

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR

Original Application No.51/2008

Dated this the 4th day of May, 2011

CORAM

**HON'BLE MR. JUSTICE S.M.M. ALAM, JUDICIAL MEMBER
HON'BLE MR. SUDHIR KUMAR, ADMINISTRATIVE MEMBER**

Om Prakash Jhakhar, Son of Shri Dev Kishan,
Through his LRs Smt. Pushpa W/o Late
Om Prakash Jhakhar aged about 38 years
Resident of C/o Surya Fancy Stores,
Pooja STD, Jai Narain Vyas Colony,
Nar Bindu Chaudhary Zila Pramukh,
Nagaur.Applicant

(By Advocate M/s J.K.Mishra and A.K.Kaushik)

Vs.

1. Union of India through General Manager,
North Western Raiplay, Jaipur,
Ganpati Nagar, Opp.Railway Hospital,
Hasanpura Road, Jaipur-302006.

2. Senior Divisional Personnel Officer
North Western Raiplay, Jodhpur Division,
Jodhpur.

3. Shri Manak Sharma,
Enquiry Reservation Supervisor
Office of Station Superintendent,
Degana Railway Station,
NWR. Respondents

(By Advocate Mr. Salil Trivedi for R.1&2
None for R.3)

ORDER

Hon'ble Mr. Justice S.M.M. Alam, Judicial Member

Applicant Om Prakash Jhakhar (Dead) through L.Rs Smt. Pushpa has filed this Original Application for grant of following reliefs:

"(i) That the impugned order dated 5.7.2005 (Annexure.A1), order dated 26.7.2007 (Annexure.A3) and order dated 30.8.2007(Annexure.A4) may be declared illegal and the same may be quashed. The respondents may be directed to give alternative appointment to the applicant by protecting post and pay ie., in pay scale of Rs. 5000-8000 and allow all consequential benefits including arrears of difference of pay. The order dated 1/6-6-2007 (Annexure.A2) maybe also directed to be modified accordingly.

(ii) That any other direction, or order may be passed in favour of the applicant, which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.

(iii) That the costs of this application may be awarded."

2. The brief facts of the case are as follows.

Applicant was initially appointed to the post of Assistant Station Master (for short ASM) Chandosi in the scale of pay of Rs. 1200-2040 on 22.5.1989. Thereafter he was sent for training and on successful completion of the same he was posted as ASM at Jhari within Jodhpur Division. Thereafter he was promoted in the grade of Rs. 1400-2300 with effect from 14.9.1992. On 1.1.1996 the pay was revised to Rs. 5000-8000 after implementation of the recommendation

of the Vth Central Pay Commission report. In the year 1993 the applicant fell sick due to some unknown disease and remained sick for long time. He was referred to the Central Hospital, New Delhi for open heart surgery where open heart surgery was done on 22.11.2003. But there was no improvement in the health of the applicant. Then he was treated by Neuro-Physician and some improvement was made in his health. Due to his ill health the applicant was decategorized vide letter dated 20.4.2004 as he was found unfit to perform the duty of ASM. However the applicant was found fit in Aye-two and below category for alternative jobs of sedentary nature and thereafter he was ordered to be temporarily deployed on the post of Correspondence Clerk in the pay scale of Rs. 5000-8000 and was posted at Jaisalmer vide letter dated 13.7.2004. The applicant declined to accept the said post and then he was posted to work as Enquiry-Cum-Reservation Clerk (for short ECRC) in the scale of Rs. 5000-8000 at Nagore vide letter dated 12.10.2004 (Annexure.A6). Thereafter the applicant was asked to give option for absorption on the post of Enquiry-Cum-Reservation Clerk in the pay scale of Rs. 4500-7000 vide letter dated 26.5.2005 (Annexure.A7) and as the applicant had no alternative except to give his written consent under pressure and so he gave his consent and then the second respondent issued an order on 5.7.2005 (Annexure.AI) whereby the applicant was posted to work on the post of ECRC in the pay scale of Rs. 4500-7000 in the office of SS,

Nagaur. Vide letter dated 1/6-6-2007 (Annexure.A2) the second respondent issued a seniority list of ECRC cadre and the name of the applicant was included in the seniority list in the pay scale of Rs. 4500-7000 despite the fact that at the time of his decategorization, he was drawing his pay in the pay scale of Rs. 5000-8000. He made representation challenging the said seniority list to the competent authority and requested for grant of proper pay scale as well further promotional benefit to him vide his representation (Annexure.A8). Vide order dated 26.7.2007 (Annexure.A3) the applicant was promoted from the post of ECRC to the post of Head ECRC in the pay scale of Rs. 5000-8000 and vide order dated 30.8.2007 (Annexure.A4) pay fixation was done in the said scale.

