

[Open Court]

THIS THE 16TH DAY OF NOVEMBER, 2011

Present:-

**HON'BLE MR. JUSTICE S. C. SHARMA, MEMBER-J
HON'BLE MR. SHASHI PRAKASH, MEMBER-A**

Original Application No. 45 of 2004
U/s 19, Administrative Tribunal Act, 1985

Narain Ram son of Shri Ratan Ram, MES No.455577 H.S. Grade-I C/o Garrison Engineer-MES, Hempur, (A.O.) R.T.S.&D. Hempur, District Udhampur, U.P.

.....Applicant

VERSUS

1. Union of India, Ministry of Defence, New Delhi, through Secretary.
2. The Garrison Engineer No.2, Shahjahanpur Road, Bareilly Cantt. Bareilly, Uttar Pradesh.
3. Garrison Engineer MES Hempur, U. S. Nagar, (Uttranchal).

Advocate for the Applicant:- Sri R. C. Pathak
Sri U. N. Bhardwaj

Advocate for the Respondents:- Sri R. K. Srivastava

ORDER

Instant O.A. has been instituted for the following reliefs:-

"i) That the Hon'ble Tribunal may be pleased to quash the letter dated 09.6.2003 (Annexure A-1) and letter no.10.3.97 (Annexure A-2) and grant all consequential benefits including seniority, promotion fixation of pay and back wages.

ii) *That the Hon. Tribunal may be pleased to issue any writ, direction or order in the nature of mandamus directing the respondents to grant the benefit of A.C.P. Scheme*

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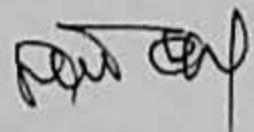
(Annexure A-24) with all consequential benefits including pay fixation, seniority, promotion and back wages.

iii). That the Hon'ble Tribunal may be pleased to issue any other suitable, writ order or direction which may be deemed fit proper under the facts and circumstances of the case.

iv). That the Hon'ble Tribunal may be pleased to award costs of the petition in favour of the petitioner."

2. The pleadings of the parties in nutshell may be summarized as follows:-

It has been alleged by the applicant that he was appointed as Driver Engine Static (DES) on 08th August, 1972, that he had already passed next Trade Test of Engine Fitter as prevailing at that time vide GE (AF) Izzatnagar P.T.O. dated 02nd June, 1980 which was the line of promotion at that time. Thereafter, applicant was re-designated as Fitter General Mechanic (F.G.M.) under Fitment of Industrial Workers in MES left out Categories as per order dated 01st February, 1995. That the having already passed the Trade Test equivalent to H.S.-II was exempted from passing any trade test for promotion to F.G.M. Grade-II Copy of the order is Annexure-A-4 dated 16th February, 1996. The applicant was promoted to the post of Fitter General Mechanic H.S.-II vide order dated 30th June, 1995 and he was placed in the time scale. The applicant was directed to appear again in the Trade Test as one time measure against 20% though the petition was already promoted to F.G.M. H.S.-II, but

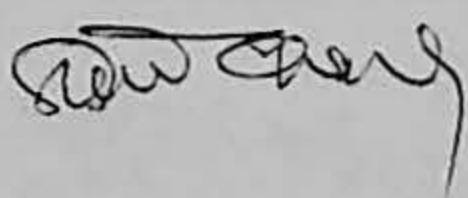


even then a show cause notice was served for not appearing in the Trade Test on dated 18th June, 1996. The applicant passed Trade Test in September, 1996 vide respondents order dated 11th November, 1996 and again promoted to F.G.M. H.S.-II and was posted in SITU as per order dated 28th February, 1997, but the respondents intimated the applicant the date of assumption of the post as 08th March, 1997 vide order dated 04th March, 1997, but the date of assumption of given by the Garrison Engineer, Bareilly is arbitrary, against the fact and rules, whereas, the applicant discharging the duties in SITU from earlier to the letter. Representations were made to the respondents, but the representations were disposed of by order dated 31st October, 1998 and the seniority was granted w.e.f. 06th July, 1995, and also benefit of pay w.e.f. 06th July, 1995 but even then the applicant was directed ~~to applicant was directed~~ to hold to Trade Test for promotion to Fitter General Mechanic H.S.-I. Compliance of the order was made, but declined to hold Trade Test for promotion to Fitter General Mechanic HS-I and assumption of promotion in February/March, 1997 instead of 06th July, 1995 is arbitrary, against rule, and representations were made for that. That the Trade Test for Grade-I was held and the applicant was declared passed vide order dated 29th October, 2001 and the applicant was promoted to F.G.M., H.S.-II to F.G.M., H.S.-I in SITU the arrears was also paid ^{to} him, but the respondents are adamant to recover the pay scale of Rs.4,000-100-

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6000/- and order was passed to this effect, representation was made, but to no effect, hence the O.A..

3. Respondents contested the case and filed Counter Reply and denied from the allegations made in the O.A.. It has been alleged that the O.A. is highly time barred as per section 21 of the C.A.T. Act, 1985. It has also been alleged that the part-II order No.23/6/2003 dated 02nd June, 2003 has been cancelled under P.T.O. dated 02nd August, 2004 and amendment to pay scale of Rs.5,000-150-8,000/- has been issued annexure-CA-1 is the copy of the order in this connection dated 02nd August, 2004. That the applicant had not passed the Trade Test of FGM HS-II as on 06th July, 1995, hence he has been promoted to FGM HS-II w.e.f. 06th March, 1997 vide P.T.O. dated 10th March, 1997 and the applicant approached the Tribunal delayed. That the O.A. is delayed of about more-than 04½ years from the date of expiry of the limitation and there are several judgments ~~have been~~ cited in the Counter Affidavit in support of their contention. That as per clarification received from higher Headquarter that the candidates are required to pass the trade of FGM HS-II even after promotion to HS-II, since the trade test passed by them prior to fitment policy was not equivalent to Trade Test for HS-II or higher grade and hence the promotion was irregular and the applicant did not appear in the Trade Test for F.G.M. HS-II and absented himself and show cause notice was



issued to him to show cause that as to why he may not be reverted and the applicant has been reverted. That the O.A. lacks merits and liable to be dismissed.

