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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI.

D.A.1516/87

Date of decision: 27.8.93

Shri Jagdish Rai Gupta ... Petitioner.

Versus

Union of India & Ors. ... Respondents.

CORAM:

THE HON'BLE MR. JUSTICE V.S. MALIMATH, CHAIRMAN.
THE HON'BLE MR. S.R. ADIGE, MEMBER(A).

For the petitioner. - Ms Raman Oberoi, proxy for
Shri B.S. Mainee, Counsel.
For Respondent No. 1 and 2. - Shri N.K. Aggarwal, Counsel.
For Respondent No.3. - Shri Ratan Paul, proxy for
Shri G.D. Gupta, Counsel.

JUDGEMENT (ORAL)

(By Hon'ble Mr. Justice V.S. Malimath, Chairman)

The petitioner, Shri Jagdish Rai Gupta, was holding the post of Trains Clerk in the year 1965 and came to be promoted as Traffic Inspector in the year 1982. Applications were invited for filling up the post of Yard Master from among the departmental candidates. For some reason or the other we are not required to consider that part of the case as the same has not been pressed. The petitioner did not appear for the selection. Respondent No. 3, Shri Budh Ram Sharma, offered himself as a candidate and was duly selected and empanelled on 11.10.1982. Before formal orders of promotion on the basis of the ranking in the panel could be given, an order regarding restructuring of the pay-scale by upgrading the percentage of post was made on 13.8.1983, copy of which order has been produced in this case as Annexure A-X. It is clear from the same that only ^apercentage of the posts upgraded to carry higher scales of pay. The order in specific

terms states that the implementation of the restructuring scale of pay on revised percentage basis shall take effect w.e.f.

1.8.1983. It further states that the promotion of Yard Masters in each of the grades shall take effect w.e.f. 1.8.1983. But so far as fixation of pay is concerned, the benefit shall be given from 1.8.1982 without payment of arrears. This order regarding restructuring was made in the light of the Railway Board's letter dated 29.7.1983. It is clear from this order that the benefit of promotion to the higher scales was required to be given w.e.f. 1.8.1983 though for the purpose of fixing the pay an earlier date i.e. 1.8.1982 was required to be taken. The order, Annexure-A-X makes it clear that the name of the petitioner is at serial No.14 by which he has been accorded the higher scale of pay of Rs.550-750, fixing the pay at Rs.570/- w.e.f. 1.8.1983. That the petitioner was entitled to the benefit of higher scale of pay of Rs.550-750 w.e.f. 1.8.1983 stands clearly established by the order Annexure AX.

2. So far as Respondent No.3 is concerned, he having secured empanelment, was given promotion and his pay was fixed in a particular scale. The orders in this behalf were amended from time to time to which we need not adverted to. It is enough to advert to the last order dated 23.2.1985, Annexure A-XII,

by which he was accorded promotion w.e.f. 17.6.1983 and to the scale of Rs.550-750 w.e.f. 1.8.1983. That is the clear effect of the order Annexure A-XII. It cannot be disputed that so far as Respondent No. 3 is concerned, he also got into the scale of pay of Rs.550-750 w.e.f. 1.8.1983.

3. From what we have stated above that the petitioner as well as Respondent No. 3 got into the same scale of pay with effect from the same date, i.e. 1.8.1983. Whereas the petitioner got into the scale by operation of the restructuring order, Respondent No. 3 got into very scale by the process of selection made for promotion to the higher grade. The question for examination is as to who should rank senior among the two persons when both came in the same scale of pay from the same date, i.e. w.e.f. 1.8.1983. The answer to this is provided by the order of the Railway Board dated 23.4.1984, Annexure R-3/3. Paragraphs 2 and 3 of the said order are extracted below for facility of reference:

"2. Doubts have been raised in regard to operation or otherwise of panels which were approved on or before 31.12.83 and were current on 1.1.1984. The matter has been considered and it is clarified that wherever panels had been approved on or before 31.12.83 and they were current on 1.1.84, the vacancies existing on that date and also those arising due to upgradation as a result of the said panels/ should be first filled by the persons on the said panels. The remaining vacancies will be filled on the basis of modified selection procedure. In other words, the terms "Vacancies existing as on 31.12.1983 and those arising on 1.1.1984 due to cadre restructuring", appearing in para 4.3 of the Board's letter referred to above, should be taken as covering only those vacancies which are available after any panel current on that date (as explained above) is exhausted.

3. The clarification in the preceding para will apply/mutates mutandis to Board's letter of 29.7.83 referred to above subject, in particular, to the provisions in paras 3.3 and 3.4 abid."

Paragraph 2 of the order deals with the effect of restructuring and empanelment which took place during the subsequent year. The clear effect of the said order is that those who come to the higher scale of pay during the relevant period by the process of selection and empanelment have to rank above those who come to the same scale during the same period by the process of restructuring. The counsel for the petitioner is right in pointing out that that paragraph does not deal with the restructuring order of 1983. Then, paragraph 3 of the order, Annexure R-3/3 says that what is stated in paragraph 2 mutandis covers the Board's letter dated 29.7.1983. The restructuring order of 13.8.1983 says that it is based on the Railway Board's letter dated 29.7.1983. Copy of the said order not having been produced by any of the parties, we had granted time to the counsel for the respondents/ to produce the same. Accordingly, the same was produced before us today. It is clear from the same that what has been referred to in paragraph 3 of Annexure R-3/3 is the restructuring order of 29.7.1983 on the basis of which the order regarding restructuring dated 13.8.1983 with which we are concerned was passed. The refore, what is stated in paragraph 2 of the order mutandis covers restructuring effected in pursuance of the Railway Board's letter dated 29.7.1983 and consequent order made on 13.8.1983(Annexure A-X). In view of the Railway

Board's order Annexure R-3/3 it is clear that the person empanelled has to rank senior to the person who gets into the same scale ~~xxxxxxxxxxxxxx~~ the process of restructuring. Hence, the respondents were right in placing in the seniority list Respondent No. 3 above the petitioner though both got into the very scale of pay of Rs.550/750 on the same date i.e. 1.8.1983. The claim of the petitioner in this behalf cannot be granted.

