

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

+ **W.P.(C) 2581/2014**

Reserved on: 13th January, 2017
Date of decision: 2nd February, 2017

GENERAL MANAGER AND ORS. Petitioner

Through: Mr.J.K. Singh, Advocate

versus

PREM PAL SINGH & ANR. Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. CHANDER SHEKHAR

SANJIV KHANNA, J.

1. The Union of India through the General Manager- Northern Railways and two other functionaries have filed the present writ petition impugning the order dated 13th December, 2011 passed by the Principal Bench of the Central Administrative Tribunal in OA No.3863/2010 whereby the OA filed by the respondents, Prem Pal Singh and Kedar Nath has been allowed holding that the respondents would be entitled to second financial upgradation in the scale of Rs. 4500-7000 under the Assured Career Progression (ACP, for short) Scheme. The Tribunal, in allowing the said OA, has followed an earlier decision in OA No.182/2005 titled ***Bachan***

Singh and Ors. Vs. Union of India and Ors., decided on 17th February, 2006. The petitioners also impugn the order dated 9th December, 2013 of the Tribunal in R.A.No.187/2012.

2. When the matter was heard on 9th January, 2017, the facts were not clear and time was granted to the petitioners to place on record the relevant documents and papers necessary for adjudicating the issue before the Court, and the writ petition was listed for hearing on 13th January, 2017. On this date, counsel for the petitioner had placed before the Court a copy of the judgment dated 29th July, 2005 passed in OA.No.3008/2004 *Dhanpat Singh & Ors. Vs. Union of India*. However, other relevant papers and documents had not been produced and placed on record. We were not inclined to grant repeated adjournments and had accordingly heard arguments and reserved our judgment. Thus, we would now proceed to dispose of this writ petition on the basis of the papers and documents placed on record.
3. We record that there was no appearance on behalf of the respondents and in fact respondent no.1 had written a letter dated 30th August, 2016 to the petitioners stating that he would not like to contest the matter. The second respondent, having retired, possibly does not have the financial means to engage an advocate to appear in Court.
4. We would refer to the facts relevant to the present dispute as ascertained from the impugned order and the documents and papers on record. The accepted and admitted position is that the two respondents were appointed as 'Store Khallasi' in the pay scale of

Rs.196-232 (revised scale of Rs.2550-3200) on 15th April, 1978 and 15th January, 1971 respectively. In 1982, 30% of those working as Khallasis including the respondents, were placed in the scale of Rs. 200-250 (Revised to Rs. 2610-3540). The respondents assert that this was a mere reclassification of the post and did not amount to promotion.

5. The two respondents had jointly filed OA No.458/2008, for grant of financial upgradation under the ACP Scheme which was disposed of by a short order passed by the Tribunal dated 3rd July, 2008 recording as under:

“2. As the claim of the applicants for grant of ACP and extension on behalf of the decision in Dhanpat Singh & Ors. Vs. Union of India & Anr. (OA-3008/2004) decided on 29.07.2005, this OA is directed to be treated as a supplementary representation of the Applicants with a direction to consider their claims in the light of the decided case (supra) by a reasoned order to be passed within two months from the date of receipt of a copy of this order.

3. It goes without saying that in the event the applicants are still aggrieved, it shall be open for them to take recourse in accordance with law liberty to revive the present O.A. No costs.”

6. The averments made in the OA were to be treated as a supplementary representation by the respondents which was to be decided in the light of the decision of the tribunal dated 29th July, 2005 in *Dhanpat Singh & Ors. Vs. Union of India & Anr.* OA No.3008/2004.

7. At this stage, it is pertinent to note that a copy of the OA No.458/2008 has not been placed on record and we do not have the benefit of examining the averments made therein.
8. In compliance with the order dated 3rd July, 2008, the petitioners vide order dated 3rd November, 2008 had granted benefit of second financial upgradation in the pay scale of Rs.3050-4590 to the two respondents and some others under the ACP Scheme. They were also given arrears of pay.
9. The respondents thereafter filed a contempt petition No.441/2008 which was disposed of on 17th December, 2008 recording as under:

“As the direction of the Tribunal in OA NO.458/2008 stood complied with in the light of the **Dhanpat Singh and Ors. Vs. Union of India & Anr.** (OA.No3008/2004) insofar as replacement of pay scale of Rs.3050-4590. The remaining grievance whether this would have to be treated as 1st ACP or 2nd ACP and in the event, applicants make representation to the respondents showing that they have not been given 1st ACP, the same would be looked into by the respondents and also the fact that classification of a post would not amount to promotion by a speaking order to be passed within two months from the date of receipt of a copy of this order.”

