

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 446/2010

Wednesday, this the 18th day of January, 2012.

CORAM

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms. K NOORJEHAN, ADMINISTRATIVE MEMBER

K.P.Cheriakoya, S/o KK Attakoya,
Chargeman, now working as Electrician,
Electrical Sub Division, Kavaratti Island.

....Applicant

(By Advocate Mr N.Unnikrishnan)

v.

1. Union of India rep. by the Secretary,
to the Government of India,
Ministry of Personnel & Public Grievances,
Department of Personnel & Training,
New Delhi-110 001.
2. The Administrator,
Union Territory of Lakshadweep,
Kavaratti.
3. The Departmental Promotion Committee,
Union Territory of Lakshadweep,
Electrical Department,
Kavaratti.
4. The Executive Engineer (Electrical),
Division Office, U.T of Lakshadweep,
Kavaratti.Respondents

(By Advocate Mr Pradeep Krishna, AGSC for R.1)

(By Advocate Mr S Radhakrishnan for R.2 to 4)

This application having been finally heard on 11.01.2012, the Tribunal on 18.01.2012 delivered the following:

ORDER

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER

The applicant in this case is aggrieved by the denial of the benefits under Assured Career Progression Scheme (ACP for short), to which, according to

him, he is entitled to, with effect from 26.12.2001, the date he completed 12 years of regular service in the post of Electrician in the pay scale of R.1200-1800.

2. Briefly stated, after his initial appointment as Engine Driver on 10.9.1987, the applicant was appointed as direct recruit in another post; and again he was appointed as direct recruit Electrician vide Annexue A-1 order dated 21.12.1989. This post is a feeder post for the next higher post of Junior Engineer. The applicant has at his credit, the academic qualification of SSLC.

3. The second respondent issued a notification dated 29.5.1997 (Annexure A-3) which is "Tthe Lakshadweep Electricity Department (Group C & D technical post) (Revised) Recruitment Rules, 1997". The schedule to this Recruitment Rules is in 3 parts. While Schedule I relates to the post of J.E(Electrical), Schedule II relates to Construction Foreman/Chargeman (PH)/Chargeman(L)/ Meter Mechanic/Cable Jointer (Inter Changeable) and Schedule III relates Mechanic/Electrician (Inter changeable). In so far as Junior Engineer (Electrical) is concerned, details of educational qualifications required are contained in col. 8 of Schedule I and Col. 9 contains the entry "whether age and educational qualifications prescribed for direct recruits will apply in the case of promotee" and the answer to the same is "Age not applicable, educational qualifications will apply." Schedule II and Schedule III also contain in col.8 the details relating to educational qualifications and col.9 relates to whether such educational qualifications prescribed for direct recruits will apply in the case of promotees".

At the end, the following note has been appended:

"in the case of promotees, who were in position as on 29.05.1997, i.e. the date of publication of (Lakshadweep Electricity Department) (Group C & D Technical posts) Recruitment Rules 1997 which is superceded by these rules, the educational qualification prescribed in Col.9 will not apply."

4. The Department of Personnel introduced a financial upgradation scheme called Assured Career Progression Scheme, 1999, effective from 9.8.1999. As per this scheme, in case of non-promotion of eligible and suitable candidates on account of non-availability of vacancy, financial upgradation will be considered after 12 years of their service in the feeder grade.

