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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No.225 of 2012

Cuttack this the 8th day of February, 2016

Benudhar ...Applicant

-VERSUS-

Union of India &Ors....Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not ? No
2. Whether it be referred to CAT, PB, New Delhi for
being circulated to various Benches of the Tribunal or not ? No


(R.C.MISRA)
MEMBER(A)


(A.K.PATNAIK)
MEMBER(J)

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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

ORIGINAL APPLICATIONS NO. 225 OF 2012

Cuttack this the 8th day of February, 2016

CORAM

HON'BLE SHRI A. K. PATNAIK, MEMBER (J)

HON'BLE SHRI R.C.MISRA, MEMBER(A)

Benudhar aged about 70 years S/o Late Satrugna retired Trackman office of Deputy Chief Engineer / Construction / East Coast Railway, Station Bazar, Town/District-Cuttack, Permanent resident of Village / PO Jakhapura, Dist.Jajpur. ...Applicant

By the Advocates- Mr.N.R.Routray

S.Mishra

T.K.Choudhury

S.K.Mohanty

-VERSUS-

- 1- Union of India represented through the General Manager, East Coast Railway, Rail Vihar, Chandrasekharapur, Bhubaneswar, Dist.Khurda.
- 2- Senior Personnel Officer, Construction/Coordination, East Coast Railway, Rail Vihar, Chandrasekharapur, Bhubaneswar, Dist.Khurda.
- 3- Deputy Chief Engineer/Construction/East Coast Railway, Station Bazar, Town/ District- Cuttack.
- 4- F.A.&CAO/Construction/East Coast Railway, Rail Vihar, Chandrasekharapur, Bhubaneswar, Dist.Khurda.
- 5- Chief Administrative Officer(Con.), East Coast Railway, Rail Vihar, Chandrasekharapur, Bhubaneswar, Dist.Khurda.

...Respondents

By the Advocate-Mr.D.K.Behera

ORDER

PER R.C.MISRA, MEMBER(A)

The applicant of this OA was initially appointed as a Casual Khalasi / Gangman in 1973 and was regularized w.e.f. 1.1.1981 vide order dated 26.3.1989. Due to lack of promotional avenues, ACP Scheme for Central Government Civilian employees was introduced during the V CPC . The applicant retired from Railway Service on 31.12.2001 after rendering 28 years of regular service. It is pleaded in the application that as per the order dated 31.01.2005 (Annex.A/4) issued by the Chief Administrative Officer (Construction), upgradation was to be granted to the beneficiaries as per their cadre promotion. Since the applicant had completed 24 years of qualifying service as on 01.10.1999, the screening committee found him suitable for 1st ACP w.e.f. 01.10.1999 and accordingly, his pay was fixed from Rs.2610-3540 to 2650-4000.

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Applicant during his entire service carrier posted as a Gangman and though had completed 28 years service as on 01.10.1999 without any promotion, he has not been granted any benefit under the ACP Scheme. Applicant vide representation Annex/A/5 dated 16.05.2011 prayed for grant of 2nd ACP w.e.f. 01.10.1999 in the scale of Rs. 3050-4590 and accordingly recalculate his retiral benefits including the pension and release the arrears accordingly, however, no heed was paid and being aggrieved with the inaction, the applicant has approached this Tribunal for grant of 1st and 2nd financial upgradation under ACP Scheme w.e.f. 1.10.1999 along with interest.

2. Respondent-Railways have filed their counter opposing the prayer of the applicant. The main thrust of the counter reply is that as per provisions of the ACP Scheme, for grant of financial upgradations, an incumbent has to fulfill the norms and conditions of promotion. Since the applicant did not fulfill the same, he was not granted the said benefit. For the sake of clarity, the relevant part of the counter-reply reads as under :-

" that Est. Srl. No. 288/99 Item No. 6(a) envisages that while granting ACP benefit normal promotion norms prescribed, such as bench mark, trade test, departmental examination, seniority-cum-fitness (in case of Gr. D employee) etc., for grant of financial up-gradation shall be ensured and para-7 of the condition stipulates that the financial up-gradation under the scheme shall be given to the next higher grade in accordance with the existing hierarchy in a cadre / category of posts without creating new post for this purpose.