The Tribunal had referred to the grievance of the two respondents and the *lis* and questions raised; whether the grant of scale of Rs.3050-4590 should be treated as the first or the second financial upgradation. As this remaining grievance had not been examined and answered, the respondents were granted liberty to make another representation, and upon the same being made, the petitioners were required to examine the issue. The contention of

the respondents was that reclassification of the post would not amount to promotion. The direction required the petitioners to pass a speaking order within two months from the date of receipt of the order.

10. The respondents made a representation which was rejected vide order dated 21st October, 2009, holding that the respondents were granted first promotion when they were given the pay scale of Rs.200-250 (revised scale of Rs.2610-3510) w.e.f. 1st August, 1982 and 1st August, 1985, respectively. On the said promotions, the pay had been fixed under Fundamental Rule 22 C (Rule 1313 of Indian Railway Establishment Code Volume-II). The respondents had also been granted the benefit of financial upgradation under the ACP Scheme in the scale of 2650-4000, which was revised to the scale of Rs.3050-4590, in view of the order passed by the Tribunal in the case of ***Dhanpat Singh (supra)***. Thus, the respondents had received one promotion and one financial upgradation.
11. The core and the primary issue which is to be decided is whether the grant of pay scale of Rs.200-250 (revised pay scale of Rs.2610-3510) was a promotion or mere re-designation. The said issue was specifically raised in the case of ***Bachan Singh (supra)*** and decided by the tribunal in the following manner:

“9. On bestowing our careful consideration to the entire aspect and rival contentions noticed hereinabove, we find justification in the contention raised that if the applicants were regularized in the year 1985, how could they be treated as having promoted to the next higher post on 1.1.1984, i.e., retrospectively, remains unclassified. On perusal of the Judgment in F.C. Jain (*supra*), we find that the ratio laid

down therein has full application in the facts and circumstances of the present case and that there is no justification to take a contrary and different view than the one arrived at, namely, mere fitment in the scale of pay w.e.f. 1.1.1984 could not be treated as promotion to the next higher post or higher grade of pay. The scope and purport of the ACP Scheme is entirely different than the one of the reclassification of grade in the year 1984. It is not disputed by the respondents that the first applicant was appointed as Lab. Khallasi on 10.4.1978 and he has rendered 24 years of regular service and as such, in our considered view, he becomes entitled to first as well as second financial upgradation, as he had not been promoted even once. Hence, first ACP would be available to him as on 1.10.1999 and the second financial upgradation on completion of 24 years of service from 10.4.1978 i.e. 10.4.2002. In case of applicants No. 2 and 3, they would be entitled to first ACP as on 10.10.1999 and the second financial upgradation in the year 2004/2005 respectively as they were appointed on 18.10.1980 and 4.10.1981 respectively.

10. In view of the above, we find no justification in the impugned communication dated 1.9.2004 and accordingly, the same is quashed and set aside. Consequently OA is allowed. Respondents are directed to grant and release them necessary benefits including arrears expeditiously and in any case with a period of two months from the date of receipt of a copy of this order. There shall be no order as to costs.”

12. We are unable to examine the correctness of the said reasoning, for the petitioners have failed to file the Recruitment Rules or place on record the relevant documents necessary for deliberation upon the issue at hand. In the absence of any material, it cannot be contended that the decision of the tribunal in **Bachan Singh's** case is fallacious and wrong. As noted above, we had afforded the petitioners an opportunity to file and place on record all material particulars and

documents, and on their failure to do so, cannot continue to indulge and grant repeated adjournments.. Accordingly, owing to the lack of relevant papers and documents, we would not like to interfere with the impugned order solely on the assumption and assertion that grant of scale of Rs.200-250 (Revised scale of Rs.2610-3510) should be regarded as promotion and not mere re-designation. The petitioners must suffer the consequences of the fault on their part.