3. Further case of the applicant is that as per comprehensive instructions incorporated in Chapter XIII of Railway Manual Vol.I with regard to absorption of disabled/medically decategorized staff, if a Railway servant by virtue of his disability acquired during services becomes physically incapable of performing the duties of the post which he occupies and shifted to some other post he is entitled for protection of his pay scale and other service benefits and cannot be reduced in rank and it is the duty of the Railway authorities to find out suitable post with same scale of pay for such decategorized Railway servants. It is the case of the applicant that some other Railway employees were given pay protection by Railway authorities on being

from A

medically decategorized and the same benefit was given to Respondent No.3 who was also decategorized. It is stated that although Respondent No.3 Shri Manak Sharma was junior to the applicant but he was getting higher scale of pay of Rs. 5000-8000 and on promotion the scale of pay of Rs. 5500-9000. The contention of the applicant is that the applicant is also entitled for the same benefit in view of the Railway Manual.

4. On filing of the application, notices were issued to the respondents who appeared through lawyer and filed reply of the OA. As per their reply the respondents have taken a preliminary objection that the instant O.A. has been filed beyond the prescribed limitation period as prescribed under Section 21(1)(a)&(b) of the Administrative Tribunals Act, 1985 as the applicant had challenged the validity of Annexure.A.I dated 5.7.2005 after a lapse of more than 2 1/2 years period. The respondents' contention is that Annexure.AI is the basic order in respect of which no relief can be granted after expiry of the period of limitation as prescribed under Section 21 of the Administrative Tribunals Act, 1985. Further contention is that since no separate application for condonation of delay has been filed in this case inspite of the ground of limitation taken by the respondents in their reply, as such as per settled law, the court cannot grant suo motu condonation with regard to delay in filing of the OA and therefore, on this ground it has been prayed to dismiss the Original Application.

fm

5. As regards merits of the case, it has been stated that after medically decategorization of the applicant, the applicant was posted as Enquiry-Cum-Reservation Clerk and he was asked to give option for absorption on the said post in the scale of Rs.4500-7000 vide letter dated 26.5.2005 (Annexure.A7) and the applicant gave his option and accepted the said pay scale which was the pay scale of ECRC. He neither filed any representation before any authority for granting higher pay scale nor he preferred any O.A. in this regard rather he chose to remain silent till he was promoted to the post of Head ECRC in the pay scale of Rs.5000-8000 and thus on the ground of delay and laches on the part of the applicant, the O.A. should be dismissed.

6. Shri J.K.Mishra, Advocate appeared for the applicant whereas Shri Salil Trivedi, Advocate appeared for the respondents and argued the case.

7. During the start of the hearing, the learned advocate appearing for the respondents submitted that the preliminary objection raised by the respondents with regard to limitation be decided first as there is specific averment of the respondents in their reply that the O.A. is barred by limitation as provided in Section 21 of the Administrative Tribunals Act (for brevity 'Act'). He submitted that the Hon'ble Apex Court in a catena of decisions has regularly held that if on the face of it the claim is stale, the court should desist to entertain such stale claims. In support of his submission, the learned

fm

25

advocate of the respondents has placed reliance on two decisions of the Hon'ble Supreme Court ie., (i) 1999 AIR SCW 3911- *Ramesh Chand Sharma Vs. Udam Singh Kamal and others with State of Himachal Pradesh Vs. Udam Singh Kamal and another* and (ii) 2008 AIR SCW 7233 – *C.Jacob Vs. Director of Geology & Mining & Anr.*

So on the basis of the argument advanced on behalf of the respondents, we are taking up the point of limitation first.

8. As per the contention of the applicant he is claiming relief that the impugned order dated 5.7.2005 (A.1), order 26.7.2007 (A.3) and order dated 30.8.2007 (A.4) be declared illegal and the same be quashed and that he may be given protection of post and pay in the scale of Rs. 5000-8000 with effect from 5.7.2005 and then for other consequential reliefs. Thus the first date from which the applicant has prayed for protection of his post and pay in the scale of Rs. 5000-8000 is 5.7.2005 rest reliefs are consequential. From perusal of the record of this OA it appears that this O.A was preferred on 21.2.2008 meaning thereby that the OA was filed after about 2 years 7 months from the date when Annexure.A.1 was passed. Section 21 of the Administrative Tribunals Act (for short Act) says that the Tribunal shall not admit any application which has been filed beyond the period of limitation prescribed under the Act. Section 21 of the Act reads as under:

“”21. *Limitation—(1) A Tribunal shall not admit an application,--*

(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of Section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months."

However, Section 21(3) of the Act gives power to the Tribunal to condone the delay if sufficient cause is shown. Clause (3) runs as under:

"(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal, that he had sufficient cause for not making the application within such period."

