

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.4379/2010**

% **Date of Decision: 03.02.2011**

Sudesh Kumari Sareen Petitioner
Through Mr.Rajeev Saxena, Advocate.

Versus

Union of India & Ors Respondents
Through Dr.Ashwani Bhardwaj, Advocate

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MS.JUSTICE VEENA BIRBAL

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner has challenged the order dated 12th March, 2010 passed by the Central Administrative Tribunal, Principal Bench in O.A No.1513/2009 titled Smt.Sudesh Kumari Sareen v. Union of India through Secretary, Ministry of Railways & Ors. holding that since the petitioner was working on ad-hoc basis, therefore, during the period she was working on ad-hoc basis, she is not entitled for counting that period for grant of the benefits under the ACP Scheme and dismissing her petition.

2. Brief facts to comprehend the disputes are that petitioner was appointed as a staff nurse vide order No.225E/289-PE dated 28th June, 1985 in the grade of Rs.425-640 and was posted at Jagadhari workshop in place of Smt.Mohinder Kaur who had been transferred to Lucknow. Her appointment notice categorically stipulated that her appointment as a staff nurse is purely on adhoc basis and her services are liable to be terminated as and when selected candidate would be available from the Railway Service Commission or replaced by the regular staff from other divisions under the orders of transfers. It was also stipulated that she would not have any claim for regular appointment till such time she would be selected by Railway Service Commission.

3. Later on pursuant to selection, the services of the petitioner were regularized in terms of notice No.752K/SM/CH/95 dated 17th June, 1995 with effect from 3rd January, 1992. Her seniority position was also fixed as staff nurse below Ms.Radhika (Scheduled Caste) placed at serial number 58 and above Mrs.Sushma Phillips placed at serial number 59 in the seniority list dated 5th May, 1994.

4. By a communication dated 31st March, 2004 regarding financial upgradation under the ACP Scheme a clarification was given deciding that 50% of temporary status of the casual labour service on absorption in regular employment would be taken into account towards minimum requirement of service of 12/24 years for the grant of benefit under the

ACP Scheme on the analogy that the same is also reckoned as qualifying service for pension. Another employee of the respondent Sh.Aturah Rehman Khan's ad-hoc service with effect from 4th August, 1982 to 25th February, 1996 were considered and he was given first full benefit with effect from 1st October, 1999.

5. The petitioner was appointed as a staff nurse in the scale of Rs.425-640/Rs.5000-8000 on ad-hoc basis on 1st July, 1985 and regularized on 3rd January, 1992 and was promoted as Nursing Sister (Rs.5500-9000/-) from 5th March, 2001, therefore, she claimed that she be given financial upgradation under the ACP Scheme by reckoning her service from 1st July, 1985 so that she becomes eligible for first financial upgradation with effect from 1st October, 1999, the date on which ACP Scheme came into force. The request of the petitioner to reckon her service from 1st July, 1985 for granting the first upgradation from 1st October, 1999 was declined by letter dated 26th June, 2008. The order was passed in consultation with the Department of Personnel and Training.

6. Aggrieved by the order of the respondent not reckoning her services from the date of her appointment on ad-hoc basis that is 1st July, 1985, she sought the copies of notings in her case under Right to Information Act and relied on a noting dated 18th December, 2007. The noting relied on by the petitioner is as under:-

“ It is correct that the instructions on ACP, interalia, provide that adhoc service shall not qualify under the ACPS. However, it may also be kept in mind that the decision for allowing substitutes and casual labourers the benefit of ACP, was taken in-house, without consulting DOP&T. A possible rationale for giving this benefit was that in a massive organization like the Railways, such cases are very frequent where gap between date of casual appointment and date of regularization is, sometimes, very vast resulting in a big loss to an employee in terms of qualifying service and hence in terms of pension. The same logic applies in the case of adhoc appointments also. As such, extension of ACP benefit in the case of adhoc service appears to be logical, just and prudent and in the interest of equity & fair play. Incidentally, a precedent is worth mentioning here that recently, in a case of adhoc appointment of a clerk in NER, who was regularized after an extensively long period of 14 years, the employee was given the benefit of financial upgradation by reckoning his adhoc service for ACPS.”

7. Aggrieved by the order dated 28th May, 2008 declining reckoning of her service from 1st July, 1985 for the purpose of grant of first upgradation, the petitioner filed an original application being O.A No.1513/2009 which has been dismissed by the Tribunal. The Tribunal relied on the ACP Scheme introduced by Railway Board for the railway servants which categorically stipulates in para 2 that certain categories of employees such as casual employees (including those with temporary status), substitute, ad-hoc and contract employees shall not qualify for benefits under the scheme. Consequently, it was held that the period during which the petitioner was working as an ad-hoc employee cannot

be reckoned for the purpose of computing the first financial upgradation under the ACP Scheme.

