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

+ **W.P.(C) 4941/2017**

RAVINDER SINGH Petitioner

Through: Mr.Gopal Aggarwal, Advocate.

versus

UNION OF INDIA & ORS Respondents

Through: Ms. Saroj Bidawat, Advocate for R-1
to R-5.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
% **09.10.2019**

CM Appl. No. 44195/2019 (delay)

1. For the reasons stated in the application, the delay of 150 days in the filing the counter affidavit is condoned. The same is taken on record and the application stands allowed.

W.P.(C) 4941/2017

2. This is the second round of litigation concerning the appointment of the Petitioner on compassionate grounds.

3. In the first round of litigation the Petitioner had to approach the Central Administrative Tribunal (CAT) by filing OA No.2224/2008 after his attempts at seeking such appointment as a result of his father, Shri Jai Singh,

who was a vehicle mechanic in the Vehicle Depot Workshop EME, Delhi Cantonment, going missing since 15th April 1999, did not succeed.

4. In the first round the CAT in its order dated 5th August, 2009 noted that the Petitioner had first applied for appointment to a Group 'C' or 'D' post on compassionate grounds on 29th December, 2003. The Board of Officers (BOO) considered his case on 6/8th December, 2004 and forwarded it to the Ministry of Defence (MoD) on 17th January, 2005. However, the MoD returned the recommendation on 12th May, 2005 asking for certain defects to be rectified. The defects were then rectified and the proposal was again submitted to the MoD. However, the MoD again rejected it on 1st February, 2007.

5. Again the BOO considered the case of the Petitioner on 11/13th July, 2007 and made yet another recommendation for his appointment on a compassionate basis. For the second time, the MoD rejected his case on the ground that no relaxation could be granted. It was in those circumstances that the Petitioner approached the CAT with aforementioned OA No.2224/2008.

6. During the pendency of the said petition, the CAT directed the Respondents to file an additional affidavit after noticing that the Petitioner had filed an application under the Right to Information Act and obtained information from the Respondents that in the list prepared by the BOO in July, 2007, the Petitioner had been placed at Sl. No.1 in the merit list. Pursuant thereto, the Respondents filed an additional affidavit on 21st July,

2009.

7. The CAT, in its order dated 5th August 2009, found that the reasons given by the Respondents in a speaking order dated 19th May, 2008, rejecting the Petitioner's request for compassionate appointment were arbitrary and discriminatory. The CAT found that Kalawati, wife of Sarika Ram, who was at Sl. No.2 in the merit list was appointed on compassionate grounds and two other juniors in rank to the Petitioner were also appointed ignoring the claim of the Petitioner. The CAT concluded that the Petitioner had 'suffered unexplainable and unjustified prejudice' and that his legitimate expectation had been affected by the letter dated 24th June, 2008. While setting aside both the order dated 19th May 2008 and the letter dated 24th June 2008, the CAT in its order dated 5th August, 2009 directed Respondent No.1 to consider the available recommendations of the BOO for appointment of the Petitioner on compassionate grounds within four weeks.

8. The Respondents challenged the above order of the CAT in this Court by filing W.P.(C) 12611/2009. This Court by the order dated 23rd October, 2009 dismissed the said writ petition and confirmed the order of the CAT. This Court noted that the Petitioner had scored 91% points, whereas Kalawati had secured 85 % points after applying the criteria for making appointment on compassionate grounds. The operative portion of the order of this Court reads as under:

“Having heard learned counsel for the parties, we are of the opinion that no infirmity can be found in the view taken by the Tribunal. The submission of learned counsel for the Petitioner is that Smt. Kalawati was in greater need of employment than the