9. Thus on the one hand Section 21(1)(a)&(b) prohibits the Tribunal to entertain an application beyond the period of limitation prescribed under Clauses (a) and (b) on the other hand Clause (3) gives power to the Tribunal to condone the delay if sufficient cause is shown.

10. The contention of the applicant is that the fixation of pay or arrears of pay is recurring cause of action and the law of limitation will not apply in a case where the impugned order was passed in violation of any rule, policy or circular of the concerned department.

21

11. He has submitted that Para 1301 under Chapter XIII of IREM Vol.I deals with absorption of Disabled/Medically Decatogorized staff in Alternative Employment which says that the Railway servant who becomes physically incapable of performing the duties of a particular post which he occupies should not be dispensed with or reduced in rank but he shall be shifted to some other post with the same pay scale and service benefits. He further submitted that Para 1308 of the said Manual says that the pay of such Railways servants will be fixed on absorption on alternative post at a stage corresponding to the pay previously drawn in the post held by such employee before acquiring disability. The learned advocate on the basis of the above provision of Railway Manual submitted that the order dated 5.7.2005 (Annexure.A.1) was issued by the respondents against the provisions contained in IREM Vol.I Paras 1301 and 1308 and thus it is violative of the rules prepared by the respondents' department itself. The contention is that if any order is void ab initio being violative of any rule, the law of limitation will not apply and so far as the instant case is concerned, the applicant had already filed representation before the authority concerned to review its decision and therefore, in the instant case the limitation will not apply. We are of the view that the argument advanced by the learned advocate of the applicant is acceptable in view of the fact that the order dated 5.7.2005 (Annexure.A1) whereby the applicant was placed in the pay

from A

scale of Rs. 4500-7000 from Rs. 5000-8000 is violative of the provisions contained in Paras 1301 and 1308 of IREM Vol.I and moreover it appears that the applicant was representing his case before the respondents for re-consideration of the case. In such view of the matter, we hold that the O.A. is within time.

12. The next question for determination is that whether the impugned order dated 5.7.2005 (Annexure.A.1) can be declared illegal?

13. The contention of the learned advocate of the applicant is that the applicant before being medically decategorised was working on the post of ASM in the scale of pay of Rs. 5000-8000. He fell sick due to some unknown disease for which he was treated at several places with no improvement in his health and then he had undergone open heart surgery and as a result of his ill health he was decategorised vide letter dated 20.4.2004 and declared unfit to perform the duties of ASM. After being medically decategorised the applicant was firstly posted to work as Enquiry-Cum-Reservation Clerk (ECRC) in the pay scale of Rs. 5000-8000 vide order dated 12.10.2004 (Annexurxurwe.A.6). The contention of the learned advocate is that this order of the authorities was in-consonance with the policy of the department. Further contention is that the respondents vide order dated 5.7.2005 (Annexure.A1) reduced the pay of the applicant in the pay scale of Rs. 4500-7000 and in this

by

regard respondents also obtained the consent of the applicant but as per policy of the department this impugned order was against the policy as such the applicant has come before this Tribunal to declare Annexure.A.1 as illegal and the letter of consent given by the applicant will not debar him from claiming relief. To support his argument learned advocate has referred Paras 1301 and 1308 of Chapter XIII of IREM.Vol.I. For proper appreciation of the submission of the learned advocate of the applicant we would like to quote the above mentioned Paras of Chapter XIII of IREM Vol.I.

“1301: A Railway servant who fails in a vision test or otherwise by virtue of disability acquired during service becomes physically incapable of performing the duties of the post which he occupies should not be dispensed with or reduced in rank, but should be shifted to some other post with the same pay scale and service benefits.

1308: Fixation of pay: The pay of the disabled medically decategorised Railway servants will be fixed on absorption in an alternative post at a stage corresponding to the pay previously drawn in the post held by them on regular basis before acquiring disability/medically decategorization.”

From perusal of the above mentioned Paras of IREM Vol.I it is established beyond doubt that it is the policy of the respondents department that the Railway Servant who becomes physically incapable of performing the duties of a particular post which he occupies should not be dispensed with or reduced in rank but he will be shifted to some other post with the same pay scale and service benefits. Para 1308 of the Manual further says that the pay of such Railway servants will be fixed on absorption on alternative post at the

stage corresponding to the pay previously drawn in the post held by such employee before acquiring disability. Thus we have no hesitation to hold that as per the above mentioned two Paras of IREM, the applicant is entitled to get his pay fixed on absorption on alternative post after being medially decategorised in the pay scale which he was previously drawing in respect of the post previously held before acquiring disability. Thus we hold that Annexure.A.1 (order dated 5.7.2005) was definitely passed by the respondents department in violation of Paras 1301 and 1308 of Chapter XIII of IRM Vol.I. Learned advocate of the respondents has contended that this order was passed after obtaining option of the applicant so at this stage the applicant is precluded from challenging the said order. We do not find much force in this argument in view of the fact that the applicant had no alternative except to accept the offer of the respondents in order to save his service which was his source of livelihood. We therefore, hold that Annexure.A.1 is illegal and must be set aside. We further hold that fixation of the pay of the applicant in the pay scale of Rs. 4500-7000 was wrong as it should have been fixed in the pay scale of Rs. 5000-8000 which pay scale he was drawing before acquiring disability and before being declared medically unfit for the job of ASM.

