accorded to him. The High Court granted both the reliefs.

In appeal to this Court,

HELD : (i) The High Court was right in holding that the respondent was entitled to count his service from October 27, 1946, for fixation of his seniority in the gradation list.

D (2) The High Court, however, erred in directing the appellant to give the respondent notional promotion as Deputy Secretary with effect from the date on which his junior secured such promotion and for payment of the excess salary accruing to him on that footing.

The power to promote an officer belongs to the executive and the judicial power may control or review government action but cannot extend to acting as if it were the Executive. The proper direction therefore, can only be that the government E should reconsider the case of the respondent afresh for purposes of notional promotion. If the service rule entitles him to promotion on the ground of seniority alone, Government should, except for the strongest reason, grant the benefit of promotion with effect from the date when his junior became Deputy Secretary especially, because, nothing had been suggested against the respondent in his career to disentitle him to promotion. However, if the criterion for promotion is one of seniority-cum-merit comparative merit may have to be assessed if length of service is equal, or an outstanding junior is available for promotion. [88F]

F (3) The appellant State should apply to the respondent the same rule of promotion as was applied to his junior and not to act adversely without giving him an opportunity. Since the respondent had retired from service, the appellant should also consider promptly his claim and make payment to him of what is due to him without further delay. [91A]

State of Mysore v. *Syed Mahmood*, [1968] 3 S. C. R. 363, 366 and *State of Mysore* v. *P. N. Nanjundiah*, [1969] 3 S. C. C. 633,637 followed.

G (4) The appellant's inexplicable indifference is not placing before the Court the relevant rule regarding promotion to the post of Deputy Secretary merits the order that the appellant should pay the costs of the respondent even though the appeal is partly allowed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 875 of 1968.

H From the judgment and order dated the 28th July 1967 of the Mysore High Court at Bangalore in Writ Petition No. 2378 of 1965.

V.S. Desai and *M. Veerappa*, for the appellant.

B.R.L. Iyangar, *S.S. Javali* and *A.G. Ratnaparkhi*, for respondent No. 1. A

The Judgment of the Court was delivered by

KRISHNA IYER, J. The State of Karnataka, appellant before us, has raised two contentions, the first being the more material but less meritorious and the second secondary but substantial. The first respondent herein filed a petition under art. 226 seeking several reliefs including (a) the quashing of an order denying him credit for service while he was Private Secretary to three Ministers beginning from October 27, 1946 till July 23, 1954 (with minor interruptions when he served in other capacities, an inconsequential circumstance in this case) when he was made Assistant Secretary, and (b) a direction for payment of such amounts as he would have got had his due *inter se* seniority and promotion been accorded to him. The High Court granted both reliefs and they are challenged in this Court. There is no doubt, on the pleadings and indubitable evidence on record, that the petitioner came into a Class I post from October 27, 1946 and his claim to service since then running continuously, is undeniable. Learned counsel for the appellant has fairly and rightly conceded the legitimacy of this claim. Indeed, the State Government had accepted the petitioner's right based on the equivalence of the post of Private Secretary and of Assistant Secretary but the Central Government did not agree, and when confronted in Court with overwhelming proof pleaded apologetically that they were not in possession of the full facts when rejecting the petitioner's seniority plea. We affirm that the first respondent is entitled to count his service from October 27, 1946 for fixation in the gradation list. B C D E

Flowing from this finding is the direction by the High Court to give the petitioner notional promotion as Deputy Secretary with effect from the date on which one P. Venkataraman, next below him, secured such promotion and for payment of the excess salary accruing to him on that footing. This part of the judgment is attacked as beyond the power of the Court. We see the soundness of this submission. In our constitutional scheme, a broad three-fold division exists. The power to promote an officer belongs to the Executive and the judicial power may control or review government action but cannot extend to acting as if it were the Executive. The Court may issue directions but leave it to the Executive to carry it out. The judiciary cannot promote or demote officials but may demolish a bad order of Government or order reconsideration on correct principles. What has been done here is in excess of its jurisdiction. Assuming the petitioner's seniority over Venkataraman, how can the Court say that the former would have been, for certain, promoted ? Basically, it is in government's discretionary power, fairly exercised to promote a government servant. If the rule of promotion is one of sheer seniority it may well be that promotion is a matter of course. On the other hand if seniority-cum-merit is the rule, as in the Supreme Court decisions cited before us, promotion is problematical. In the absence of positive proof of the relevant service rules, it is hazardous to assume F G H

A that by efflux of time the petitioner would have spiralled up to Deputy Secretaryship. How could we speculate in retrospect what the rule was and whether the petitioner would have been selected on merit and on the strength of such dubious hypothesis direct retro-active promotion and back pay? The frontiers of judicial power cannot be stretched thus for. The proper direction can only be that government will re-consider the case of the petitioner afresh for purposes B of notional promotion. If the service rule entitles him to promotion on the ground of seniority alone, Government will, except for the strongest reason grant the benefit of promotion with effect from the date Venkataraman became Deputy Secretary. Nothing has been suggested against the petitioner in his carrier to disentitle him to promotion and we have no doubt Government will give him his meed. However, if the criterion for promotion is one of seniority-cum-merit, comparative C merit may have to be assessed if length of service is equal or an outstanding junior is available for promotion. On the facts before us, there is no reason to regard the petitioner's eligibility on merit for Deputy Secretaryship to be denied or delayed when Venkataraman was promoted.

