

(13)

RESERVED

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD.

...

T.A. No. 252 of 1987

(W.P. No. 280 of 1980)

Amin Uddin through heirs & L.Rs
(Smt. Shamim Akhter and others) Petitioners.

Versus

Union of India and others Respondents.

...

Hon'ble Mr. Justice, K. Nath, V.C.

Hon'ble Mr. K. Obayya, A.M.

(By Hon'ble Mr. K. Obayya, A.M.)

The Writ Petition, described above, is before us on transfer from the High Court of Judicature at Allahabad, Lucknow bench, under Section 29 of the Administrative Tribunals Act, 1985.

2. The petitioner who was working as Driver 'C' in Northern Railway, Lucknow was subjected to a disciplinary proceeding, as a result of which, he was placed under suspension and subsequently, after enquiry, removed from service by an order dated 17.07.1969. The above order was confirmed in appeal on 23.1.1970 and review on 16.3.1972. The petitioner challenged his removal order in a suit filed in the Court of First Additional Munsif, Lucknow. The Original Suit No. 166 of 1973 was allowed on 13.2.1979 by setting aside the order of removal. Thereafter the petitioner was reinstated in service on 10.7.1979. The petitioner moved the department for payment of arrears of salary and other allowances. The department paid him pay and allowances only for three years i.e.

Contd 2p/-

- 2 -

from 9.7.1976 to 9.7.1979, and not for the entire period covered by his removal and suspension. Aggrieved by this, he has filed this petition which is before us on transfer for disposal.

3. The prayer of the petitioner is for a direction to the respondents to fix proper grade and pay arrears of salary and other allowances from 30.11.1968 to 9.7.1979 in the scale of ;

- (a) Driver 'C' w.e.f. 30.11.1968
- (b) Driver 'B' w.e.f. 10.10.1969
- (c) Driver A w.e.f. 29.11.1973
- (d) Driver Special 'A' w.e.f. 24.3.1978

and to make the petitioner as special grade driver.

4. The contention of the petitioner is that his reinstatement^{was} in pursuance of court orders, and in such a contingency he is entitled for arrears of salary and allowances, as provided under rule 2044(1) (3) of the Railway Establishment Manual, Vol. II, deeming him to be continuing in service, notwithstanding suspension and removal. It is further contended that in the intervening period of removal and reinstatement, many of his juniors were promoted and the petitioner should be given the benefit of higher scale of the promotion posts, from the date of promotion of his immediate junior. It is alleged by the petitioner that the action of the respondents, in withholding payment of his dues as per entitlement is arbitrary and violative of rules.

5. In the written statement filed on behalf of the respondents, it is stated that the petitioner was reinstated in service and paid arrears of salary and allowances in accordance with applicable rules. The prayer of the

13/3

petitioner in the suit was for a declaration that his removal was illegal and inoperative, and in pursuance of the decree, the petitioner was given the benefit of continuity of service. It is also stated that the petitioner is not governed by Payment of Wages Act, consequently, in terms of P.S. 5642 and Railway Board's Circular dated 5.5.1972, he is entitled for arrears of pay and allowances for a period of 3 years only from the date of reinstatement. According to them, Rule 2044-A of Railway Establishment Code has to be read with clarifications and instructions of the Railway Board, which have the force of law under Article 309 of the Constitution. It is contended that all the dues of the petitioner were settled as per his entitlement. Regarding promotion, their stand is that the petitioner could not be considered as he was out of service for 10 years and his juniors had to be promoted in the vacancies that arose from time to time.

6. In the rejoinder, the petitioner has reiterated the stand taken in the petition, that he is governed by Rules 2044 and 2044-A of the Railway Establishment Code. It is stated that the petitioner is governed by Sec. 4 of Payment of Wages Act and the Board vide Circular E(DA-RG-6-18 dated 8.9.1978 has clarified that there is no limitation for payment of arrears of salary and allowances in cases of reinstatement under courts orders (RA-1). It is also stated that P.S. 5642 has not laid down any new instruction, but has only clarified what is contained in Rule 2044.

h

7. We have heard the learned counsel of the parties. The relief sought in this petition raises two questions;

- (i) Whether the petitioner is entitled for the higher grades of the promotion posts on the dates claimed by him.
- (ii) Whether he is entitled for payment of arrears of salary and allowances for the period covered under suspension and removal i.e. from 30-11-1968 and 15.8.1969.