As the applicant was not qualified in prescribed medical test i.e. B-1 medical category therefore he was not granted the scale Rs. 2650-4000/- and Rs. 3050-4590/- as 1st and 2nd financial up-gradation.

But in the case of Sri Fagu Sahoo, he was declared fit in B-1 medical category and was granted 1st financial up-gradation in scale Rs. 2650-4000/- and 2nd financial up-gradation in scale Rs. 3050-4590/- w. e. f. 01.10.99 (revised order due to effect of date of ACP/scale which was granted erroneously) vide SPO / C/ Co-Ordn. / BBS's O.O. No. 59/2011, dt. 17.5.2011 in obedience to Hon'ble CAT/CTC's order dt. 24.3.2011 in O.A. No. 302/2008.

Therefore the applicant cannot be compared to his case at par with the case of Sri Fagu Sahoo."



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.3.

3. The respondents have contended that as per letter dated 31.01.2005 the applicant was granted 1st and 2nd financial upgradation in the scale of Rs. 2610-3540 and Rs. 2650-4000 under the ACP Scheme vide Dy. C.P.O. (C), Bhubaneswar Office Order dated 9.3.2000. It is submitted that due to exigencies of service, he was working on adhoc/officiating basis and such period cannot be counted for grant of financial upgradation under the ACP Scheme as claimed by him in terms of the conditions laid down in Annex.-1 under Est.Srl.No. 288/99. Further, it is averred that the case of applicant cannot be compared with the case of Sri Fagu Sahoo as he was fulfilling the terms and conditions of Est. Srl. No. 288/99. Since the applicant was not qualified in the prescribed medical test i.e. B-1 medical category, therefore, he was not granted the scale of Rs. 2650-4000 and Rs. 3050-4590 as 1st and 2nd financial upgradation. However, Sri Fagu Sahoo was declared fit in B-1 medical category and thus was granted both the financial upgradations that too in obedience to the order of this Tribunal in OA No. 302/2008. It is, therefore, prayed that the OA be dismissed being devoid of merits.

4. We have heard the learned counsel for both the sides and perused the records. Recently, this Tribunal vide order dated 18.01.2016 in OA No.214/2012 decided a matter where the benefit of ACP had not been granted to the applicant therein on the ground that he did not qualify in the prescribed medical test, i.e., B-1 category. This Tribunal having taken note of Estt. Sr.No.288/99 dated 1.12.1999 and Para-6 of the "Conditions for grant of benefit under the ACP Scheme", held as under.

"At this stage, we need to go over the conditions to be satisfied for award of ACP, as contained in Estt. Sr. No. 288/99 dt. 1.12.1999, of the South Eastern Railway para 6 of the "Conditions for grand of benefits under the ACP Scheme" is quoted below.

6. The following shall be ensured while granting benefits under the ACP Scheme.

a) Fulfillment of normal promotion norms prescribed, such as bench-mark, trade-test, departmental examination, seniority-cum-fitness (in case of Group D employees), etc for grant of financial upgradations.



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.4.