8. The petitioner has challenged the order of the Tribunal contending inter-alia that she is entitled for parity as a substitute as the respondent at one stage had considered her replacement as a substitute as she was appointed in place of Mrs. Mohinder Kaur who was transferred to Lucknow. According to her the confusion regarding her status being an ad-hoc or a substitute had been put to rest on her appointment as a regular employee. Once she had been regularized she became entitled for all benefits including counting of the period of her initial placement. The petitioner also relied on the definition of qualifying service under Rule 3 sub Rule 22. It was contended that under the rules it is clarified that once a person is appointed in any capacity of a regular nature except being a casual labour or person outsourced for some purpose he would be falling within the ambit of regular servant and the services rendered by him/her are to be counted for the purpose of working out the qualifying service. The petitioner also relied on the case of Sh. Aturah Rehman Khan, employed in North-Eastern Railways, whose period of ad-hoc service from 1st August, 1982 to 25th February, 1996 was counted and consequently the petitioner claimed the benefit of the ACP. The petitioner also relied on the note which is reproduced above stipulating that the respondent is a massive organization which may have gaps between date of casual employment

and date of regularization which may result in a big loss to the employee in terms of qualifying service.

9. The petition is contested by the respondents who filed a counter affidavit dated 30th November, 2010 of Dr. Gajendra Kumar who reasserted that respondent was appointed purely on ad-hoc basis and she worked from 1st July, 1985 to 2nd January, 1992 on ad-hoc basis. The petitioner was appointed on regular basis with effect from 3rd January, 1992 and she was promoted as per her seniority in the grade of Rs.5500-9000/- from 5th March, 2001 that is, next promotion was given to her within nine years and two months of regular service. Regarding the case of Sh.Aturah Rehman Khan for counting his ad-hoc service pursuant to letter dated 25th April, 2007 it is contended that the letter has been superseded by Railway Board's letter No.PV-V/2005/ACP/5/NR dated 28th May, 2008 as well as GM/P letter No. 220-E/267/XX/EiiBii dated 26th June 2008 whereby the case of the petitioner was subsequently rejected. The respondents' contention is that on the basis of the case of Sh.Aturah Rehman Khan the petitioner is not entitled for any benefit. According to them if the note to the ACP Scheme categorically excludes reckoning of the service of an employee as an ad-hoc, even if the services of Sh.Aturah Rehman Khan was counted that will not entitle the petitioner to claim negative discrimination and seek a direction to commit another violation of the provisions of the ACP Scheme.

10. We have heard the learned counsel for the parties. This cannot be disputed by the learned counsel for the petitioner that under the ACP Scheme especially para 2, employees such as casual employees (including those with temporary status), substitutes, ad-hoc and contract employees are categorically excluded for qualifying for benefits under the aforesaid scheme. This also cannot be disputed that the appointment of the petitioner on 1st July, 1985 was an adhoc employment in the grade of 425-640/-. Even if she was appointed in place of Mrs.Mohinder Kaur who had been transferred to Lucknow on 8th June, 1985, the appointment of the petitioner shall be ad-hoc and cannot be termed as a substitute appointment. In any case this appointment was given to the petitioner pursuant to order dated 28th June, 1985 and if the petitioner was of the opinion that her appointment is not as an ad-hoc employee but as a substitute employee according to rules of the respondent, the petitioner ought to have challenged the same at that time. The petitioner cannot be permitted to contend that she was not appointed as an ad-hoc employee but she was a substitute employee almost after 24 years of her appointment.

11. This also cannot be disputed by the petitioner that she has not challenged para 2 of the ACP Scheme excluding grant of benefit under the scheme to the ad-hoc employees. Though challenge to the relevant para of the scheme has not been claimed by the petitioner, yet excluding the ad-hoc employees will not be applicable to her. The

petitioner cannot claim that despite the scheme which is not challenged by her, she would be entitled for benefit under the scheme which categorically excludes the period during which she was employed as an adhoc employee.

12. Reliance has also been placed on Chandigarh Administration & Anr. v. Jagjit Singh & Anr., (JT) 1995 (1) 445 holding that merely because the respondent authority has passed an irregular order in case of one person, the same will not be a ground to direct the same authority to issue similar order in case of another person contrary to rules. The ground of discrimination can be raised by the petitioner only if the order passed in favour of a person is legal and in accordance with rules which is not valid in her case. Thus the petitioner is not entitled for any direction from this Court to issue a Mandamus contrary to rules and to direct the respondent to violate the tenor of the relevant terms of the scheme.

13. The note relied on by the petitioner also cannot change the terms and conditions in the ACP Scheme. In any case the relevant paras of the ACP Scheme has not been challenged by the petitioner and in the circumstances the note which is detailed hereinabove cannot come to her rescue. In the circumstances the petitioner has failed to make out a case for reckoning her period of service as ad-hoc employee for grant of benefit under the ACP Scheme.

14. Considering the totality of facts and circumstances the petitioner has failed to make out any illegality or perversity in the order dated 12th March, 2010 of the Tribunal declining to reckon her service as an ad-hoc employee towards grant of ACP Scheme. In the circumstances, there are no grounds to interfere with the order of Tribunal and the writ petition is, therefore, dismissed. The parties are, however, left to bear their own costs.

ANIL KUMAR, J.

FEBRUARY 03, 2011

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VEENA BIRBAL, J.