So far as the entitlement for the promotion grades are concerned, it is admitted that at the time of removal in 1969, the petitioner was Driver 'C' Grade. On reinstatement in 1979, he was continued as Driver-C till his retirement in 1982. In para-9 of the counter affidavit, the respondents admit that during the period 16.8.1969 to 10.7.1979, the petitioner was out of service, promotions of staff junior to the petitioner were made and the petitioner could not be considered for promotions since he was not in service. The learned counsel for the respondents pointed out that according to recruitment rules, promotions for the post of Driver-B and above are by selection. He referred to para 210 Chapter-II of the Railway Establishment Manual, Appendix-6. In this, it is indicated that the post of Driver-B and higher posts namely Driver-A and A Special are all selection posts. Promotions to these posts is by positive act of selection which consist of qualifying test and empanelment. The petitioner remained in service on reinstatement for more than 2 years and 7 months. He did not come up for any selection

A2/S

- 5 -

during this period. Since promotions to these posts are not 'automatic' based on seniority, but on selection in qualifying tests, the petitioner's claim for promotions/ deemed promotions on the dates indicated by him, merely on the basis of seniority is not tenable. Consequently, he is not entitled for higher grades attached to the posts of Driver 'B', Driver 'A' and Driver 'A' Special. In this view of the matter, we answer the first question in the negative.

8. This takes us to the question of payment of arrears of salary and allowances for the period 30.11.1968 to 9.7.1979. The petitioner was, admittedly, under suspension during the period 30.11.1968 to 16.8.1969, for which this claim is for the balance amount of salary and allowances after adjustment of subsistence allowance already paid. His further claim is for payment of pay and allowances for the period covered by removal i.e. 14.8.1969 to 9.7.1979. In para-10 of the petition, there is, however, an admission to the fact that the petitioner was paid pay and allowances for the period 9.7.1976 to 9.7.1979 i.e. for 3 years from the date of reinstatement. This means, the pay and allowances for the remaining period i.e. from 16.8.1969 to 8.7.1976, remain to be paid.

9. It is contended on behalf of the petitioner that, the petitioner's reinstatement was under orders of the court, as such, Rule ~~2044~~ 2044 A of the Railway Establishment Code is applicable to him, by which, he is entitled for arrears of pay and allowances. It is also contended that the case of petitioner is governed by 'Payment of Wages Act, 1936 and under this, there

Contd 6p/-

- 6 -

is no limitation for payment of arrears of pay and allowances. The contention of the learned counsel for the respondents is that the order of removal was set aside by the Additional Munsif and the petitioner was reinstated in service and given service benefits. In the judgment of the court, there is no direction regarding payment of salary and allowances, and in the absence of any such direction, payment of salary is regulated in accordance with applicable departmental rules. His further contention is that rules 2044 and 2044 A have been amended from time to time by the Railway Board, in exercise of the powers conferred under para 123 of the Railway Establishment Code, Vol. I and that instructions of the Board have force of law under Art. 309 of the Constitution. So far as, non-gazetted employees are concerned, and the petitioner is a Grade 'C' Driver and fully covered by these instructions. The learned counsel referred to the instructions contained in Railway Board's letters No. E (D & A) 63 RG 6-36 dated 11.10.1963, No. E (D & A) 56 RG 6-12 dated 22.9.1961 and E (D & A) 71 RG- 8 dated 30.3.1972. These letters mention that employees, whose removal or dismissal has been set aside by courts are entitled for payment of arrears of salary and allowances on reinstatement subject to a period of limitation upto 3 years. The period of limitation, however is not applicable to cases governed under payment of wages Act; and it is contended that the petitioner is a Grade 'C' Driver and this grade being a higher grade is outside the ambit of the 'Payment of Wages Act.'

R

10. We have given our anxious consideration to the rival contentions of the parties. We have examined the order of Additional Munsif dated 13.2.79 in O.S. No. 166 of 1973, the Suit was decreed with costs with the declaration that the enquiry and order of suspension and termination are invalid. It was held that the order of removal was passed by an authority lower in rank to that of the appointing authority violating Article 311(1) of the Constitution of India, that proper opportunity was not given to the plaintiff to explain his case before termination violating Article 311(2) of the Constitution and was vitiated by bias and favouritism. There is no direction as to the payment of arrears of salary and allowances. In such cases, the applicable rules come into play. Reliance was placed by the petitioner in Rule 2044-A (1) and 2044-A(3), we would like to notice these rules and instructions/clarifications issued from time to time on applicability of these rules.

Rule 2044-A(1)

"Where the dismissal, removal or compulsory retirement of a railway servant is set aside by a court of law and such railway servant is reinstated without holding any further enquiry, the period of absence from duty shall be regularised and the railway servant shall be paid pay and allowances in accordance with the provisions of Sub rule (2) or (3) subject to the directions, if any, of the court.