14. The next contention of the applicant is that vide letter dated 1/6-6-07 (Annexure.A2) the respondents issued Seniority List of

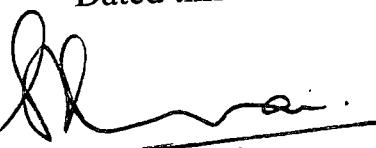
ECRC cadre and the name of the applicant was included in the seniority list in the pay scale of Rs. 4500-7000 whereas his junior namely Shri Manak Sharma (third respondent) was shown in the pay scale of Rs. 5000-8000. Likewise Vide Annexure.A3 Shri Manak Sharma was promoted to the pay scale of Rs. 5500-9000 from the pay scale of Rs. 5000-8000 whereas the applicant was promoted in the pay scale of Rs. 5000-8000 from the pay scale of Rs. 4500-7000 and accordingly as per Annexure.A.4 their pay was fixed. The contention of the applicant's lawyer is that since Shri Manak Sharma was junior to the applicant, as such the applicant is entitled to be promoted on par with Manak Sharma from the date he was promoted. In reply to this argument the learned advocate of the respondents submitted that as per the provisions contained under Paras 1301 and 1308 of Chapter XIII of IREM Vol.I the applicant is only entitled to get the protection of his pay which he was already drawing but he is not entitled to claim any seniority on that very ground. He submitted that the seniority list (Annexure.A2) will show that Manak Sharma was already in the pay scale of Rs. 5000-8000 and therefore vide Annexure.A3 he was promoted in the pay scale of Rs. 5500-9000 whereas the applicant was in the pay scale of Rs. 4500-7000 occupying the post of ECRC and when he was promoted to HERC his pay scale was given in the scale of Rs. 5000-8000. He submitted that if this court holds that since the date of decategorization the applicant is entitled to get the pay scale of

Rs. 5000-8000 then even on promotion he will get the same pay scale as the post of HERC carries the scale of Rs. 5000-8000 and the applicant was promoted to this post on 26.7.2007. Thus he argued that the benefit of pay protection can only be given to the applicant once and so on promotion to the post of HERC which carries pay scale of Rs. 5000-8000 there will be no change in the pay scale of the applicant as the pay scale of HERC is Rs. 5000-8000. We are of the view that the ^{argument} of the learned advocate of the respondents has got much force. We, therefore, hold that although the applicant is entitled to protection of his pay scale after being declared unfit in the post of ASM and, therefore, after being absorbed on the post of ECRC, he is entitled to get his pay fixed in the pay scale of Rs. 5000-8000 which he was drawing earlier by way of pay protection as provided under Paras 1301 and 1308. We are, further of the view that this pay protection can be given to the applicant only once, and even after promotion of the applicant to the post of HERC, which post carries pay scale of Rs. 5000-8000, the applicant shall not be entitled for grant of higher pay scale in the pay scale of Rs. 5500-9000, which pay scale is provided for the post of ERS, and since the applicant has not been promoted to that very post of ERS, as such he will not be entitled to get scale of pay of Rs. 5500-9000 which is the pay scale of ERS, and so we are of the view that the relief claimed in the OA with regard to

fixation of seniority as well as fixation of pay in the pay scale of Rs. 5500-9000 cannot be granted to the applicant.

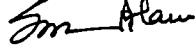
15. In the result, we find and hold that this OA can be partly allowed. Accordingly this OA is partly allowed and Annexure.A1 order dated 5.7.2005 is hereby set aside and it is held that the applicant is entitled to the benefit of pay protection in the pay scale of Rs. 5000-8000 since 5.7.2005 when he was absorbed on the post of ECRC in the office of SS, Nagore. We, therefore, direct the respondents to fix the pay of the applicant in the pay scale of Rs. 5000-8000 since 5.7.2005 and thereafter grant all other consequential benefits including arrears within a period of three months from the date of receipt/production of this order. In the circumstances of the case, there will be no order as to costs.

Dated this the 4th day of May, 2011



SUDHIR KUMAR
ADMINISTRATIVE MEMBER

Ks



JUSTICE S.M.M. ALAM
JUDICIAL MEMBER