

Sushil Kumar Sahni and Others Vs.

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Court : Central Administrative Tribunal CAT Delhi

Decided On : Jan-30-2012

Judge : The Honourable Dr. Veena Chhotray, Member (a) & the Honourable Mr. a.K. Bhardwaj, Member (J)

Appeal No. : Original Application No.2406 of 2011 to 2426 of 2011

Appellant : Sushil Kumar Sahni and Others

Advocate for Pet/Ap. : For the Applicants: N.S. Dalal, Advocate. For the Respondent: J.S. Bhasin, U.N. Tiwary, Ajesh Luthra, Ms. Arati Mahajan with Nitesh Kumar, Advocates.

Judgement :

Dr. Veena Chhotray:

1. As is submitted by the counsels appearing for the parties, these batch Original Applications involve closely related facts and common issues of law. Hence they are being disposed by this common order. The applicants in all these OAs are represented by the learned counsel Shri N.S. Dalal, while the respondents by different learned counsels, as mentioned above. As the lead case, OA No.2410/2011 (Ashok Kumar vs DTC) would be argued by the learned counsels, Shri N.S. Dalal and Shri J.S. Bhasin respectively for the applicant and the respondents. The references in this Order pertain to this case unless otherwise specified.

2. Through these OAs the applicants, previously appointed as Conductors and subsequently as Assistant Store Keepers, are seeking the benefits of second and third financial upgradations under the ACP/MACP Schemes, counting their service from the date of appointment as Conductors. Besides, they also seek quashing the impugned order dated 5.1.2011 in respect of S/Shri Sunil Kumar and Paramjit Sharma, applicants in OA No.2419/2011 and 2411/2011 respectively.

3. The brief factual matrix of these cases is summed up below.

3.1 The applicants of all these OAs had initially been appointed as Conductors on daily wage basis to be regularized in course of time in that capacity. This took place some time during the years 1982-83. The DTC implemented the ACP Scheme w.e.f. 12.8.2002, vide its Circular dated 23.8.2002 (Annex A/7). On introduction of this Scheme in the DTC, the applicants got their first ACP in the year 2002.

3.2 In the year 2005, the respondents invited applications from among the Conductors with Higher Secondary qualification and at least two year's experience of Store Keeper. The applicants participated in this selection process and were appointed as Assistant Store Keepers. The relevant appointment order dated 6.6.2005 is annexed with the Counter Affidavit filed by the Respondents. As per the respondents, the posts of Conductors and Assistant Store Keepers are two different cadre posts with different pay scales. However, the emphasis of the applicants is on the switch over claimed to be by way of mere 're-designation' in this case besides the pay protection of their existing emoluments given to the selected employees.

3.3 The grievance of the applicants is that the Respondents are now taking the date of appointment as Assistant Store Keeper i.e. 6.6.2005 as the relevant date for purposes of reckoning their entitlement for the next financial up-gradation and stating it to be due in June 2015. As per the applicants, however, after counting 24 years of service from the date of their regular appointment as Conductors in 1982-83, they would be entitled to the second ACP from some time in the years 2006-07. Along with the OA, the Respondent's letter dated 5.1.2011 has also been enclosed in which the above view of the Respondents in respect of two Assistant

Store Keepers viz. S/Shri Sunil Kumar and Paramjeet Singh (Applicants in OA Nos.2419 and 2411/2011) has been communicated. The OAs seek quashing of this impugned order.

4. Shri N.S. Dalal, the learned counsel for the applicants would argue the subsequent appointment of the applicants as Assistant Store Keepers not being a case of direct appointment but simply one of re-designation. Further, it would be submitted that as per the Respondent's own stand, the service as Conductors was being counted for the purposes of Pension but not for financial up-gradations under the ACP/MACP Schemes. As per the learned counsel, such a dissection could not be permitted.

It would also be contended that while as Conductors they were getting the pay scale of Rs.3050-4590, on grant of the first ACP, the pay scale given to them was Rs.4,000-6,000, which was protected even after their re-designation as Assistant Store Keepers. Thus, according to the learned counsel, the applicants had not been given the benefit of a higher pay scale in the wake of being re-designated as Assistant Store Keepers. The case of the applicants would be stated to be squarely covered by the clarification issued under Para 5 of the ACP Scheme as introduced by the DTC. Emphasizing that the benefits under ACPS are limited to higher pay scale, it had been clarified that if an employee is appointed to another post, it should not make any difference for purposes of ACP, so long as he remains in the same pay scale (enclosure with the Rejoinder).

An averment of some other similarly situated persons having been given this benefit would also be made. In this context, the information received under the RTI in respect of one Shri Pradeep Soni would be cited (Annex. A/6). Besides, the learned counsel would rely on the decision of the Principal Bench of the Tribunal in the TA No.776/2009 decided on 25.9.2009. It would be contended that the issues in the present OAs were squarely covered by the decision in this TA.