(2) Where the dismissal, removal or compulsory retirement of a railway servant is set aside by the court solely on the ground

of non-compliance with the requirements of clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, the pay and allowances to be paid to the railway servant for the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of reinstatement shall be determined by the competent authority and the said period shall be regularised in accordance with the provisions contained in sub rules (4), (5) and (7) of Rule 2044(F.R.54).

(3) If the dismissal, removal or compulsory retirement of a railway servant is set aside by the court on the merits of the case the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purposes for the period, to which he would have been entitled had he not been dismissed, removed or compulsory retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be."

The Civil Court having declared the removal of the employee to be null and void, he was reinstated. Rules 2044 and 2044-A deal with situations of reinstatement. Rule 2044 deals with cases of employees "reinstated as a result of appeal or review"; Rule 2044-A deals with employees reinstated as a result of the order of dismissal etc. being set aside by a Court of Law. Hence

b

A3
9

- 9 -

Rule 2044 has nothing to do with a case of reinstatement under court decree except in so far as the certain portions have been made applicable for arithmetical purposes by Sub Rule (2) of Rule 2044-A.

11. Sub Rule (1) of Rule 2044-A lays down the broad proposition that on reinstatement in consequence of courts order the period of absence must be regularised, and the railway employee must be paid his salary and allowances in accordance with Sub Rule (2) or (3) subject, of course, to any specific directions of the Court. These two sub rules classify the cases in which order of dismissal etc. is set aside by the Court.

12. Sub Rule(2) deals with a case where the order of dismissal etc. "is set aside by the court solely on the ground of non-compliance with the requirements of clause (2) of Article 311 of the Constitution". It must be noted that this sub rule is confined to cases of violation of clause (2) and not of clause (1) of Article 311 of the Constitution.

13. Sub Rule (3) deals with cases which do not fall under sub rule (2); it speaks of cases in which the order of dismissal etc. is set aside by the Court "on the merits of the case". Since all cases in which dismissal etc. is set aside are to be dealt with, in view of sub rule (1) of Rule 2044-A, either in accordance with sub Rule (2) or sub Rule (3), and Sub Rule (2) deals only with cases of violation of clause (2) of Article 311, Sub Rule (3) deals with all other cases which concern

violation of provision other than those of clause (2) of Article 311, and this class of cases is described in Sub Rule (3) as "on the merits of the case". Thus an ex parte decree setting aside dismissal etc. on grounds other than Article 311(2) will also be "on the merits of the case". In particular, a decree setting aside dismissal etc. for violation of Article 311(1) or for mala fides or for no evidence is outside sub rule (2) and therefore falls in Sub Rule (3) of Rule 2044-A. In this case, the removal order was set aside for violation of Article 311(1) and for reasons of bias and favouritism. The case therefore falls within Sub Rule(3) of Rule 2044-A.

14. The period between dismissal etc. and reinstatement under Sub Rule (3) of Rule 2044-A "shall be treated as duty for all purposes and he shall be paid full pay and allowances for the period".

15. The period of three years limitation under Article 7 of the Limitation Act commences from the date when the wages become due. In the case of an employee whose dismissal has been set aside by a court of law the wages become due when the Suit is decreed. It is on that date that the relationship of master and servant is revived and all the back wages become due in a lump sum. The servant can file a Suit at any time within three years of the date of the court decree. In this case the Suit was decreed on 13.2.79 and the Writ petition was filed on 7.10.80. The entire claim therefore is within limitation. In the case of

P

A3
11

- 11 -

Maimoona Khatun and Another Versus State of U.P. & Another
1980 SCC(L&S) 464 the Supreme Court held as follows :-

" We are clearly of the opinion that in cases where an employee is dismissed or removed from service and is reinstated either by the appointing authority or by virtue of the order of dismissal or removal being set aside by a civil court, the starting point of limitation would be not the date of the order of dismissal or removal but the date when the right actually accrues, that is to say, the date of the reinstatement, by the appointing authority where no suit is filed or the date of the decree where a suit is filed and decreed."

16. We may mention that the Supreme Court reiterated the same view taken in the case of State of Madhya Pradesh Versus State of Maharashtra 1977 SC 1466. The employee therefore was entitled to full Pay & Allowances for the entire period from the date of removal to the date of reinstatement.

