

RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH ALLAHABAD

Dated: This 06<sup>th</sup> day of February 2020

**HON'BLE MR. RAKESH SAGAR JAIN, MEMBER – J**

**Original Application No. 330/00978 of 2015**

Brijesh Kumar Mishra, S/o Late B.B Mishra, Administrative Assistant 'A' Defence Materials & Stores Research & Development Establishment, G.T. Road, Kanpur R/o P-31/2 Type II Raksha Vihar Colony, Shyam Nagar, Kanpur - 208013

.....Applicant

By Advocate: Ms. Saumya Mandhyan/Shri S.J. Istiaque

Versus

1. Union of India through Director General, Defence Research & Development Organization, New Delhi.
2. Scientific Adviser, Defence Research & Development Organization, DRDO Bhawan, Rajaji Marg, New Delhi.
3. The Director, Defence Materials & Stores Research & Development Establishment, P.O. Road, Kanpur – 208013.

.....Respondents

By Advocate: Shri Ashutosh Shukla

**ORDER**

1. Applicant Brijesh Kumar Mishra in the present O.A. seeks the following reliefs:-

- "(i) *To issue a writ, order or direction in the nature of certiorari quashing the order dated 26.02.2015 as served under covering letter dated 13.03.2015 passed by Additional Director (Personnel) for Director General, Defence Research & Development Organization, New Delhi.*
- (ii) *To issue a writ, order or direction in the nature of mandamus commanding the respondents to accord seniority and other consequential benefits relating back to appointment letter dated 31.01.2001.*
- (iii) *To issue such order and further order or direction which this Hon'ble Tribunal may deem fit and proper in the nature and circumstances of the present case.*

(iv) to award cost of the petition to the applicant".

2. Case of applicant is that his request for appointment on compassionate grounds was rejected by the respondent-department which order of rejection was challenged in Hon'ble High Court, Patna. The Writ petition was allowed by the Hon'ble High Court vide order dated 15.01.2001 wherein respondents were directed to issue compassionate appointment order within 2 weeks. Respondents filed LPA No. 458/2001 against the order 15.01.2001 which was dismissed vide judgment dated 24.01.2002. Thereafter, respondents preferred SLP against the order dated 24.01.2002. The SLP was dismissed and appointment order dated 05.01.2011 was issued by respondents.
3. It is the further case of applicant that it is settled law that employment under compassionate grounds is to be accorded from the date when the judgment was passed by the Hon'ble High Court and the delay in issuing the appointment letter is attributable to the respondents and for which delay, the applicant cannot be made to suffer. Therefore applicant is entitled to notional pay, seniority etc from 31.01.2001 but his representation for being entitled to notional benefits from 31.02.2001 was rejected by the Ministry of Defence vide order dated 26.02.2015. Therefore, applicant seeks seniority and other consequential benefits relating back to appointment letter dated 31.01.2001.
4. The relevant portion of the impugned order 26.02.2015 (Annexure A-1) reads as under:

*"2. The matter has been examined in consultation with the concerned authority. Thereafter, it has been found that after dismissal of Civil Appeal No. 8905/2003 by the Apex Court, the department implement the judgment of the Hon'ble High Court. Accordingly, a post of Admin Asstt. 'A' was released by DHRD vide their letter dated 07.06.2010 to DMSRDE, Kanpur. Further, necessary instructions from this HQ were also issued to appoint Shri Brijesh Kumar Mishra to the post of Admin Asstt. 'A' on compassionate grounds. Accordingly, Shri Brijesh Kumar Mishra was appointed as Admin Asstt. 'A' on*

compassionate grounds in the year 2010. Earlier, a representation dated 12.03.2014 was submitted by the applicant to SA to RM for retrospective grant of appointment from the date of the order dated 15.01.2001 passed by the Hon'ble High Court of Patna which was not agreed to.

