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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 07.08.2019

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W.P.(C) 2932/2003

UNION OF INDIA & ANR.

..... Petitioners

Through: Mr. A.S. Dateer, Advocate

versus

S.K. JAIN & ORS.

..... Respondents

Through: Mr. H.C. Kharbanda, Mr. T.N. Saxena
& Mr. Vipin Kumar Saxena,
Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

JYOTI SINGH, J. (ORAL)

CM APPL. 32759/2019 (Early hearing)

The application is allowed and the matter is taken up for final disposal today.

C.M. stands disposed of.

W.P.(C) 2932/2003 & CM APPL. No. 5003/2003 (Stay)

1. The present writ petition filed by the Union of India through General Manager, Northern Railway and Chief Accounts Officer, Northern Railway, New Delhi assails the judgment dated 25.10.2002 passed by Central Administrative Tribunal, Principal Bench, New Delhi, in OA No. 814/2002. The learned Tribunal, by the impugned judgment, has allowed the OA and has quashed the order dated

07.03.2002 passed by the petitioners herein and has directed the petitioners to extend the benefit of including the past service rendered by the respondents in the grade of Junior Accounts Assistant (hereinafter referred to as 'JAA'), which service had already been included for computing the pensionary benefits, for the purpose of pay and allowances. However, the claim for inclusion of the past service for pay and allowances for the period between the date of termination as JAA and fresh appointments has been disallowed.

2. In nutshell, the brief facts are that the respondents herein, who were the applicants before the learned Tribunal, were initially appointed as JAAs in the pay scale of 330-550 (pre-revised) on different dates through the Railway Recruitment Board. As a term and condition of their employment, the respondents were required to qualify the Appendix IIA Examination I.R.E.M (hereinafter referred to as 'the examination') within the prescribed period of three years and within the prescribed number of chances for appearance in the said examination.

3. It is an admitted case of the parties that all the three respondents did not qualify the requisite examination within the prescribed period and accordingly their services were terminated in the year 1990. Against the said termination, respondent Nos. 1 and 2 filed an Original Application before the Central Administrative Tribunal, which was allowed and the termination orders were quashed. On a Special Leave Petition being filed by the petitioners, the Apex Court modified the orders of the Tribunal and directed the petitioners to give one more

chance to the respondents to clear the examination.

4. In spite of the extra opportunity given to the respondents, they were unable to clear the requisite examination and their services were again terminated. However, on a written request of the respondents, they were subsequently considered and appointed as Accounts Clerk as fresh entrants in the pay scale of Rs. 950-1500/-. This appointment was done on the basis of a policy of the Railways that in case a directly recruited JAA fails to qualify in the prescribed examination and is terminated, if the said employee seeks fresh appointment in the lower grade of Accounts Clerk, he can be considered for the said appointment as a fresh entrant. The policy is dated 06.10.1989 and further provides that in case of such an appointment, the benefit of past service would only be given for pensionary benefits and the requirement of training and passing a written test prescribed for directly recruited Accounts Clerk would be waived.

5. In the offer of appointment given to the respondents, it was stated that they would not be given any benefits of previous service except to count it for pensionary benefits. The respondents undoubtedly had given their acceptance for the various conditions mentioned in the offer of appointment on different dates including the condition of past service. On being employed as Accounts Clerk, the period of service of the respondents intervening between the termination and their subsequent employment in the lower post of Accounts Clerk was treated as 'dies non'.

6. It is significant to note here that on 24.03.1999, the Head

Quarter Northern Railway had issued a policy letter whereby it was decided that for those Accounts Clerks, who were initially appointed on compassionate grounds as JAAs and were reverted on account of non-passing of the examination, the past service would be counted. On the basis of this policy letter, the respondents gave a representation to petitioner No. 2 herein seeking counting of their past service as JAAs for the purposes of fixation of pay and allowances, protection of pay and other benefits claiming parity with those appointed on compassionate grounds but were similarly placed in all respects.

7. Getting no response to the representations, the respondents filed OA No. 3182/2001 before the Tribunal, which was disposed of by the Tribunal giving a direction to the petitioners herein to pass a speaking order vide its order dated 04.12.2001. Pursuant thereto, the petitioners passed a speaking order on 07.03.2002 rejecting the claim of the respondents for counting their past service in the higher post for the purposes of pay fixation.

