

Reserved:

CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD BENCH.

...

O.A. No. 564 of 1988

Dated: 25 November, 1994

Hon. Mr. Justice B.C. Saksena, V.C.
Hon. Mr. S. Das Gupta, Member (A)

1. A.F. Singh son of N.F. Singh,
aged about 38 years, Clerk in the
office of Chief Workshop Manager,
Central Railway, Workshop Jhansi ... Applicant.

(By Advocate Sri M.P. Gupta)

VERSUS

1. Chief Workshop Manager,
Central Railway,
Jhansi.
2. Union of India Respondents.

(By Advocate Sri A.V. Srivastava)

O R D E R

(By Hon. Mr. S. Das Gupta, Member(A))

The main relief prayed for in this Original Application filed under Sec. 19 of the Administrative Tribunals Act, 1985 that the order contained in the letter dated 17.1.1987 (Annexure- A 2) passed by the Deputy Chief Mechanical Engineer, Jhansi to treat the period from the date of suspension of the applicant till his reinstatement in service as a period not spent on duty be declared as void and to regularise this period as the period spent on duty for all purposes. It has also been prayed that the respondents be directed to grant the applicant promotion and seniority as Senior Clerk w.e.f. 1.1.1979 from which date the posts were upgraded by the Railway Board and pay the difference of pay and allowances accruing there from.

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2. Briefly stated, the facts of the case are that the applicant while working as Junior Clerk in Central Railway Jhansi, was suspended w.e.f. 15.9.1981 and was thereafter served with a charge-memo dated 27.2.1982 for imposition of major penalty. After holding a departmental enquiry, the applicant was dismissed from service w.e.f. 10.3.1983. The applicant appealed against the order of dismissal but the same was rejected. This led the applicant to file a civil suit which was dismissed by the Munsif court at Jhansi. An appeal was filed in the court of District Judge, Jhansi and the same was later on transferred to this Bench of the Tribunal and registered as T.A. No. 611 of 1986. The Tribunal by its order dated 28.10.1986 set aside the order of dismissal giving liberty to the respondents to hold a fresh disciplinary enquiry according to law. It further directed that in case the respondents decided not to hold fresh disciplinary proceedings, they shall pass an order revoking the suspension of the applicant within a period of 3 months. It appears that the respondents did not exercise their option to initiate fresh disciplinary proceedings and in compliance with the direction contained in the Tribunal's order dated 28.10.1986, issued the impugned order dated 17.1.1987 (Annexure- A 2) reinstating the applicant in service and inter alia ordering that the period from the date of his suspension till the date of his reinstatement in service i.e. from 15.9.1981 to 17.1.1987 shall be treated as period

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not spent on duty in terms of Rule-2044(A) ^{v. of the Indian Railway Establishment Code} It is this order which is under challenge. It has been further averred in the application that a few days before the date of suspension of the applicant, he was to be promoted as Senior Clerk in accordance with the seniority against the posts upgraded by the Railway Board in 1979. It has been alleged that the applicant's promotion was withheld with malafide motives. After his reinstatement, the applicant is stated to have pressed his claim for the due promotion as Senior Clerk and the respondents subjected him to a written test in which he was asked questions without intimating any syllabus and without considering that the applicant was out of service for orders. The applicant alleges that the result of the written test was foregone conclusion and no promotion order has yet been issued.

3. That applicant's case is that since the order of dismissal had been set aside by the Tribunal, the provision of Rule-2044 (A) did not apply to his case. He contends that since the respondents decided not to initiate the disciplinary proceedings against him, he stands fully exonerated of all the charges. Since he has not been found guilty of the order of suspension has become wholly unjustified. In these circumstances, he claims, his case should be governed by the instructions

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contained in the circular letter dated 22.9.1961, a copy of which is at Annexure- A 17. The applicant contends that in terms of the instructions contained in the said letter dated 22.9.1961, the provisions of the Rule-2044- R II are inapplicable to those cases where courts of law have declared the dismissal, removal etc to be null and void and inoperative. As regards the denial of promotion to the post of Senior Clerk, the applicant has alleged that he has been deprived of his long due promotion ^{due} to the discriminative and malafide action on the part of the respondents. This denial of promotion has caused humiliation and harassment to the applicant and is alleged to be a case of reduction in rank.