Counsel for the State made reasonable efforts to help the Court D with the relevant rule but his client's cooperation was not forthcoming. We direct the appellant to apply to the first respondent the same rule of promotion as was applied to Venkataraman and, to be fair enough, not to act adversely without giving him an opportunity. In the light of the State's reluctance to produce the rule we almost think the High Court order is substantially just. Even so, it is for the Government to promote with retrospective effect. We, therefore, E set aside the second part of the High Court's order in the judicial hope that justice will be done to the petitioner.

The pragmatic limitation on judicial power we have set is not novel but traditional, as is evident from the two recent rulings of this Court—both rendered in appeals from the Mysore High Court—where probably judicial promotion of executive officers was perhaps not viewed as F an avoidable encroachment.

In *State of Mysore* v. *Syed Mahmood*(1). Bachawat J., speaking for the Court, held in a case where the promotion of an officer was involved that the proper direction should be that the State Government should "consider the fitness of Syed Mahmood and Bhao Rao for promotion in 1959....The State Government would upon such consideration be under a duty to promote them as from 1959 if they were G then fit to discharge the duties of the higher post and if it fails to perform its duty, the Court may direct it to promote them as from 1959." The Court concluded in that case thus :

> "We direct the State Government to consider whether Syed Mahmood and Bhao Rao should have been promoted to the posts of senior statistical assistants on the relevant H dates when officers junior to them were promoted, and if so, what consequential monetary benefits should be allowed to them"

(1) [1968] 3 S.C.R. 363, 366.

Similarly, in *State of Mysore* v. *P. N. Nunjundiah*(1), Ramaswami, J., speaking for the Court, dealt with a service dispute and while agreeing with the substantive conclusion of the High Court modified the order in so far as the promotion was ordered by the Court. The learned Judge observed :

> "The argument was stressed on behalf of the appellants that in any event the High Court was not right in issuing a writ of *mandamus* "directing the appellants to promote respondent No. 1 as Overseer with effect from February 1, 1961 and as Supervisor with effect from April 1, 1963 and to give him all consequential benefits. In our opinion there is justification for this argument. It has been pointed out by this Court in *The State of Mysore* v. *Syed Mahmood and others* (supra) that in matters of this description the High Court ought not to issue writs directing the State Government to promote the aggrieved officers with retrospective effect. The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1st respondent should have been promoted on the relevant date and so what consequential benefits should be allowed to him. In the present case we are informed that both respondent No. 1 and respondent No. 2 have been promoted as Overseers after the filing of the writ petition. In the circumstances we consider that proper course is to issue a direction to the appellants to consider whether the respondent No. 1 should have been promoted to the post of Overseer with effect from December 1, 1961 and as a Supervisor with effect from April 1, 1963, what should be the relative seniority as between respondent No. 1 and respondent No. 2 and what consequential benefits should be allowed to respondent No. 1".

We respectfully agree with the guideline furnished by these two decisions which fortify the view we have taken.

While we agree that the High Court has been impelled by a right judicial instinct to undo injustice to an individual, we feel that a finer perception of the limits of judicial review would have forbidden it from going beyond directing the Executive to reconsider and doing it on its own, venturing into an area of surmise and speculation in regard to the possibilities of escalation in service of the appellant. Judicial expansionism, like allowing the judicial sword to rust in its armoury where it needs to be used, can upset the constitutional symmetry and damage the constitutional design of our founding document.

The length of this litigation has really disappointed the petitioner by denying him the enjoyment of likely promotion. He retired the day before the judgment of the High Court. No one in service would be affected by the allowance of the petitioner's claim and what was a service issue has now been reduced to one of money payment. A retired government official is sensitive to delay in drawing monetary benefits. And to avoid posthumous satisfaction of the pecuniary

(1) [1969] 3 S.C.C. 633, 637.

A expectation of the superannuated public servant—not unusual in government—we direct the appellant to consider promptly the claim of the petitioner in the light of our directions and make payment of what is his due—if so found—on or before April 15, 1974. The government's inexplicable indifference in not placing before the Court the relevant rule regarding promotion to the post of Deputy Secretary merits the order that the appellant pay the costs of the
B petitioner/ first respondent ; for, the wages of winner's sloth is denial of costs, and something more.

In the result the appeal fails in the first part and is allowed in the latter part on the lines indicated above and subject to the directions regarding costs just stated.

Appeal partly allowed.

V.P.S.