4. It is necessary to state that the petitioner's counsel did not press the case about the petitioner not having been afforded an opportunity to participate in the selection for preparing the panel for promotion. Hence, it has become unnecessary for us to discuss ^{the} petitioner's case in this behalf.

5. The only other question for examination is the complaint of the petitioner about the threatened action to recover from the petitioner the benefit of higher scale of Rs.550-750 accorded to him on the basis of the restructuring order. The petitioner's case is that he was served with a notice as per Annexure-A-II dated 22.6.1987 requiring him to show cause as to why the excess amount paid in the scale of Rs.550-750 should not be recovered from him on the ground that though the petitioner was transferred and posted to a post carrying higher scale of Rs.550-750, the petitioner did not carry out the said order and did not join at the place of posting. The petitioner

gave a reply as per Annexure A-XV on 13.7.1987 stating that he has never received a copy of the order of posting and that, therefore, it cannot be said that he refused to work on the post to which he was posted. Thereafter, no formal order appears to have passed to make recovery of the higher amount paid to the petitioner. But the petitioner apprehending recovery approached this Tribunal and obtained an interim order staying recovery. The respondents have not pleaded that they have passed any order for recovery. It is obvious that if any order for recovery was passed, one would expect ^{them} to produce the same. Annexure A-II is not an order of recovery. It is only a notice requiring the petitioner to show cause as to why the recovery should not be made. The petitioner has shown cause in response to the notice vide Annexure A-XV.


Silence on the part of the respondents in not making any order of recovery would justify an inference that the respondents were satisfied with the explanation offered and, therefore, they dropped further proceedings for recovery. On facts so far as the petitioner is concerned, he has taken the stand in the rejoinder that the order of transfer relied upon by the respondents dated 29.10.1984 was not made known to him, that none came to take charge of the post held by him and none asked him to vacate the post held by him and to go on transfer. The petitioner's case is that no order regarding posting having been passed, ^{the} respondents are not entitled to blame the petitioner for not joining at the place to which he was posted. The order makes it clear that it is a common order for several

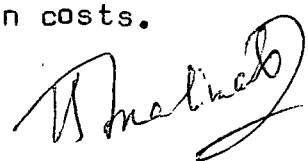
persons. In the normal course, one would expect it to have been served to all concerned. The petitioner has further taken the stand that he was not made aware to the same. They have received the reply to the show cause notice dated 22.6.1987, as pleaded by the petitioner. As already stated, it would be reasonable to draw an inference from the conduct of the respondents that the respondents did not consider it just and proper to make an order for recovery against the petitioner. We say so because the respondents have not stated that they have made any such order regarding recovery. Though ^{the} recovery was stayed, there is no direction restraining the respondents from passing an order holding that the petitioner is liable to refund. As the respondents have not passed any order for the last six years after issuing notice to the petitioner, we are justified to draw an inference in favour of the petitioner. What is surprising in this case is that though the order of transfer appears to have been made in the year 1984, the notice regarding refund of the excess amount comes to be issued nearly after two years and eight months. What is more surprising is that if the petitioner did not obey the order of transfer, no steps were taken by the respondents either to enforce the order of transfer or to cancel the order of transfer or to take punitive action for breach of discipline. The conduct of the respondents regarding silence in all these matters further strengthens the inference that the respondents were not at all serious in taking steps against the petitioner for not joining at the place to which he has been transferred. Having regard to all these circumstances, we consider it just and proper to direct the

respondents not to effect any recovery of the difference in emoluments, the petitioner having been paid the salary in the higher scale of pay of Rs.550-750. This does not, however, mean that the respondents are not entitled to give the petitioner if they have not already done so a proper posting to a post carrying the higher scale of pay of Rs.550-750. If hereinafter the petitioner does not comply with the order regarding posting in the post carrying higher pay scale of Rs.550-750, we reserve liberty to withhold the payment in the higher scale of pay.

6. For the reasons stated above, this petition is partly allowed. While rejecting the claim for seniority of the petitioner over Respondent No.3, we restrain the respondents from recovering from the petitioner the difference in the pay and emoluments paid to him in the higher pay scale of Rs.550-750 till this date. We, however, reserve liberty to the respondents to make an appropriate order of posting of the petitioner in the post carrying the higher scale of Rs.550-750. In the event of the petitioner not joining the post to which he has been transferred, the respondents ^{then} would/be at liberty not to accord to him the benefit of the higher scale of pay of Rs.550-750 with effect from the date of making such an order.

7. Parties shall bear their own costs.


(S.R. ADIGE)
MEMBER(A)


(V.S. MALIMATH)
CHAIRMAN