Respondent because she has two minor children whereas the Respondent has some adult sisters. While this may be so, the fact remains that on the parameters laid down and accepted by the Petitioners, the Respondent scored 91 percentage points as against Smt. Kalawati who scored only 85 percentage points. Therefore, on the basis of the criteria laid down by the Petitioners themselves, the need of the Respondent was comparatively greater than the need of Smt. Kalawati. Smt. Kalawati cannot be said to have a better claim than the Respondent merely because she has some minor children, otherwise this would mean the incorporation of an entirely new criteria which is not a part of the scheme devised by the Petitioners. We, therefore, find that the Tribunal was correct in the view it has taken and it rightly directed the Petitioners to reconsider the case of the Respondent. There is no dispute that the Respondent is fully eligible for appointment on compassionate grounds and has been so recommended. Consequently, the Petitioners should reconsider his case and grant him appointment on compassionate ground as already recommended. However, this should not be construed to mean that Smt. Kalawati should be removed from service. We expect the Petitioners to comply with our orders within a period of four weeks from today.

The writ petition stands disposed of.”

9. From the counter affidavit filed in the present writ petition it appears that consequent upon the above order of this Court, the Petitioner's case was once again considered. This time his appointment at the 505 Army Base Workshop, Delhi Cantonment was approved. He joined duty there on 29th June, 2010.

10. The counter affidavit of the Respondents further states that as far as Kalawati is concerned, her husband went missing on 4th May, 1998. She had

to approach the Court for a declaration that she and her children were the legally wedded wife and children respectively of her husband. This was done by a decree dated 8th August, 2002 of the civil court. Her case for appointment on a compassionate basis was thereafter taken up and her appointment was approved by the sanction of DG, EME on 30th May, 2008. It is not disputed, however, by the Respondents that in the merit list, the Petitioner stood at Sl. No.1 with 91 % points, whereas Kalawati was second with 85 % points.

11. Aggrieved by the delay in the Respondents appointing him and the relative loss of seniority vis-a-vis those who were below him in the merit list, the Petitioner in the second round approached the CAT by filing OA No. 4140/2012. In this OA, the Petitioner pointed out that his representation that his seniority should be fixed from the date Kalawati was appointed on compassionate grounds was rejected on 19th February, 2011. An appeal against the said rejection order was also rejected on 15th March, 2012.

12. In resisting the above application the Respondents raised three preliminary objections before the CAT as follows:

(i) In the first round of litigation, the Petitioner had not raised the plea of seniority and therefore he should be held to have waived such a plea.

(ii) Since the Petitioner failed to raise the said plea in first round, the principle of *res judicata* and constructive *res judicata* would apply.

(iii) The persons against whom the Petitioner was claiming the relief of seniority had not been made party to the OA.

13. The CAT appears to have accepted the above preliminary objections in paras 22 and 23 of the impugned order which read thus:

“22. As noted above, from the order of the Tribunal in OA No. 2224/2008 (supra) and the judgment of the Hon'ble High Court in Writ Petition (C). No. 12611/2009 (supra), it becomes abundantly clear that the issue of seniority was very much before the Tribunal/ Hon'ble High Court and hence before the parties at that time as well, but the fact remains that the applicant did not raise this issue at that point of time and neither this Tribunal nor the Hon'ble High Court passed any order on the issue of seniority. The only order passed by the Tribunal or the High Court was for consideration of the applicant's claim for compassionate appointment. Therefore, the principles of *res judicata*, waiver, estoppel and acquiescence will apply in this case and we hold that on these grounds itself, the OA is not maintainable.

23. It is a fact that the applicant is seeking seniority and notional fixation of pay vis-a-vis some so called juniors who are not before us as the applicant has not arrayed them as private respondents. Therefore, clearly this OA also suffers from the defect of non-joinder of necessary parties and on this ground also is not maintainable.”

14. The CAT then considered the merits of the case and accepted the plea of the Respondents that in terms of the circular dated 9th October, 1998 of the Department of Personnel and Training (DoPT), seniority would be counted only from the date of actual appointment. In the present case, pursuant to the order of this Court the Petitioner here was appointed on 29th June, 2010 and, therefore, could reckon his seniority only from that date. The CAT noted

that the High Court had rejected the arguments of the Respondents that Kalawati was in greater need of employment but added that “we state this just to indicate that it is not because of abuse of power but because of some reasoning Smt. Kalawati was given appointment earlier”.