4. After Counter Affidavit of the Respondents Rejoinder Affidavit has also been filed on behalf of the applicant reiterating the facts as has been alleged in the O.A. Moreover, one Supplementary Affidavit has also been filed on behalf of the respondents.

5. We have heard Sri R. C. Pathak, Advocate for the applicant and Sri Dharmendra Tiwari Advocate holding brief of Sri R. K. Srivastava, Advocate for the respondents and perused the entire facts of the case.

6. At the time of commencement of the argument Sri R. C. Pathak, Advocate for the applicant argued that O.A. No. 46 of 2004 was decided by the Tribunal on dated 13th April, 2011 and that the applicant is also similarly situated person like that of Mahesh Chandra Joshi that the case ~~of~~ ^{identical} of the applicant is ~~equivalent~~ to that in all four corners and he is also entitled to the same treatment. Learned counsel for the respondents although admitted that the applicant is similarly situated like that of M. C. Joshi, but he stated and tried to distinguish the case of the applicant from the case of M.

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C. Joshi on ~~that~~ ^{the} ground that the O.A. is highly delayed and there is a delay of about 4 $\frac{1}{2}$ years in the filing the O.A.. When the attention of the Respondents' Advocate was diverted towards the order passed in the case of M.C. Joshi and it was told to him that the O.A. filed by M.C. Joshi was also filed in the year 2004 and all the facts were identical to the applicant then the learned counsel for the respondents replied that if a plea was not taken in the earlier O.A. then the respondents are not debarred from taking the same plea of limitation in present case and in this respect respondents tried to distinguish the case of the applicant.

7. It is settled principle of law that if a point directly or substantially involved and the same has not been taken in the ~~on other side~~ litigation then it can be presumed that intentionally the concerned has not taken that plea. It will be ^a great injustice if we will not follow the principle of parity. The Hon'ble Apex Court in several judgments held that if a person who is similarly situated then irrespective of the fact that he did not approach the Tribunal even then he is entitled for the similar treatment. If the applicant opted not to approach the Tribunal and might have waited for the same treatment as has been done with the similarly situated person then on this ground such a person cannot be denied the identical treatment ~~on the ground~~ that he has not approached the Tribunal. When this plea was directly and substantially available to the

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respondents ~~Advocate~~ in earlier litigation in O.A. No. 46 of 2004, but it was not taken then it is to be presumed that the respondents are not interested in taking this plea and they have waived this plea and it cannot be said that it is subsequent litigation of the present *Moreover* applicant because the earlier O.A. is also of the year 2004 and the instant O.A. is also of the year 2004 and it cannot be said that the O.A. No. 46 of 2004 is earlier to the present O.A. and it may be possible that both the O.As. were filed on the same date or with no interval, but it is a different matter that both the O.As. have the same controversy and it ought to have been consolidated and ~~it~~ ought to have been decided by a single judgment, but it may be possible that the Advocates might have not pressed that the present O.A. may also be connected with O.A. No. 46 of 2004 and both may be decided by a common order in order to avoid the repetition and conflicting judgment, hence it will not be justified to deny the same benefit to the present applicant merely on the technicalities that the O.A. is barred by limitation. Whereas, the same technical defect ~~is~~ was also available in O.A. No. 46 of 2004 which was later, in point of time to the present O.A.. Articles 14 and 21 of the Constitution of India provide that there must be equality and there must not be any distinction from one person to another person.

8. As we have stated above that both these persons applicant as well as M. C. Joshi were similarly situated persons and having into

Signature

account that the judgment had already been delivered in O.A. No. 46 of 2004 the objection of the respondents ^{has} lost its significance because otherwise it will be denial of similar treatment to the similarly situated person and there may be distinction from the one category of employees to other, hence it will be unjustified on our part to dismiss the present O.A. on technical ground of limitation.

And we will like to decide the matter as per the O.A. No. 46 of 2004 ^{order of} and the learned counsel for the respondents also conceded that the applicant is also a similarly situated person hence it will not be justified to again consider the same controversy. We have also perused the facts and also having gone through the orders of O.A. No. 46 of 2004 and we are convinced and agree with the learned counsel for the applicant that the applicant is similarly situated person in all four corners, hence instead of deciding the controversy again it will be just and appropriate to decide the present O.A. on the same wording as has been decided in O.A. No. 46 of 2004..

9. For the reasons mentioned above we are of the opinion that the present applicant is similarly situated like that of M. C. Joshi and he is also entitled for the same treatment. O.A. deserves to be disposed of with same relief in same wordings, hence O.A. is decided accordingly.

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"9. It is clear that the applicant deemed to have been placed in the seniority of HS Gr.II w.e.f. 06.1.1995 and his pay fixed in the pay scale of Rs.4,500-7,000/- from the date his juniors had been promoted. The pay fixation be notional from the date his juniors were promoted but actual from the date he was actually promoted i.e. 31-10-1998. Further, while granting him the benefit of Second ACP of Rs.5,000-8,000/-, his pay be fixed taking into account his pay drawn as on that date after rescheduling his pay on the advancement o his promotion in grade of HS II. The difference in pay shall be made available to the applicant **without interest** within four months from the date of receipt of certified copy of this order. O.A. is thus allowed. No costs."

Member-A
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Member-J
Member-J