3. In view of the above circumstances, it is pertinent to mention that the claim of Smt. Sarojini Mishra for retrospective appointment on compassionate grounds to her son is not sustainable under the eye of law since the order passed by the Hon'ble High Court dated 15.01.2001 did not reach its finality because there is a continued stay granted by the Hon'ble Apex Court for operation of the impugned order of the High Court. The order of the Hon'ble High Court relates its finality after dismissal of the SLP. The appointment on the compassionate grounds cannot be claimed retrospectively".
5. The mainstay of the stand of respondents in countering the O.A., as per, their Counter Affidavit is that:
  - "(i) That, the applicant made representations dated 21.1.2014 (Annexure A8 to the OA) & representation dated nil (Annexure A12) for preparing the dates of appointment between 15.1.2001 and 30.01.2001 from 19.01.2011 (the date of appointment) on the post of Admn. Asstt. 'A'. The said representations were decided by the authorities concerned by a speaking and reasoned orders dated 6.3.2014 (Annexure A9) and 26.2.2015 (Annexure A-1 impugned order).
  - (ii) That, in the representation dated 21.1.2014, the applicant has relied upon the order dated 13.2.2010 of the Apex Court in Civil Appeal No. 8905 of 2003 Union of India Vs. Sarojini Mishra whereby the UOI's appeals has been dismissed. Full facts of the case are not mentioned in the aforesaid order. However, he has also relied upon the Supreme Court's order dated 13.5.1998 in a series of

litigations in C.A. No. 2710 to 2722 of 1998 arising out of SLP (C) No. 339 of 1994 Director of Education, U.P. (Secondary) and another Vs Pushpendra Kumar and others whereby the court has allowed the appeal of the Director of Education (Secondary), set aside the judgment of Allahabad High Court and disposed of the writ petition of the respondents with the direction that if no class III post is available in the Institution in which the deceased employee was employed as in any other institution in the district, the said respondent would be appointed against a class IV post in the institution in which the deceased employee was employed and a supernumerary post in class IV be created for that purpose. The order passed by the District Inspectors of Schools for appointment of the respondents applicants in appeals, other than appeal arising out of S.L.P (C) No. 2734 of 1992, are restored and the respondents applicant in the said appeal should be treated as having been appointed on a class IV post as per the order for such appointment that were issued by the District Inspector of Schools, in appeals arising out of SLP (C) No. 2734 of 1993 the concerned District Inspector of Schools shall consider the application of the respondent applicant for appointment and if no class III post was available on the date of passing of the impugned judgment of the High Court, the said respondent applicant should be appointed on a class IV post in the institution in which the deceased employee was employed with effect from the date of the impugned judgment of the High Court.

*In the said appeals, the High Court had taken the view that under the Regulations as they stood prior to notification dated 2.2.1995 a supernumerary post in class III was required to be created for appointing the dependent of the member of teaching/non teaching staff in a non-government aided institution dying in harness. This view of the High Court was assailed by the appellants.*

The Hon'ble Court has exhaustively dealt with the issues involved in the appeals and has observed that the provision of compassionate appointment (being as a departure from the general provisions by following said procedure) is in the nature of an exception to the general provisions and an exception cannot subsume the main general provision and thereby nullify the provisions by taking away the right conferred by the main provisions.

This decision of the Hon'ble Supreme Court is not helpful to applicant in the case of appointment on class IV post of a dependent of a member of a teaching/non-teaching staff of an aided institution has been made effective from the date of order of the High Court, while nothing has been so said in the case of those dependents who were appointed in class III posts.

Besides the facts of the aforesaid cases being quite different, in the case of applicant (Sri Mishra) no such order has been made by the High Court.

- (iii) That while deciding the representation dated nil to Hon'ble Raksha Mantri, the matter has been examined in consultation with the concerned authority. Thereafter it has been found that after dismissal of Civil Appeal No. 8905/2003 by the Apex Court, the department implement the judgment of the Hon'ble High Court. Accordingly, a post of Admin Asstt. 'A' was released by DHRD vide their letter dated 7.6.2010 to DMSRDE Kanpur. Further, necessary instructions from this HQ were also issued to appoint Shri Brijesh Kumar Mishra to the post of Admin Asstt. 'A' on compassionate grounds. Accordingly, Shri Brijesh Kumar Mishra was appointed as Admin Asstt. 'A' on compassionate grounds in the year 2010. Earlier a representation dated 12.3.2014 was submitted by the applicant to SA to RM for retrospective grant of appointment from the date of the order dated 15.1.2001 passed by the Hon'ble High Court of Patna which was not agreed to.