15. Mr. Gopal Aggarwal, learned counsel for the Petitioner, stressed that the Respondents could not take advantage of their failure to grant the Petitioner appointment from the date on which he was considered meritorious for such appointment. He submitted that the Respondents unjustly invoked the DOPT circular dated 9th October, 1998 to deny him his right of fixation of his seniority from the date when Kalawati was appointed. He further submitted that there was no question of the Petitioner waiving the plea of seniority in the first round, as the Petitioner without securing appointment on compassionate grounds could not have raised such a plea. Such a plea would have been pre-mature at that stage.

16. Mr. Aggarwal submitted that CAT was in error in holding that the persons who were likely to be affected by the Petitioner’s plea in relation to seniority were not made party. He pointed out that even before the CAT, Kalawati and two others, who were below the Petitioner in the merit list for appointment on compassionate grounds, were indeed made party.

17. This Court notices that in the impugned order of the CAT Kalawati, Manjula and Alwin Francis Montha, the three private Respondents likely to be affected if the Petitioner’s plea of seniority were to be upheld, were indeed impleaded in the Petitioner’s OA before the CAT as Respondent

Nos. 6, 7 and 8. Even before this Court, they have been impleaded likewise. However, despite service of notice they have chosen not to contest the present petition. This was the position before the CAT as well.

18. Ms. Saroj Bidawat, learned counsel for the Respondents referred to the counter affidavit filed where the same stand as urged before the CAT has been taken. In other words, it is contended that in terms of the DoPT circular dated 9th October, 1998 the *inter se* seniority of persons appointed on the compassionate grounds can be reckoned only with reference to the actual date of appointment and not earlier.

19. This Court has considered the aforesaid submissions. At the outset, it is required to be noticed that there is an Office Memorandum (OM) dated 29th April, 2003 issued by the DoPT which states that the request for compassionate appointment has to be regulated strictly in accordance with DoPT instructions. This was followed by the OM dated 5th May, 2003 with the subject “time limit for making compassionate appointment”. In para 3 of the said OM it is stated as under:

“3. The maximum time a person's name can be kept under consideration for offering Compassionate Appointment will be three years, subject to the condition that the prescribed Committee has reviewed and certified the penurious condition of the applicant at the end of the first and the second year. After three years, if compassionate appointment is not possible to be offered to the Applicant, his case will be finally closed, and will not be considered again.”

20. In other words, a person's case for appointment on compassionate basis

cannot be kept pending for more than three years. In the present case, from para 4 to 6 of the counter affidavit it is seen that the Petitioner's case was first considered and a proposal was submitted by the BOO for his appointment on compassionate basis on 6th/8th December, 2004. This was, however, turned down by the MoD. The second time when the recommendations were made by the BOO was on 11th/13th July, 2007.

21. The entire proceedings of the BOO dated 11th/13th July, 2007 have been placed on record before this Court as an annexure to the additional affidavit filed by the Respondent in OA No. 2224/2008 before the CAT. As part of the annexures to the said proceedings is a table showing the relative position of the Petitioner on the one hand and Respondent Nos. 6, 7 and 8 on the other for appointment in Group 'C' and 'D' categories in September, 2006. The Petitioner figures at Sl. No. 1 in the merit list with 91% points. Kalawati is at Sl. No.2 in merit list with 85% points. Manjula and Alwin Francis Montha Respondent Nos. 7 and 8 respectively, each have 72 and 70% points respectively. There is no doubt, therefore, that at the time of recommendation by the BOO there was vacancy in the 5% quota for appointment on compassionate grounds against which the Petitioner could have been appointed as he was in fact at Sl. No.1 in the merit list. This is admitted by the Respondent in their counter affidavit filed in the present case, para 5 of which reads as under:

“The case was re-examined by the BOO for the QE September 2006 held on 11-13th July, 2007 taking into account of the 5% wastage vacancies as per DoPT OM No. 14014/3/2005-Estt (D) dated 14 Jun 2006. In the board, the Applicant was placed in his

relative merit and stood in the 1st position and recommended for compassionate appointment against 5% quota.”

