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Ct. No. 04

Akd

WP.CT. 56 of 2021

Bikash Roy
Vs.
Union of India & Anr.

Mr. Ujjal Roy,
Mr. Arpa Chakraborty.

... for the petitioner.

Mr. Subhankar Chakraborty,
Mr. Saptarshi Bhattacharjee,
Ms. Ruchira Manna.

... for the respondents.

The instant writ petition has been taken out by the petitioner challenging an order dated 26th September, 2019 passed by the Central Administrative Tribunal, Calcutta Bench, in Original Application No. 350/01630/2017, whereby and whereunder the application challenging the speaking order dated 11th September, 2017 passed by the Divisional Railway Manager (P) was dismissed on the ground that the petitioner himself opted for lower post at the lower grade pay and, therefore, is estopped from contending otherwise.

Before we proceed to deal with the points urged before us, it would be relevant and apposite to adumbrate the salient facts, which are more or less undisputed.

The petitioner was working as PM-A under Chief Yard Master/Santragachi in the pay band of Rs.5200-20200/- at the Grade Pay of Rs.1900/-. The petitioner suffered with various ailments and was medically decategorized and on the recommendation of the Screening Committee constituted in the Operating Department of Kharagpur Division in alternative category posted to the post of Station Peon at the lower grade pay of Rs.1800/-.

A declaration was submitted by the petitioner before the Screening Committee that he is willing to

accept the post of station peon in the Operating Department which had lower grade pay of Rs.1800/-.

Subsequently the petitioner raised an issue that in view of the Indian Railway Establishment Manual, which basically deals with absorption of disabled/medically decategorized staff in an alternative employment and specifically provides that such staff shall not be put into lower grade pay but should remain in the same grade pay in the alternative department, if feasible; the decision of the authority in relegating the petitioner at the lower grade pay is contrary to the said Manual.

The representation so made was not attended by the authority and an application was made before the Tribunal being OA 861/2017. It appears that the order was also passed by the Divisional Railway Manager (P), South Eastern Railway, Kharagpur Division, on 19th August, 2016 denying the benefit to the petitioner under the aforesaid Manual. The said tribunal application was disposed of 29th August, 2017 directing the competent authority to take a decision on such representation and communicate the result thereof to the writ petitioner.

Consequent upon the said direction having passed by the Tribunal, the competent authority passed a speaking order dated 11th September, 2017 denying the prayer of the petitioner that he should have been placed in a post having an equivalent grade pay. The said decision was solely based upon the declaration made by the petitioner and the estoppel to operate against him.

Challenging the same a tribunal application being OA No. 350/01630/2017 was taken out, which is dismissed by the impugned order solely on the ground that the moment petitioner showed his willingness to accept the lower post having lower

grade pay, he cannot take a rebound and contend that he should have been placed at the same grade pay. The relevant portion of the impugned order is reproduced as under:-

“5. In the written statement the respondents have categorically submitted that due to medical categorization and willingness to accept lower pay with Grade Pay of Rs.1800/-, applicant’s pay was re-fixed in Grade Pay of Rs.1800/- with Rs.500/- Personal Pay to protect his original pay and as such, his original pay was not reduced at any time. As such, the decision relied upon by the applicant is not applicable in the facts and circumstances of this case.

6. In view of the fact that upon medical decategorization, applicant himself gave his willingness to accept the lower post with lower grade pay and accordingly his pay was re-fixed after protecting his original pay, we do not find any infirmity or illegality in the matter of re-fixation of pay of the applicant.”

Learned Advocate for the petitioner submits that Rule 1301 of the said Manual categorically provides that a railway servant, who has become partially incapable because of ailments and not in a position to perform the duties to the post which he held, should not be dispensed or reduced in rank but should be shifted to some other post with same pay-scale and service benefits.

According to the learned Advocate, such being the provision contained in the said Manual, the authority should not have acted in contravention therewith and should have extended the benefits,

which the petitioner was enjoying at the post before being declared medically incapacitated. It is further submitted that the employee does not stand on a bargaining position with the employer because of the fear of losing the livelihood and any act done on the dictate of the employer, which prejudicially affected his right, cannot withstand in the judicial scrutiny and placed reliance upon an unreported judgement of the Supreme Court rendered in case of *Somesh Thapliyal & Anr. ETC vs. Vice Chancellor, H.N.B. Garhwal University & Anr. (Civil Appeal No(s). 3922-3925 of 2017)*.

He further submits that even if the petitioner was granted special allowances, but such allowances can never be attached to grade pay and, therefore, the benefits which are attached to such grade pay, may not be counted or calculated on the basis thereof.

The learned Advocate appearing for the Railway Administration submits that neither the competent authority nor the Tribunal has committed any error in rejecting the claim of the petitioner for the simple reason that the petitioner himself voluntarily accepted the regularization in the lower post having a lower grade pay and, therefore, is estopped from contending otherwise. It is further submitted that the promissory estoppel would operate against the petitioner. The petitioner having elected to accept the proposal by making declaration, there is no infirmity in the decision of the competent authority as well as the Tribunal in rejecting the claim of the petitioner.

On the conspectus of the arguments so advanced before us, the point, which emerged therefrom, is whether the petitioner after making a declaration to accept the proposal to be placed at the lower post with lower grade pay can resile therefrom

by taking shelter under the provisions of the said Manual.

The facts as enumerated hereinabove leaves no ambiguity in our mind that the petitioner, who became medically incapacitated because of the ailments and declared unfit to render services attached to the post which he held and in view of the provisions contained in the said Manual, is required to be declared medically decategorized. The provisions concerning such aspect is no doubt for the welfare of the employee, who may not be allowed to lose his livelihood to sustain the family but may be retained in the employment so that the family should not suffer penury. The object is more need based and intended for the benefit of the employee and, therefore, such beneficial provisions is required to be interpreted and construed in such perspective.