17. The defendants' case ~~is~~ that Pay & Allowances could be given only for three years is a result of confusion flowing from a number of clarifications given by the Railway Board from time to time. In the written statement reliance is placed on the Railway Board's circular dated 5.5.1972 (PS No.5642) which in turn refers to Railway Board letter dated 30.3.72 which again refers to a letter dated 22.9.61 as amended by letter dated 11.10.63 and so on the chain goes down to the letter dated 27.3.53. Railway Board's letter dated 27.3.53 said

P

AB
12

- 12 -

that where reinstatement is made on account of Courts declaration of dismissal etc. being null and void, payment of salary and allowances should be decided in accordance with the Rule 2044. It is not clear whether Rule 2044-A had been inserted by them or not; but the Railway Board's letter dated 22.9.61 noticed that the judicial decisions were that Rule 2044 did not apply to such cases and therefore the Railway Board reconsidered the matter. On such reconsideration the Board decided that Rule 2044 applies to cases where dismissal etc. is held by a court of law or by the appellate or reviewing authority to be illegal for failure to follow Article 311 and payment of wages and treatment of the intervening period as duty for all purposes is automatic and compulsory. This was however made subject to two provisos. Proviso (a) said that arrears were to be paid subject to the law of limitation and the period of limitation was mentioned to be three years backward from the date of institution of the Suit if a suit is filed and if no suit is filed the period would be that prior to the date of the sanction by the competent authority. This was modified by Railway Board's letter dated 11.10.63 to the effect that the arrears would be paid for three years period immediately preceding the date of the judgement of the court or the order of the appellate or reviewing authority on the ground that Article 311 of the Constitution had not been followed.

18. Railway Board's circular dated 5.5.72 mentioned in the written statement says that copy of

AB

A3
13

- 13 -

Railway Board dated 30.3.72 was being forwarded for information and guidance. Letter dated 30.3.72 invites attention to proviso (a) to para 3(ii) of the Railway Board's letter dated 22.9.61 referred to above as amended by the letter dated 11.10.63 and says that in terms of those letters in cases of reinstatement on ground of removal etc. being held by a court of law or by the appellate or reviewing authority to have been made without following the procedure required under Article 311 of the Constitution, payment of full pay and allowances for the intervening period is subject to the law of limitation, "i.e. for a period of three years immediately preceding the date of the judgement of the court of law etc", and then explains that this decision does not apply to employees to whom the Payment of Wages Act applies. The question whether or not the Payment of Wages Act applies to the deceased employee Amin Uddin is in controversy in this case. According to the plaintiff it applies. According to the defendants it does not apply; but none of the parties has produced relevant material for decision of that question. Be that as it may, we have found that even if the Payment of Wages Act does not apply, the plaintiffs are entitled to arrears of pay and allowances for the entire period from the date of removal to the date of reinstatement.

19. As indicated by us, the stand of the respondents is a result of confusing instructions issued by the Railway Board from time to time. The spate of circulars and clarifications on the subject is a classic

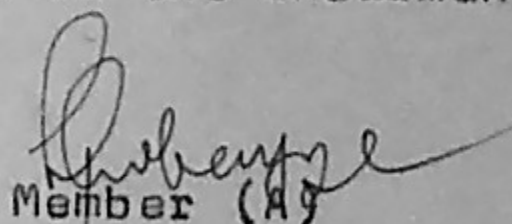
B

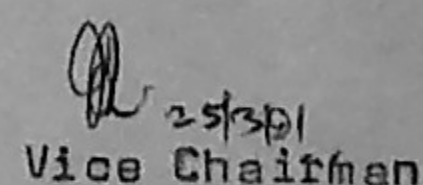
A2
14

- 14 -

example of the Railway Administrations causing confusion on plain and simple issues leading to huge litigation between the Railway employees and the Railway Administration which is almost 40 to 50% of the entire institution before the Central Administrative Tribunals. One could only wish that Railway Administration confine themselves to the rules and let the competent authorities make independent judgement with liability to be pulled up for patent faults. Experience shows that the authorities evade issues by inviting clarifications from superior officers up the ladder upto the Railway Board which may take months before the issue could be sorted out at the concerned level and in the meantime both the employee and the Administration suffer. The matter before us is quite plain but complicated by the so called clarifications.

20. In the result, the Suit is decreed in part and the defendants are directed to pay full pay and allowances of the deceased employee Amin Uddin to the heirs and legal representatives namely the present applicants for the entire period from 16.8.69 (the date of removal from the service) to 10.7.79 (the date of reinstatement & less the amounts already paid, if any, to the deceased, as Driver grade 'C') (with interest at the rate of 10% per annum simple from 13.2.79 (the date of the Civil Court decree) within a period of six months from the date of receipt of a copy of this judgement. Parties shall bear their costs of the present Suit. A copy of this judgement shall also be sent to the Chairman of the Railway Board for information.


Member (A)


25/3/91
Vice Chairman

Dated the 25th March, 1991.

RKM / N.U.