8. Against the said speaking order, the respondents then filed OA 814/2002 with the following prayers:

“i) the Hon’ble Tribunal may graciously be pleased to pass an order of quashing the impugned order dated 7.3.2002 (Annex. A/1), and pass an order directing the respondents for re-fixation of pay of the applicants after counting the past service of the applicants rendered as junior Account Asstt before their appointment as Accounts Clerk, with all the consequential benefits;

ii) any other relief which the Hon’ble Tribunal deem fit and proper may also be granted”

9. Vide the impugned judgment dated 25.0.2002, the learned Tribunal has allowed the OA with the following directions:

“12. OA in the above circumstances succeeds substantially and is accordingly allowed. The impugned order dated 07.3.2002 is quashed and set aside and the respondents are directed to extend the benefit of including the past service rendered by them in the grade of Jr. Account Assistants which service had already been included for commuting the pensionary benefits, for the purposes of pay and allowances. The applicants will not however be entitled for the benefit inclusion of their service for the purpose of pay and allowances, in the interregnum between the date of their termination as Jr. Accountants as well as fresh appointments as clerks cum typist. No costs.”

10. It is this judgment which is impugned before us. Vide order dated 02.05.2003, this Court had issued notice to show cause to the respondents and the operation of the judgment dated 25.10.2002 was stayed. The said interim order continued till 10.01.2005, on which date ‘Rule DB’ was issued and the interim order was made absolute till the disposal of the writ petition. It is on an early hearing application filed by the respondent that the writ petition was listed before us today for final arguments.

11. We have heard the learned counsels for the parties and examined their respective contentions.

12. Learned counsel for the petitioner contends that the respondents were initially appointed as JAAs and their services were terminated as they had failed to qualify the prescribed examination. It was only as a matter of benevolence that the Railways had appointed them in the

lower post of Accounts Clerk, at their own request. This appointment was, however, subject to an express condition that it would be treated as a fresh appointment and would not entitle them to the benefit of past service except for counting it for pensionary benefits. The respondents having accepted these conditions were estopped from making any further claims on account of past service. The learned counsel further contends that the respondents had no vested right for being employed as Accounts Clerk. On the contrary, in the case of those appointed on compassionate basis had a vested right to continue in employment of the Railways, since they were dependents of those who had died while in Railway service. Though, they had not cleared the examination, but their right to continue on compassionate appointment subsisted and that is why they were only reverted to the lower post without any break in service. However, in the case of the respondents, the period from their termination to the fresh appointments was treated as '*dies non*' as per the Railway Policy and despite this, the past service was to be counted for pension. This benevolent action of the petitioners has been overstretched by the Tribunal in granting relief to the respondents.

13. Learned counsel for the petitioners further contends that the case of the respondents that they were similarly situated with those who were compassionate appointees is completely misconceived as the two categories did not stand on the same footing. While in the case of those appointed on compassionate grounds as JAAs, the appointments were given as a matter of policy due to the death of their family member in harness and at the time of appointment they were

deemed to possess adequate qualifications for holding the higher post. Thus, their right to continue in service was guaranteed to them and even on their failure to clear the examination, they were only reverted to a lower post without any break in service. However, in contrast, in the case of respondents, it was clearly mentioned that their failure to clear the examination will lead to termination of service and the fresh appointment was only an act of benevolence.

14. *Per contra*, the learned counsel for the respondents contends that no doubt, they had not cleared the prescribed examination for the post of JAAs and their services were terminated. However, the re-appointment as Accounts Clerk was as per the policy of the Railways and it cannot be said that the appointment as Account Clerks was an act of benevolence. It is further contended that those who were appointed on compassionate grounds as JAAs were similarly situated as the respondents, as they had also failed to clear the required examination and were appointed like the respondents as Accounts Clerk as a fresh appointment. The reason or ground set up by the Railways to distinguish the case of the respondents that there was a gap between the termination of the services of the respondents and their fresh appointment while in the case of the compassionate appointees there was no break, is totally misconceived and cannot be a ground to deny pay protection and fixation of pay as claimed by the respondents.