4. In the counter affidavit filed by the respondents, 2 preliminary objections have been taken to the maintainability of this application. In the first place, it has been argued that the application is not maintainable since the Union of India has not been impleaded as respondents. The second objection to the maintainability of the application is that the same is excessively time barred.

5. On the ^{merit} ~~limitation~~ of the case, it has been submitted that in the light of the order dated

184

28.10.1986 of this Tribunal, the entire matter was re-examined by the competent authority who, after careful consideration, decided to reinstate the applicant by revoking his suspension order and treating the intervening period as period not spent on duty in terms of Rule- 2044(A) of the Railway Establishment Code Vol.II. This order, it is claimed, is fully valid and proper and is in no way inconsistent with any rule in this regard.

6. As regards the allegation that the applicant has been denied promotion to the post of Senior Clerk in a malafide manner, it has been submitted that the promotion to the post of Sr. Clerk is on the basis of seniority-cum-suitability and according to rule, after the applicant was reinstated in service, he was called for suitability test to consider him for promotion to the post of Senior Clerk on 12.12.1987. The applicant appeared in the written test but he failed to pass the same and as such, he was not found fit to be promoted to the higher post. It has been submitted that had he qualified in the written test, he would not only have been promoted as Senior Clerk but would also have been assigned due seniority. It has also been submitted that the applicant did not challenge the order dated 17.12.1987 (Annexure- R.A.1) declaring the result of the written test.

7. The applicant has filed a rejoinder affidavit

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in which it has been stated that the Union of India was subsequently made a party to this application by an amendment application which was allowed by the Tribunal. It has also been stated that after the impugned order was passed on 17.1.1987, the applicant had submitted repeated representations but no action was taken on the same. The application, the applicant, claims is, therefore, within the period of limitation. As regards the merit of the case, the averments made in the Original Application have been reiterated in the rejoinder affidavit.

8. The first objection to the maintainability of the applicant taken by the respondents is obviously ~~and is~~ without any force since the Union of India was subsequently made a party to the application by way of amendment which was allowed by the Tribunal.

7. The second objection on the ground of limitation is however, appears to have been ~~well~~ taken in view of the fact that the impugned order is dated 17.1.1987, whereas, the application was filed on 31.5.1988. The applicant has ^{attempted} ~~admitted~~ to circumvent this point by stating that his representations against the impugned order were pending with the respondents. It has not been averred by the applicant

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that there was a provision for statutory appeal against the impugned order. However, since the impugned order is issued by the disciplinary authority and has a bearing upon the disciplinary action taken against him, it will not be unreasonable to assume that the applicant had a right and,infact, a duty to represent against this order before rushing to the Tribunal for redressal. In that view of the matter, the application is within the period of limitation since the first representation is stated to have been made on 24.2.1987 and this fact has not been specifically denied by the respondents.

8. Coming to the merits of the case, we find that the applicant has heavily relied on the instructions contained in the Railway Board letter dated 22.9.1961 in contending that the intervening period between the date of suspension and the date of reinstatement should be treated as duty for all purposes and that the arrears of pay shall be paid subject to the law of limitation. We have carefully gone through the instructions contained in the aforesaid letter. The relevant portion is reproduced below;

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2. As a result of certain judicial decisions in the recent past that Rule 2044(F.R.54)- R II would not apply in such cases, the matter has been reconsidered. In this connection, the following question with regard to the reinstatement of dismissed removal/discharged railway servants or railway servants whose

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services have been terminated came up for consideration.

" Whether in cases of reinstatement on the ground of dismissal/removal/discharge from of termination of service being held by a court of law or by an appellate/reviewing authority to have been made without following the procedure required under Art. 311 of the Constitution, payment of full pay and allowances for the intervening period is automatic and compulsory."