5. Several objections would be raised on behalf of the Respondents. Shri J.S. Bhasin, the learned counsel, would rebut the rival contention of the subsequent appointment of the applicants as Assistant Store Keepers being cases of mere re-designation. Adverting to the relevant appointment order, the learned counsel

would argue these to be cases of fresh appointments. It would also be submitted that the said appointments had been made with certain specific stipulations. These, inter alia, included that for the purposes of financial up-gradations/promotions, the regular service was to be counted from the date of appointment as Assistant Store Keepers. As per Shri Bhasin, having accepted these terms of appointment, the applicants were now precluded from taking pleas to the contrary. Non-challenge of the relevant orders of appointment at an appropriate point of time or even in the present OA would also be highlighted by the learned counsel.

Shri J.S. Bhasin, the learned counsel for the respondents, would argue that even taking the case of the applicants at its face value about the date of entitlement for the next financial upgradation being the years 2006-07, the present OAs were time barred and hit by delay and latches. The learned counsel would rely upon certain judicial rulings to support his case.

The thrust of the learned counsel would be about the cadres of Conductors and the Store Keepers being different with different pay scales. Referring to their comparative hierarchical tabular statement submitted in the Counter Affidavit, the learned counsel would submit that whereas the pay scale of the post of Conductor was Rs.3050-4590, that for Assistant Store Keeper was Rs.3200-4900. As the pay scales of both these posts were not identical, the clarification No.5 under the DTC ACP Scheme being relied upon by the applicant's learned counsel would be averred not to be applicable in the present case. On the other hand, the learned counsel would seek to highlight the condition no. 9 under the MACP Scheme, relied upon in the OA (a copy annexed to the OA as Annex. A/2 would be stated to be not a correct representation of the relevant condition).

Producing a copy the DTC Circular dated 17.12.2009 regarding implementation of the MACP Scheme Condition 9 would be referred. As per this Condition, while 'Regular Service' for MACP was to commence from the date of joining of a post in a direct entry grade, however, past continuous regular service in another Govt. department carrying same Grade Pay, without a break, was also to be counted. As per Shri Bhasin, since the Pay Grades of the posts of Conductor and Assistant

Store Keeper were not the same, the applicant's services as Conductors could not be reckoned for purposes of financial upgradations.

6. The averment of discrimination would be strongly rebutted by Shri Bhasin who would submit that even in those cases where the second financial upgradation had been granted taking into account the initial service as Conductors, they were wrongly given and Respondents were taking corrective steps. In support, a Circular No.PLD-V/ACP/11/7335 dated 22.12.2011 would also be produced by the learned counsel.

The last contention of Shri Bhasin would be further reinforced by the learned counsel, Ms. Arati Mahajan representing the Respondents in the OAs No.2424/2011 and 2426/2011. Explaining the case of Shri Pradeep Soni, it would be submitted by the learned counsel that he had got ACP only after 24 years of service in the post of Assistant Store Keep.

7. The above contentions would be sought to be rebutted by the applicant's learned counsel Shri Dalal. He would further submit that acceptance of appointment letter would not preclude the applicants from claiming benefit of ACP Scheme on the basis of the service rendered by them as Conductors. As per the learned counsel, the claims now being agitated were in accordance with the basic Scheme of ACP/MACP. Further, it would be argued that no rule of estoppel could not be evoked against law. The respondent's plea of 'delay' would also be sought to be rebutted by submitting about the rejection letter issued in similar cases of two Applicants of these batch OAs by the impugned letter dated 5.1.2011. Besides, the denial of financial upgradations as per entitlement constituting a recurring cause of action, would be contended. Even the judgments being relied upon on behalf of the respondents, would be submitted not to be applicable in the present cases since they affected third party rights, which was not the case here.

As regards Shri Pradeep Soni, the learned counsel would submit that the name of Shri Soni did not figure in the Circular dated 22.12.2011, now produced by the respondent's learned counsel Shri Bhasin, regarding withdrawal of the erroneously granted second ACP benefits. The contention of Ms Arti Mahajan would also be sought to be rebutted by submitting that while granting the ACP benefits to Shri

Soni, the initial service as Conductors had been taken into account.

8. Having carefully considered the respective submissions and the material on record, we find the following aspects relevant.

8.1 The Order of appointment as Assistant Store Keepers dated 6.6.2005 enclosed by the respondents as Annex. R/2 inter alia, stated as follows:-

“The following Conductors have been found suitable for the post of ASK and are hereby appointed as ‘Asstt. Store Keeper’ with immediate effect in the pay scale of Rs.3200-85-4900 on the terms and conditions enumerated hereunder. Their posting have been indicted against each:

XXXX XXXX XXXX XXXX XXXX

They will be on probation for a period of one year. They can be reverted to their substantive post at any time without notice and without assigning any reason therefore.

They will continue to draw their basic pay/perks in the pay-scale they are getting and no additional monetary benefit will be given instantly on their re-designation/appointment.