It is the well-known position that ACP benefit is personal to the employee. Grant of ACP cannot be construed as regular or functional promotion, and there is absolutely no scope for creation of post as an adjunct to award of ACP on an employee. But the instructions have clarified that the norms and conditions of promotion will be attracted when an employee's case is considered for ACP. Performance will be the yardstick for adjudging the eligibility of an employee for ACP. The provision quoted above lays down a few criteria as bench mark, trade-test, departmental examination and seniority-cum-fitness (in case of group D employees). 'Fitness' is the general ability of a person to perform the task assigned to him. Fitness is the most important criterion of an individual employee who is assigned to the performance of a job. Although it is not stated in so many words, physical fitness is a very important aspect of general fitness. The respondents' submission is that based upon the medical category at the time of appointment, the fitness has been determined. First of all, this is not categorically mentioned in the impugned order but subsequently clarified. The order mentioned that applicant has not qualified in the prescribed medical test, giving out a false impression that a medical test was actually conducted. Secondly, if the prescribed eligibility is at the time of consideration of the employee for ACP, is it fair that the medical category at appointment will hold sway? Strictly, according to instructions, is not 'seniority-cum-fitness' to be determined at the time of consideration? It is the well-stated position that the criteria of promotion would be applied in the case of ACP. Therefore, conditions of promotion have to be separately considered, and conditions at the time of appointment cannot be merely extrapolated at the time of consideration of promotion/ACP. To give one example, qualification in trade test is a criterion. Is not trade test conducted afresh at the time of promotion/award of ACP? It is quite obvious that bench-mark, trade test and departmental examination are all applied afresh at the time of consideration. Then why not fitness? There is nothing in the conditions for award of ACP that prescribes that medical category at the time of appointment will be the final determinant of 'fitness' of the employee. It is only a decision of concerned authorities that it should be so. However, the fact of the matter is that there is nothing sacrosanct about medical category at appointment, while considering promotion/ACP. In fact, the conditions prescribed lay down that the employer has to be satisfied about 'fitness' of the employee for getting ACP benefit. This 'fitness' in its narrower connotation would obviously mean 'physical fitness' but in its broader sense may mean much more. To give an illustration, is mental fitness not an important part of

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fitness? All that it would mean is, that 'fitness' has to be certified on 'a real time' basis, that is at the exact point of consideration of conferring the benefit. That will be the fair way of such assessment, and if we read the conditions carefully, that will be in keeping with the spirit of the instructions.

The sole ground of rejection of the prayer of the applicant is that he did not qualify in the prescribed medical test in B-1 category. Since the admitted position is that such medical test was not conducted, the ground of rejection appears to be arbitrary. There is no doubt that the respondents are relying upon the ground that in case of Fagu Sahu, the medical category at the time of appointment was B1 and in the case of applicant it was C1 and that applicant cannot, therefore, claim parity with the said Fagu Sahu. While we consider this submission to be fair, we still do have our reservations as to whether this submission is to be accepted in the face of clear conditions of eligibility for grant of ACP under the relevant instructions. In fact, such submission fails the test of judicial scrutiny. When it is admitted by respondents that medical test at the point of consideration was not actually conducted, how can they submit that applicant "has not qualified in the prescribed medical test"? That being the only ground on the basis of which the prayer of the applicant was rejected, we do not find the impugned orders dt. 12.1.2012 and 18.1.2012 to be legally sustainable.

Ideally, the applicant should have been asked to go through a medical test for the determination of his fitness in order to consider his eligibility for ACP benefit. The applicant has however retired on 30th June 2007, and it is too late in the day for him to go through a medical test. However, based upon the grounds we have discussed in the foregoing paragraphs, we quash the order dt. 12.1.2012 and 18.1.2012, and remit the matter back to the respondents for reconsideration of the claim based upon other conditions as applicable to ACP, and if in the course of reconsideration, he is found to be eligible, to confer on the applicant the resultant benefits within a period of 120 (one hundred twenty) days from the date of receipt of the order.

In the result, the O.A. is thus allowed, leaving the parties with no order as to costs".



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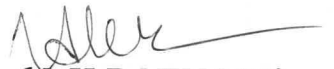
.6.

5. Since the issue has already been decided by this Tribunal as mentioned above, we do not feel inclined to make a departure from the view already taken under similar circumstances. Accordingly, the respondents are directed to consider the matter based upon other conditions as applicable to ACP, and if in the course of consideration, applicant is found to be eligible, he be conferred with the benefits within a period of 120 (one hundred twenty) days from the date of receipt of the order.

6. In the result, the O.A. is thus allowed, leaving the parties to bear their own costs.



(R.C.MISRA)
MEMBER(A)



(A.K.PATNAIK)
MEMBER (J)

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