3. It has been decided that Rule-2044 -R-II is inapplicable in such circumstances in such cases ;

(1) if it is decided to hold a further inquiry and thus deem the Railway servant to have been placed under suspension from the date of dismissal/removal/discharge/ termination under Rule 1706(3) or 1706(4)-R.I., the Railway servant will be paid the subsistence allowance from the date he is deemed to have been placed under suspension;"

9. It is clear from the perusal of above provision that had the instructions contained in the aforesaid Railway Board letter dated 22.9.1961 been still extant, the applicant's contention that the intervening period should be treated as on duty would have had considerable force. It is, however, quite clear to us that these instructions have long ^{since} been superseded as would be evident from

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a reference to the relevant provisions contained in the Indian Railway Establishment Code, Vol. II. The 4th reprint of this code was issued in 1974 and the relevant provisions of this Volume is contained in Rule-2044(A). The provisions of this Rule are analogous to those in F.R. 54(A). The relevant portion to this Rule is reproduced below;

*2044-A(F.R.54-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 inquiry, the period of absence from duty shall be regularised and the railway servant shall be paid 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).

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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 and he shall be paid the full pay and allowances for the period, to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.

(4) "

10. Sub-rules (4), (5) & (7) of Rule-2044 (A) read as follows;

(4) in case other than those covered by sub-rule (2) (including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirements of clause (2) of Art. 311 of the constitution and no further inquiry is proposed to be held) the railway servant shall, subject to the provisions of sub-rules (6) and (7) be paid such proportion of the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Railway Servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period as may be specified in the notice.

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Provided that except in the case of such railway servants as are governed by the provisions of the Payment of Wages Act, 1936 (4 of 1936), any payment under this sub-rule shall be restricted to a period of three years immediately preceding re-instatement or retirement on superannuation, as the case may be.

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be converted into leave of any kind due and admissible to the railway servant.

Note- The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of;

(a) extraordinary leave in excess of three of three months in the case of temporary railway servant; and

(b) leave of any kind in excess of five years in the case of permanent railway servant.

(6)

(7) The proportion of the full pay and allowances determined under the proviso to sub-rule(2) or under sub-rule(4) shall not be less than the subsistence allowance and other allowances admissible under Rule 2043 (F.R. 53).

(8) "

56

11. From a plain reading of the provisions contained in Rule-2044(A) read with Sub-rules (4), (5) and (7) of Rule-2044(A) of the Indian Railway Establishment Code Vol. II would make it clear that where dismissal of the railway servant is set aside by a court of law and he is reinstated without holding any further enquiry as is the case before us and ~~and~~ such setting aside of the dismissal is solely on the ground of non-compliance with the requirement of Clause-~~27~~ of ^{Article} ~~Rule~~-311 of the Constitution and where he has not ^{been} exonerated on merits, the period of absence from duty including the period of suspension preceding his dismissal shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose. It also provides that if the railway servant so desires such authority may direct that the period of absence from duty including the period of suspension shall be converted into leave of any kind due and admissible to the railway servant. In the case before us, the applicant was dismissed from service and the period of dismissal was set aside by the Tribunal not on merits but on the ground of procedural infirmity. It is, therefore, not a case of exoneration on merits. Also the respondents reinstated the applicant without holding any further enquiry. In these circumstances, in terms of the provision of Rules stated above, the period of absence including the period under suspension shall not be ^{be} treated as a period spent on duty unless

58

the competent authority otherwise directs or a request is made by the railway servant for converting the period of absence into leave of any kind and this request is acceded to. In the case before us, the competent authority has decided that the period of absence shall not be treated as period spent on duty and it is not the case of the applicant that he made any request for converting this period into leave due and admissible. The impugned order, to treat the period as not spent on duty is, therefore, perfectly valid and in accordance with rules on the subject.

12. As regards the wages for the intervening period, a perusal of the provision of the relevant rules quoted above would make it clear that it is for the competent authority to decide as to what ^{proportion} ~~probation~~ of the full pay and allowances shall be payable for the intervening period and this ^{proportion} ~~probation~~ may be determined by the competent authority after giving a notice to the railway servant of the quantum proposed. There is no averment either in the original application or in the written statement as to whether any such order was passed by the competent authority or if any such order was passed, whether it was passed after giving a notice to the applicant regarding the quantum payable. In the absence of any averment in this regard, we see no necessity of ~~entering~~

54

into this matter at all.