The employment is a challenging phenomenon because of the huge unemployment in the country and a person, who was competent and eligible to be appointed and having appointed at the post and otherwise competent to discharge the functions attached to some other posts, may not be put to the disadvantages as he has not been declared a complete medically disabled or unable to perform any duty required by the institution.

Precisely for such reason Chapter 13 of the said Manual finds place therein containing various provisions depending upon the eventuality and the circumstances. Para 1301 contains a broad head pertaining to the absorption of disabled/medically decategorized staff in alternative appointment. The aforesaid provision is quoted as under:-

“A Railway servant who fails in a vision test or otherwise by virtue of disability acquired

during service becomes physically incapable of performing the duties of the post which he occupies should not be dispensed with or reduced in rank, but should be shifted to some other post with the same pay scale and service benefits.”

From a meaningful reading of the aforesaid provision, it leaves no doubt in our mind that a railway servant, who fails his vision test and otherwise because of the disability acquired during the service has been declared unfit to perform the duties to the post, should not be dispensed or reduced in rank, but should be shifted to some other post with the same pay-scale and the service benefits.

To mitigate the situation where there is no alternative post in the said Department the framers of the said Manual were conscious about the same and incorporated paragraph 1303 by inserting the concept of creating supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit.

Para 1304 provides absorption to the substantive post upon abolition of the supernumerary post, if such post is fit for such medically decategorized staff.

On a conjoint reading of the aforesaid paragraphs, it is manifest that the staff after having medically decategorized because of the impairment or locomotive disability or of any such kind may not be thrown out of the job but may be posted in an alternative post having the same pay-scale and benefits nor shall be reduced in rank. The framers were conscious that there may not be a substantive post suitable for such medically decategorized staff in the Department and incorporated the provision that

supernumerary may be created and the duties may be assigned to such staff which he can render without any difficulties or having no impact on his medical health.

Railways, in fact, decided to put the petitioner in an alternative post but sought for a declaration that in absence of such suitable alternative post at the same grade pay the petitioner if agreed may be placed in a post having lower grade pay.

The enlightening observations made in the said unreported Supreme Court judgment in *Somesh Thapliyal (supra)* may have thrown some light on the concept of unequal bargain where the employer holding dominion position commands to the employee who always stand at the weaker position; such observations made in paragraphs 42 and 43 of the said unreported Supreme Court judgment are quoted as under:-

“42. The submissions of the learned counsel for the respondents that the appellants have accepted the terms and conditions contained in the letter of appointment deserves rejection for the reason that it is not open for a person appointed in public employment to ordinary choose the terms and conditions of which he is required to serve. It goes without saying that employer is always in a dominating position and it is open to the employer to dictate the terms of employment. The employee who is at the receiving end can hardly complain of arbitrariness in the terms and conditions of employment. This Court can take judicial notice of the fact that if an employee takes initiation in questioning the terms and conditions of employment, that would cost his/her job itself.

43. The bargaining power is vested with the employer itself and the employee is left with no option but to accept the conditions dictated by the authority. If that being the reason, it is open for the employee to challenge the conditions if it is not being in conformity with the statutory requirement under the law and he is not estopped from questioning at a stage where he finds himself aggrieved.

Learned Advocate for the Railways has not disputed that the Indian Railway Establishment Manual is prepared in exercise of power conferred in the substantive Act and is not a mere executive document. If such being the position, the Manual, which is created in exercise of statutory power, has a statutory flavor and, therefore, the authority has to act and adhere the provision thereto. It is not a mere executive decision or for working of the establishment itself.

The authorities created under the statute or served in a public domain cannot do anything unless conferred by law and, therefore, any departure therefrom may be susceptible to be interfered with through the judicial fiat.

A responsible employer has a duty to divulge all the rights and benefits which the employee enjoys or is entitled under the statutory document and cannot seek any declaration which prejudicially affects the employee and put him in a disadvantageous position. The employee may not be aware of his rights created in a statutory document and may be forced to act which is prejudicial to his interest leading to denial of legitimate claim. Although the declaration has been made by the petitioner accepting the proposal of the employer to put him at the lower post/rank with

lower grade pay, but such declaration having sought by the employer in dominating position, is contrary to the spirit of the said Manual, which clearly debars the posting of such medically decategorized staff to a lower post/rank as well as at the lower pay-scale. There cannot be an estoppel against the statute. If the statute provides the thing to be done in a particular manner, such thing shall be done in such a manner and not otherwise. The employer cannot act at his whims nor by exerting the dominating position unless his employee to act prejudicially to his entitlement or right created in the Manual.

Both the authorities and Tribunal have proceeded simplicitor on the basis of such declaration made by the writ petitioner and without adverting to the nitty-gritty of such provisions contained in the Manual and have denied the benefits to the petitioner by rejecting the application.

We thus do not find any justification in the order of the Tribunal as well as the competent authority rejecting the representation of the petitioner claiming the same grade pay and the benefits attached thereto and, therefore, the same are quashed and set aside.

Since the petitioner has already attained superannuation, he is entitled to the financial benefits and, therefore, we direct the respondent no. 2, the Divisional Railway Manager (P), South Eastern Railway, Kharagpur Division, to calculate the benefits attached to the said grade pay, which the petitioner held at the time of being declared medically decategorized and shall ensure that all such financial benefits are extended to the petitioner within eight weeks from the date of communication of this order. The authorities shall also re-fix the pensionary and other retiral benefits on the basis of the grade pay and shall disburse the same, if not

already disbursed, at an earliest.

With the above observations, the writ petition is disposed of.

There will, however, be no order as to costs.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)