5. The applicant was hoping that the Department would consider his case for such financial upgradation on completion of 12 years of service as he was not promoted to the post of J.E. Since the Department did not consider his case, he filed necessary representations although belatedly in 2008 (it is also claimed by the applicant as early as in 2004 he had preferred certain representations which however, have not been annexed) which was not replied to. Hence the applicant has moved this O.A seeking the following reliefs:

- i) Call for the records leading to the denial of promotion as Junior Engineer in the pay scale of Rs.4500-7000 available to non-Diploma Holders and of ACP financial upgradation in pay scale of Rs.4500-7000 to the applicant and also the records relating to granting promotion to the post of Junior Engineer (Electrical) on the basis of Annexure – Recruitment Rules;
- ii) Declare that the applicant is entitled to be promoted as Junior Engineer (Electrical) in the pay scale of Rs.4500-7000 or to financial upgradation available to non-diploma holders w.e.f. 26.12.2001;
- iii) Issue appropriate orders or direction to respondents to issue necessary orders granting promotion to the post f Junior Engineer (Electrical) in the pay scale of Rs.4500-7000 including all other consequential benefits thereon w.e.f. 26.12.2011 within a reasonable period.
- iv) Issue appropriate order or direction to respondents to grant financial

upgradation in the pay scale of Rs.4500-7000 to the applicant with all consequential benefits w.e.f. 26.12.2001 within a reasonable time.

6. Respondents have contested the O.A. They have stated that the application is hopelessly barred by limitation. The fact of the applicant's appointment on 21.12.1989 and his qualification as well as his having completed 12 years of service without any promotion are all undisputed. However, as regards the claim for ACP, respondents have stated that since the recruitment rules provided that the qualification as per recruitment rules would be applicable to promotions also, the applicant, not in possession of Diploma as required under the rules, could not be considered for financial upgradation. It has also been stated that the respondents had already granted MACP to the applicant as per the terms and conditions of the MACP Scheme. The respondents have also stated that the earlier 1997 Rules have been superceded by 2002 Rules in which it has been clearly indicated that in case of promotion under the rules for those who were in position as on 29.5.1997 i.e. the date of publication of Lakshadweep Electricity Department (Group C and D Technical posts) (Revised) Recruitment Rules, the educational qualification in Col.8 will not apply except for the post of Junior Engineer. Vide Annexure R2(c), under the latest amended Recruitment Rules, vide notification dated 19.12.2009 also, the aforesaid note has been specified.

7. The applicant has filed his rejoinder reiterating his contentions in the O.A.

8. Additional reply had been filed by the respondents producing a copy of the order dated 17.2.2011 in O.A.736/2010.

9. In their additional reply, respondents have stated that this is a case where the applicant did not possess qualifications for the post of J.E and as such was not considered for promotion and his claim for ACP benefits has also been turned down on the ground that when requisite qualifications are not fulfilled for promotion, the financial upgradation cannot be also be granted.

10. Applicant has filed additional rejoinder in which he has referred to the case of one K.P.Kassali, an Electrician, with SSLC qualification, appointed in 1983 and promoted as JE on 20.10.1995, had been fitted in the scale of Rs.4500-7000 and latter afforded ACP benefits and placed in the scale of Rs.5000-8000.

11. Reply to the additional rejoinder was filed by the respondents in which they have stated that K.P.Kassali was promoted as JE as per the then Recruitment Rules. They have also stated that it is not true that the said Kassali was drawing a higher pay scale as per ACP scheme. The respondents have placed reliance upon Annexure R2(g) letter which is the statement of election of pay under CCS(Revised) Pay Rules, 2008 furnished by the said Kassali.

12. A further rejoinder has filed by the applicant by annexing 2 orders (a) Order dated 7.9.2006 and (b) Order dated 8.10.2009.

13. Counsel for the applicant argued that the 1997 Rules, has to be interpreted properly. The notification talks of only "schedule" and not 'schedules' and further the note appended at the end should mean a note commenced to all the three parts of the schedule. Counsel submitted that this is evident from the fact that in the 2002 Recruitment Rules, non applicability of that note has been specifically indicated with reference to the post of JE. If the note appended to the schedule pertains only to schedule III, there is no need at all to indicate that



the note is not applicable to promotions of JE.

14. Counsel also argued that Shri Kassali was a non-Diploma holder but was given promotion as JE in 1995. The counsel submitted that the above promotion would go to show that promotion as JE is admissible even for non-diploma holder Electricians.