13. We have noted that the 5th reprint of the Indian Railway Establishment Code Vol.II was superseded by the 6th edition thereof which was issued in 1987. It would appear from the preface of the 6th edition ^h ~~suggestion~~ that the same came into effect in March, 1988. Since the impugned order is dated 17.1.1987, the provisions contained in the 5th edition are clearly applicable to this case. Moreover, even in the 6th edition, which ^{is} extant on date, Rule-1344 which deals with this matter is analogous to Rule-2044A of the 5th edition ~~and~~ and both are concordant .

14. In view of the clear provision in the Indian Railway Establishment Code, the contention of the applicant that the order treating the intervening period as not spent on duty is illegal, ^{has no force} ~~is~~ ^h.

15. The learned counsel for the applicant during the course of argument sought to rely upon certain case laws in support of his argument ^{that} ~~in~~ the order treating the intervening period as not spent on duty, is not sustainable in law. These are;

(i) Devendra Pratap Narain Rai Sharma Vs. State of U.P. and others, AIR 1962SC 1334.

(ii) M. Gopalkrishna Naidu Vs. State of Madhya Pradesh, AIR 1968 SC 240.

(iii) Union of India and another Vs. Sri Babu Ram Lalla, AIR 1988 SC 344,

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15. Devendra Pratap Narain's case relates to Rule- 54 of the fundamental rule framed by the State of U.P. This case has, therefore, no application to the case before us.

16. In the case of M Gopalkrishna Naidu, the facts of the case revealed that a departmental enquiry was initiated against the applicant and the enquiry officer found the applicant not guilty. The respondents, however, disagreed with the findings and served a notice to show cause why he should not be dismissed. Subsequently, the respondents held that the charges against the applicant were not proved beyond doubt and he was reinstated in service after passing an order to the effect that he shall not be allowed any pay, ^{than} what he had actually received by way of subsistence allowance and the period of absence shall be treated as period spent on duty for the purpose of pension only. On these facts the Supreme Court directed the respondents to consider the question of denovo after giving the applicant reasonable opportunity to show cause against the action proposed against him. This case is clearly distinguishable from the case before us on facts and has, therefore, no application to the controversy before us.

17. Lastly, in the case of Babu Ram Lalla, the

56

Supreme Court agreed with the findings of the High Court that the order of termination of service was a nullity and on that basis it was directed that the applicant shall be paid salary on the footing that he has always continued in service and the void order was never in existence in the eye of law. In the case before us, it was not the finding of the Tribunal that the order of dismissal was a nullity. It was set aside only on the ground of procedural infirmity. The decision in Babu Ram Lall's case is, therefore, of no assistance to the present applicant.

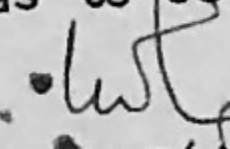
18. From the foregoing it would be clear that the various case laws cited by the learned counsel for the applicant are of no assistance to the applicant, and the conclusion already arrived at by us ^{on} ~~at~~ this controversy is not in any way affected by the case laws cited.

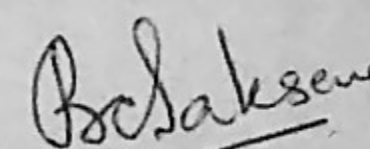
19. So far as the controversy relating to the denial of promotion to the applicant is concerned, the respondents have averred that the promotion to the post of Senior Clerk is not on seniority alone but is also subject to a qualifying test. This has not been rebutted by the applicant. It is also an admitted fact that the applicant was ^{given} ~~giving~~ an opportunity to appear in the qualifying test after he was reinstated in service and he failed in the test. The applicant, no doubt, tried to assail

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the result of the qualifying test by attributing malafide to the respondents in conducting the test but the facts averred to impute malafide are very vague in nature and do not lay any firm foundation for presuming that the respondents had any malice towards the applicant. Having been given an opportunity to appear in the qualifying test and having failed in the test, the applicant cannot turn round and claim that he should ~~not~~ have been promoted retrospectively with due seniority.

20. In view of the foregoing, we find that the application is devoid of merits and the same is therefore, dismissed. There shall, however, be no order as to costs.


Member (A)


Vice-Chairman

(n.u.)