15. The learned Tribunal has allowed the O.A. on the ground that the persons who were appointed on compassionate grounds as JAA

and were reverted as Accounts Clerks were placed similar to the respondents herein and therefore depriving the respondents of the benefits of past service towards pay fixation, etc. was violative of equality as enshrined in Article 14 of the Constitution of India.

16. The facts are not in dispute between the parties and the narrow controversy which needs to be adjudicated in the present writ petition is whether the respondents are entitled to the benefit of the services rendered by them as JAAs for the purposes of pay protection and consequent pay fixation in the lower post of Accounts Clerk.

17. The undisputed fact is that the respondents were terminated from their services as JAAs on account of not clearing the prescribed examination. However, on account of a policy of the Railways, they were given fresh appointments to a lower post of Accounts Clerks. They were treated as fresh entrants in the said post and their past services as JAAs was counted only for the purposes of pensionary benefits. A perusal of the Policy dated 06.10.1989 issued by the petitioners shows that a conscious decision was taken by the petitioners that in the event of directly recruited JAAs not clearing the examination, they would be recruited as Account Clerks and the training and written test prescribed otherwise for direct recruits to the post of Accounts Clerks would be waived of. In view of this Policy, we cannot agree with the contention of the petitioners that appointing the respondents to the post of Accounts Clerks was an act of benevolence by the Railways.

18. In so far as the contention of estoppel is concerned, on the

ground that at the time of appointment, the respondents were informed that their past services would only account for pension and that the respondents had undertaken to accept the terms and conditions, suffice would it be to state that there is no estoppel against law. In service law, when an employee is appointed to a lower post, the formula of pay fixation provides that the pay protection of the erstwhile higher post would be given and till such time that the salary of the new post does not equalize with that of the higher post, the increments are paid. Therefore, if the law entitles pay protection, the mere terms and conditions of the respondents will not override the law.

19. There is yet another reason why the contentions of the petitioners do not appeal to us. The respondents had in their representations as well as in the original application before the Tribunal set up a categorical case that certain people who were appointed on compassionate grounds as JAAs and were terminated on account of not clearing the examination and were subsequently appointed as Accounts Clerks, were given the benefits of past service for pay protection and pay fixation etc. The petitioners have defended this similarity alleged by the respondents on the ground that those who were appointed on compassionate basis were not terminated but were simply reverted to the post of Accounts Clerks, with no break in service. The learned Tribunal has observed that this distinction between the two categories is a very artificial distinction and we cannot but agree with this finding and observations of the Tribunal. In our view, the respondents were similarly placed with those, who were appointed on compassionate basis. Both category of employees were

initially appointed as JAAs and could not clear the requisite examination to enable them to continue on this post. Both were then re-appointed to the lower post to Accounts Clerks. Unfortunately for the respondents, their services were terminated in the first instance and before they could be re-appointed, there was a break in the service. This was certainly not their creation. The petitioners chose to immediately revert those who had been appointed on compassionate basis and they were, thus, fortunate not to have a break in service. In our view, this cannot be a reason to discriminate the employees in the two categories. In fact, the Railways had itself taken the decision to appoint the respondents as Accounts Clerks and cannot deny them the benefit of the service rendered by them as JAA.

20. The Tribunal has, on account of the discrimination between the two set of employees and the law on past service, rightly directed the petitioners to extend the benefit of past service of the respondents in the grade of JAAs for the purposes of pay and allowances. We do not find any infirmity in the impugned judgment, while examining the same on the touchstone of Article 14 of the Constitution of India.

21. We hereby dismiss the writ petition, upholding the judgment of the Tribunal dated 25.10.2002. We direct the petitioners to give benefits of the said judgment to the respondents within a period of six weeks from today. The respondents will, however, not be entitled to inclusion of their services for pay fixation between the date of their termination as JAAs and fresh appointments as an Accounts Clerks.

22. The writ petition is accordingly dismissed with no order as to

costs. The interim order dated 02.05.2003, which was made absolute vide order dated 10.01.2005, is hereby vacated.

JYOTI SINGH, J

G.S.SISTANI, J

AUGUST 07, 2019
rd/pkb

HIGH COURT OF DELHI



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