13. The petitioners have filed on record the order dated 6th July, 2010 whereby OA No.2507/2009 filed by Dhanpat Singh and four others claiming relief that they should be granted second financial upgradation in the pay scale of Rs.4500-7000. It was highlighted that the Dhanpat Singh and others had made an identical claim as that of the respondents, for they had prayed for treating the grant of pay scale of Rs.3050-4590 as the first financial upgradation and not as the second financial upgradation, but the prayer was rejected. We have examined the said decision in the case of ***Dhanpat Singh*** and others and find that OA No.2507/2009 was dismissed by the Tribunal vide order dated 6th July, 2010 on technical grounds and not on merits. The Tribunal had held that Dhanpat Singh and others had earlier filed OA.3008/2004 and had restricted their prayer for grant of upgradation in the scale of Rs.3050-4590 under the ACP Scheme from 1st October, 1999 with consequential benefits including arrears of pay and allowances. In the said OA, Dhanpat Singh and others had not raised the plea and ground that this scale should be treated as first financial upgradation and they were also entitled to pay scale of Rs.4500-7000, as the second financial

upgradation. It is apparent that the Tribunal had applied the principle of *res judicata* or constructive *res judicata* and observed that the plea as raised was no longer available to them in view of the pleadings and averments made earlier in the OA No.3008/2004. The petitioners have filed before us a copy of the order dated 29th July, 2005 passed in OA No.3008/2004 filed by Dhanpat Singh and others and we find that this is factually correct.

14. Counsel for the petitioner could have argued that the plea of constructive *res judicata* would be equally applicable to the respondents herein. In fact, a feeble attempt was made to so urge by referring to the order dated 3rd July, 2008 disposing of OA.No.458/2008, which has been quoted above. The said argument cannot be accepted for the simple reason that the onus to establish constructive *res judicata* is on the petitioner. To discharge the onus the petitioners should have filed on record a copy of the pleadings made by the respondents in OA No.458/2008. This has not been done. This was also not done and argued before the Tribunal. We do not think that the plea of constructive *res judicata* should be accepted by merely referring to the order dated 3rd July, 2008, disposing of OA NO.458/2008 mentioned above for several reasons. As noted above pleadings have not been filed and secondly order dated 17th December, 2008 disposing of CP No.441/2008 shows that the bench was not convinced that the principle of *constructive res judicata* was applicable. We would not, on the basis of any assumption, infer and hold that the respondents in OA.No.458/2008 had confined and restricted their prayer to grant of scale of Rs.3050-

4590 and therefore, were barred and prohibited from raising the plea that grant of the scale of Rs.3040-4590/-, should be treated as first financial upgradation and not as the second financial upgradation.

15. The aforesaid discussion has led us to the following conclusions:

- (i) In the ***Bachan Singh's case (supra)*** it has been held that mere fitment in the scale of pay could not be treated as promotion to the next higher post or higher grade of pay. Accordingly, the respondents are entitled to first financial upgradation in the scale of Rs.3050-4590 and second financial upgradation in the scale of Rs.4500-7000/-, under the ACP Scheme. The petitioners have not filed the relevant papers including Recruitment Rules etc. to show and establish that the judgment of the Tribunal in the case of ***Bachan Singh (supra)***, is erroneous and does not lay down the correct law.
- (ii) The decision in the case of ***Dhanpat Singh (supra)*** is of no consequence. Their OA.2507/2009 was dismissed by applying the principle of constructive *res judicata* as Dhanpat Singh had filed an earlier OA.3008/2004 in which they had prayed for financial upgradation to the scale of Rs.3050-4590/-. In the OA.3008/2004, prayer for grant of financial upgradation in the scale of Rs.2650-4000/- was not made, neither was it contended that financial upgradation in the scale of Rs.2610-3540/-, should be

treated as the first financial upgradation. The subsequent OA No. 2507/2009 was, therefore, dismissed on the ground of constructive *res judicata*. The principle of *res judicata* or constructive *res judicata* would not be applicable to the case of respondents for the petitioners have failed to bring on record the pleadings in OA.458/2008 filed by the respondent at the first instance. Orders passed in the said OA and in the Contempt Petition No.441/2008 do not affirmatively establish that the plea of *res judicata* / constructive *res judicata* would be applicable.

16. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed. No order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

FEBRUARY 2nd 2017
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