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

+ W.P.(C) 11539/2016 & CM Nos.45434-35/2016

UOI AND ANR

..... Petitioners

Through: Mr. R.V. Sinha & Mr. Ashok Singh,
Advocates

versus

DILEEP KUMAR SAXENA

..... Respondent

Through: Ms. Meenu Mainee, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

ORDER

% **07.12.2016**

1. The respondent, Dileep Kumar Saxena, had appeared in the Limited Departmental Competitive Examination for the post of Assistant Mechanical Engineer, held on 9.10.2007 and was first in the merit list.
2. Dileep Kumar Saxena never got appointed as the Railway, vide their order dated 28.1.2008, had declared he and two others were ineligible, for their experience in the earlier unit was excluded and only the experience gained in the absorbing unit was counted. Dileep Kumar Saxena, thus, did not have requisite experience of five years.
3. Dileep Kumar Saxena then filed OA No.303/2008 before the Central Administrative Tribunal, Principal Bench ('Tribunal'), and by an interim order dated 7th February, 2008 was allowed to appear in the viva voce.
4. OA No.303/2008 was disposed of by the Tribunal vide order dated

17.7.2008, recording as under:

“3. The three applicants herein by an order dated 28.01.2008 issued by the General Manager, Northern Railway, were debarred from appearing for Viva Voce Test to be conducted on 12.02.2008 and the same forced the applicants to knock at the doors of the Tribunal through this application. Now, it has been brought to our notice that in pursuance of the interim order of this Tribunal dated 07.02.2008, the three applicants were allowed to appear for the interview, which was held on 12.02.2008 and the results are also declared. Since by virtue of interim order, all the three applicants appeared for the interview the result of which has since been declared, we are of the opinion that nothing remains to be considered and the object of filing the OA is achieved by the applicants and that way, this application can be dismissed. Accordingly, the OA is dismissed as having become infructuous.”

5. As highlighted above, Dileep Kumar Saxena had secured 271.4 marks in the written examination and viva voce, and was the first amongst the five persons included in the final list. The direction, though vague, can be deciphered, was to appoint Dileep Kumar Saxena. This was the purport and spirit behind the order, when the Tribunal had observed that in terms of the interim order dated 7th February, 2008 Dileep Kumar Saxena had appeared in the interview and since the result had been declared, nothing

remained to be considered.

6. The petitioner herein took the order literally and despite the fact that Dileep Kumar Saxena had topped the list, did not issue the appointment letter. This was unfortunate, but what happened later was even more perplexing.

7. Dileep Kumar Saxena, flummoxed and confused, moved MA No.3/2009 seeking action, but did not succeed. The copy of the order dated 24.2.2009 disposing of MA No. 3/2009 has not been filed, but apparently Dileep Kumar Saxena was asked to take recourse to the appropriate remedy as per law.

8. The respondent filed OA No.2092/2009, which was dismissed as withdrawn vide order dated 16.8.2010, observing that Dileep Kumar Saxena would seek review of the order dated 24.2.2009, whereby OA No.303/2008 was disposed of.

9. The respondent filed Review Application No.290/2010 in OA No.303/2008, which was dismissed as withdrawn vide order dated 16.12.2010, observing that a better application should be filed. A second review application was filed, but was dismissed, observing no ground for review was made out and in the garb of review, attempt was to reargue the

case.

10. The conundrum is apparent and the frustration of Dileep Kumar Saxena understandable, and the stand and stance of the petitioner lamentable.

11. The respondent filed WP (C) No.6055/2012 before this Court, and the following order was passed:-

“1. OA No.303/2008 filed by 3 applicants, out of whom only 1 remains to fight the battle i.e. the writ petitioner before us, was disposed of by the Tribunal on July 17, 2008. The order does not adjudicate the merits of the controversy between the parties.

2. It so happened that the 3 applicants before the Tribunal were held not qualified to participate at the selection process for appointment to the post of Assistant Mechanical Engineer. Written examinations were over and viva-voce had to be held. The 3 applicants prayed to the Tribunal that they be permitted to appear at the viva-voce; needless to state they challenged the decision taken to debar them for participating further in the selection process. On February 07, 2008 an interim order was passed by the Tribunal permitting the 3 applicants to participate at the viva-voce simultaneously issuing directions to the General Manager Northern Railway to permit the 3 applicants to appear at the viva-voce. When the application came up for hearing the Tribunal held that since by virtue of

interim order the 3 applicants had appeared for the viva-voce, nothing remained to be adjudicated.

3. The Railway Authorities thereafter took the stand that there being no direction to declare the result, the results of the 3 applicants could not declare.

4. Application filed by the writ petitioner requiring directions to be issued for his result to be declared has been dismissed by the Tribunal.

5. Suffice would it be to state that the grievance of the petitioner has not been adjudicated upon by the Tribunal. Permitting somebody to participate in a selection process under an interim order would not mean that the main matter has become infructuous for the reason till the cause on which the Department was prohibiting a person from appearing at a selection process is decided, the lis subsists.

6. Accordingly, we dispose of the writ petition setting aside the impugned order dated July 17, 2008 as also September 23, 2011. We restore OA No.303/2008 for adjudication on merits by the Tribunal.”

12. By the impugned order dated 02.08.2016, OA No.303/2008 has been allowed, relying upon the judgment of the Supreme Court in ***Renu Mullick vs Union of India, 1994 SCC (1) 373***, that past service in the earlier unit would be counted for eligibility, i.e. the petitioner's prior experience would qualify him for sitting in the examination for the post of

Assistant Mechanical Engineer in the Loco/DSL Stream. The aforesaid dictum of the Supreme Court was followed in another OA No.1817/2005 vide order dated 5.1.2006. To this extent there is no dispute. The petitioners accept the verdict and directions. *Albeit*, the petitioners object to the direction for consequential benefits.

13. Learned counsel for the petitioners submit that the respondent should not be paid consequential benefits, as has been directed in Paragraph 9 of the impugned order, which, for the sake of convenience, is reproduced below:-

“9. In view of this, the O.A. is allowed and the respondents are directed to promote Shri Dileep Kumar Saxena to the post of AME w.e.f. the date the others have been promoted, with all consequential benefits. The time frame fixed for compliance of our order is 90 days from the date of receipt of a certified copy of this order.”

14. In the given facts and circumstances, we do not find any reason, whatsoever, to interfere with the impugned order. Dileep Kumar Saxena had secured the highest marks (271.4) and was ranked first amongst the five candidates selected. It is rather unfortunate that Dileep Kumar Saxena has suffered on account of the highly technical stand taken by the petitioners. Dileep Kumar Saxena was made to file an application, an original

application and two review applications. Had the petitioners acted in a reasonable and prudent manner, all proceedings could have been avoided. The defect in the prayer clause of the original application or the order/directions in the order dated 17.07.2008, was stretched and made a ground for completely unwarranted litigation.

15. There are decisions which hold that promotion should not be given with retrospective effect and that backwages should not be paid. There are contra decisions holding that backwages can be paid, depending upon the factual matrix of each case. Looking at the facts of the present case, the Tribunal was justified and correct in granting consequential benefits. There was no impediment or bar on the petitioners in promoting and appointing Dileep Kumar Saxena after he had secured the highest marks. They have caused inexplicable delay.

We do not find any merit in the writ petition and the same is dismissed. There shall be no order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

DECEMBER 07, 2016/tp