*In view of the above circumstances, it is pertinent to mention that the claim of Smt. Sarojini Mishra (applicants mother) for retrospective appointment on compassionate grounds to her son is not sustainable under the eye of law since the order passed by the Hon'ble High Court dated 15.1.2001 did not reach its finality because there is a continued stay granted by the Hon'ble Apex Court for operation of the impugned order of the High Court. The order of Hon'ble High Court relates its finality after dismissal of the SLP. The appointment on the compassionate grounds cannot be claimed retrospectively.*

*For kind perusal of this Hon'ble Court, photocopy of final order of Apex Court is enclosed as ANNEXURE SCA2.*

- (iv) *That it is most important to mention here that after dismissal of appeal by the Apex Court on 13.1.2010, the applicant was given appointment vide appointment letter dated 5.1.2011. The stay order granted by the Apex Court on 10.1.2003 was in existence till the date of final disposal of appeal, as such, no action was taken with regard to this case.*
- (v) *That all the action taken by the respondents are in conformity with various Rules and instructions issued in this regard. The applicant has utterly failed to come forth with any cogent grounds for filing the present original application before this Hon'ble Court. The very averment made by the applicant under paragraph reference are based on the surmises and conjuncture and in any view of the matter cannot be substantiated by the applicant and as such, the claim of the applicant deserves to be dismissed on the ground of concealment of material evidence".*

*In view of the aforesaid facts and circumstances, the aforesaid OA may kindly be dismissed being devoid of merits".*

6. I have heard and considered the arguments of the learned counsel for the parties and gone through the material on record.
7. The record of the case reveals that Hon'ble High Court vide order and judgment dated 15.01.2001 directed respondent-department "to provide appointment as claimed by the petitioner on compassionate ground by issuing order within 2 weeks of the receipt/production of a copy of this order commensurate to his qualification." The respondent-department carried the matter upto the Hon'ble Apex Court by filing a SLP which was dismissed vide order dated 13.01.2010 by observing that "Heard learned counsel for the appellants. In the facts of the present case, we are not inclined to exercise our jurisdiction under Article 136 of the Constitution of India. No order as to the costs. Interim order dated 10.01.2003 shall stand vacated." Accordingly the respondents issued the order of appointment dated 05.01.2011 (Annexure No. A6)in favour of applicant.
8. The limited controversy in the present O.A is whether applicant is entitled to notional seniority and its consequential benefits of notional pay etc from 15.01.2001 when the Hon'ble High Court issued direction for appointing the applicant on compassionate grounds or whether the applicant would be entitled to seniority etc from the date of his appointment letter dated 05.01.2011.
9. Applicant filed representation for fixing his seniority with reference to the direction dated 15.01.2001 of Hon'ble High Court directing respondent to appoint the applicant. Applicant's case being that but for the litigation initiated by the respondent-department, he would have been appointed on latest by first week of February 2001. Applicant points out that keeping in view the direction of Hon'ble High Court, he would have been appointed latest by first week of February 2001, therefore, applicant be given notional seniority and its consequential benefits from February 2001.
10. Indubitably, the facts coming out in the present O.A. that direction was given by the Hon'ble High on 15.01.2001 to appoint the applicant within two weeks and his appointment was delayed on account of litigation carried by the respondent-department and which litigation

was beyond the control of the applicant. In these circumstances, impugned order dated 26.02.2015 (Annexure- A1) is quashed and set aside. Direction is issued to the respondent-department to refix the notional seniority of the applicant and fix his pay scale and all the benefits attached thereto, as per, Rules on the basis that the applicant was entitled to being appointed on compassionate ground from 01.02.2001, as per, direction of the Hon'ble High Court but the respondent chose to litigate for which the applicant cannot be faulted with. But the applicant will not be entitled to back wages or any other financial benefit, save and except the notional seniority. The directions must be complied with within three months. O.A. is accordingly disposed off. No costs.

**(Rakesh Sagar Jain)**

Member (J)

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