For the purpose of financial upgradation/ promotion, their regular service will be counted from the date of their appointment as Asstt. Store Keeper and their candidature can be considered for promotion to the post of Store Keeper/Chief Store Keeper on the principle of seniority-cum-fitness.

They will be treated as fresh appointee as A.S.K. However, their past seniority shall be counted towards pension benefits etc., if applicable as per rules.

Xxxxx” (emphasis supplied)

The contention of the applicant’s learned counsel about the appointment of the applicants as Assistant Store Keepers not being a case of fresh appointment but only of re-designation cannot be conclusively accepted as per the appointment letter in question. This view is further reinforced by the Respondent’s argument of

the appointment being preceded by the appointees being on probation for one year. It is also noted that the appointment as Assistant Store Keeper is in the pay scale of Rs.3200-4900, which admittedly is different from the pay scale of Rs.3050-4590 of the posts of Conductors.

8.2 We also find merit in the Respondent's contention about the appointment order having clearly stipulated that for the purposes of financial upgradation, the regular service of such employees was to be counted from the date of their appointment as Assistant Store Keepers. This was made applicable in the case of promotion also where the candidature was to be considered for promotion to the next hierarchical posts of Store Keeper/Chief Store Keeper. Evidently, the applicants had accepted these terms of appointment in 2005 without any protest at that time regarding the stipulation in respect of financial upgradations. There is no averment before us about the same having been challenged by them earlier in any OA; nor do they form a subject of challenge in the present OAs. Therefore, the applicants are virtually trying to agitate the claims for entitlement regarding financial upgradations at variance from the terms of the appointment orders in question, which already stand accepted by them long ago in 2005.

8.3 As regards the objection by Shri Dalal to evoking the principle of estoppel; the same is also not found to be tenable. The applicants joined on the post of Assistant Store Keeper accepting the conditions contained in the Appointment Letters offered to them. Having accepted such conditions and assumed the charge of the post in question, the applicants are estopped from questioning the conditions of the appointment letter and agitate claims like the services rendered by them as Conductors to be taken into account for determining their eligibility for the benefit of ACP etc. The learned counsel is not correct in raising the plea of non-application of the principle of estoppel against law, as in the present case he is unable to show any provisions of law in terms of which even after accepting the post of Assistant Store Keeper in a higher pay scale, the applicants are entitled for reckoning the benefits of past service rendered by them as Conductors for entitlement to upgradation of pay scale in terms of the ACP Scheme. Rather in terms of the aforementioned Clarification No.5, once the applicants had accepted the post in the pay scale higher than the posts occupied by them at the time of

assuming such higher post, they would not be entitled to reckoning the past service rendered by them on lower posts for ACP purposes. Accordingly, we accept the plea of estoppel raised by the learned counsel on behalf of the respondents.

8.4 The claims in these OAs are also hit by limitation as well as delay and latches. As stated above, the basic cause of action arose in the year 2005 itself at the time of issuance of the said appointment order and its acceptance on the part of the applicants. Taking the argument further, even taking their claims at face value, they were entitled to the second financial up-gradation during the years 2006-07; however, the present OAs have been filed in 2011. Thus, as is trite, those who sleep over their rights do not have equity in their favour.

Further the mere plea that in a similar case on a representation made in 2010, the Respondents have rejected it by an order of January, 2011 would not help the applicants either to cross the bar of limitation as prescribed under Section 21 of the AT Act or cross the hurdle of delay and latches.

The contention of the applicant's learned counsel about ACP being a recurring cause of action and hence the present OAs not being hit by delay and latches or limitation is also not found to be acceptable. This is because ACP is not a normal incidence of service, the benefits of which can flow to an employee automatically just in due course of service. On the other hand, before such benefits can be made admissible in favour of an employee, there has to be a screening to ascertain the fulfillment of the prescribed conditions by a Committee constituted for that purpose. Surely, as per the claim of the applicants, such a cause of action would have accrued to them only in the years 2006-07.

8.5 In its recent judgment in D.C.S. Negi Vs Union of India and Ors dated 7.3.2011 for Special Leave to Appeal (Civil) 7956/2011 CC 3709/2011 (arising from the judgment and order dated 11.4.2008 in WPC No.6350/2007 of the High Court of Delhi), the Hon'ble Apex Court in no uncertain terms expressed disapproval of entertaining applications in disregard of Section 21 of the AT Act. Taking note of the negative form in which the language of the Section was couched, it was held that Tribunal, which is a creation of the Statute, must first consider whether the

application is within the limitation period as per Section 21 or sufficient cause to condone has been shown as per Section 21 (3). The present OAs do not come within the purview of Section 21 of the A.T. Act.

9. To conclude, having considered the foregoing preliminary objections raised by the Respondents, we do not find the OAs as maintainable nor do we consider it necessary to further delve into the issues on merit. Accordingly the OAs stand dismissed hereby with no orders as to costs.

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