22. It appears that for the third time, the Petitioner’s case was considered by the BOO and again a proposal was sent to MoD on 31st October, 2007. This was done consistent with the para 11(e) of the DoPT circular dated 9th October, 1998. Again, the case was turned down by the MoD on 18th December, 2007. The detailed speaking order in support of such rejection was passed on 19th May, 2008. It is only after the said reasons were given to him that the Petitioner could approach the CAT in the first round with O.A. 2224/2008 which has been discussed herein before. The reasons put forth by the Respondents in the said order dated 19th May, 2008 were rejected by the CAT and the same were quashed with the directions to the Respondent No.1 to consider the existing recommendations of the BOO within a period of four weeks for appointment of the Petitioner on compassionate grounds.

23. It is thus seen that although the Petitioner was found eligible for being appointed on a compassionate basis from December, 2004 onwards, for no fault of his, the case for his such appointment was not taken up till the order of the CAT was affirmed by this Court by its order dated 23rd October, 2009. It is only thereafter that Petitioner was appointed and he joined his duties on 29th June, 2010.

24. As already noticed, Kalawati was appointed on 30th May, 2008. While it is a fact that her appointment was at the station workshop in EME, Jabalpur whereas the Petitioner was appointed at the Army Base Workshop in the Delhi Cantonment, the Petitioner’s appointment was on a date almost two

years after the appointment of Kalawati. This delay in the Petitioner's appointment was entirely attributable to the Respondents. While it is true that the DoPT OM dated 9th October, 1998 states that the *inter se* seniority of persons appointed on compassionate grounds has to be reckoned with reference to the date of appointment, in the present case by delaying the date of the Petitioner's appointment till two years after the appointment of Kalawati, who was below him in the merit list, the Respondents have caused prejudice to the Petitioner.

25. The Court is unable to accept the plea that the Petitioner ought to have raised this issue in the first round of litigation and that not having done so he should be held to have waived such claim. If the Petitioner had raised such a claim even when his case for appointment on compassionate grounds had not been accepted in accordance with DoPT OM dated 9th October 1998, it would have been considered premature. Further, the plea regarding seniority not having been in issue earlier, the order of the CAT in the first round cannot be said to bar the Petitioner from raising that plea on the principle of *res judicata*. It is true that both the CAT and this Court in the first round merely directed that the Respondents should consider the case of the Petitioner for appointment on compassionate ground and did not issue any specific direction concerning seniority. However, no such direction could have been given since that was not in issue in the first round.

26. The Petitioner was justified in expecting the Respondents to act in accordance with law as far fixing his notional seniority and pay was concerned. There is merit in the Petitioner's contention that his seniority and

pay ought to have been fixed on notional basis from at least the date of the appointment of Kalawati, who was immediately below him in the merit list.

27. The CAT was also in error in holding that those affected by the plea of the Petitioner regarding seniority had not been made parties before the CAT. As already noticed hereinabove, they were parties both before the CAT and in this Court but chose not to contest.

28. For the above reasons, the impugned order dated 24th May, 2016 of the CAT is hereby set aside. A direction is issued to the Respondents to issue appropriate orders, not later than four weeks from today, notionally fixing the seniority and pay of the Petitioner from the date of appointment of Kalawati, i.e. 30th May, 2008. It is, however, made clear that the Petitioner would not be entitled to any arrears of pay as a result thereof. The petition is accordingly allowed but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

OCTOBER 09, 2019

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