15. Counsel also indicated that a perusal of 2002 Recruitment Rules would show that two sets of pay scales have been provided for, for the post of JE:- one for Diploma holders in scale Rs.5000-8000 and another for non-diploma holders in scale Rs.4000-5000. This confirms the admissibility of promotion from the post of Electrician to the post of J.E even if one does not have diploma qualifications.

16. Counsel for the respondents submitted that note appended to Schedule III should be confined to that part of the schedule only and cannot be extended to Schedule I and II. As regards promotion to Kassali, it was acted by a different set of Rules then existing.

17. Arguments were heard and documents perused.

18. The three part of the schedule each in respect of one particular post, have uniformly 14 columns and col.8 and 9 are invariably identical. It is only in the qualification part of it that there has been some change. The note appended at the end of the schedule as available in 1997 Rules if read in conjunction with schedule at col.8 and 9, schedule II col.8 and 9 and schedule III col. 8 and 9, the same read equivocally. That the note appended at the end of the schedule

applies to all the three parts of the schedule is also evident from the fact that in the 2002 Rules, there is a reference of exception to the post of JE in the very same note. If the note is confined only to the third part of the schedule (Schedule III) as contended by the respondents, there is no need to reflect exception to JE (Electrical) in the note as J.E is in no way connected with the post to which Schedule III is related. For JE is not the post as reflected in schedule III. Thus, it must be construed that the clause appended at the end of the schedule applies to schedule I, schedule II as well as schedule III.

19. Counsel for the applicant is fully right when he has stated that provision exist for granting a promotion to non-diploma holders as could be seen from a different pay scale for the post of JE for non-Diploma holders under the 2002 Rules. He is also right when he compared the case of Shri K.P.Kassali who was promoted to the post of JE in 1995 itself. The respondents, though claimed that promotion to Kassali was on the basis of the then extant Rules, they have not chosen to make available a copy of the Recruitment Rules nor have they contrasted the same with the 1997 Rule or 2002 Rules. Thus it is amply clear that by mere misinterpretation of the rules, respondents are under the mistaken impression that the applicant does not fulfil the requisite qualification to be considered for financial upgradation under the ACP scheme for higher pay scale applicable to non-diploma holders of J.Es.

20. While the above is on merit, the technical objection raised by the respondents about the limitation is to be addressed here. The entitlement of the applicant to the financial upgradation arose effective from December, 2001. If so, he should have approached the Tribunal after exhausting departmental remedies. According to the counsel for the applicant, he had requested the

financial upgradation in 2004 followed by 2008. It is the department which is expected to suo motu consider financial upgradation and allow the same even before the employees could be expecting such financial upgradation. This was not done for a considerable time and it was then that the applicant had to pen the representation in 2004 followed by 2008.

21. Limitation in service matter is of two types (a) whether one time of cause of action and (b) recurring or continued cause of action. Erroneous pay fixation is a recurring cause of action. It is made clear that such a cause of action should not be consequential to any other cause of action. For example, granting seniority would result in higher position for consideration for promotion and grant of promotion would result in enhanced pay and allowances. Here, wrong fixation of pay is on account of wrong fixation of seniority and as such wrong fixation of pay is not a proximate cause of action but is a consequential cause of action. In contrast to the above, ACP scheme provided for "financial upgradation" which means that a person entitled to such financial upgradation, if not afforded the same, would be drawing less pay every month and the cause of action is continuous. In the case of **M.R.Gupta v. Union of India** [(1995) 5 SCC 628], the Apex Court has held as under:

"The claim to be paid the correct salary computed on the basis of proper pay fixation, is a right which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a government servant to be paid the correct salary throughout his tenure according to computation made in accordance with the rules, is akin to the right of redemption which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished.

22. While holding so, the Apex Court has also held that in so far as drawal of arrears is concerned, limitation would apply. And in so far as arrears, the extent of arrears that would not be affected by the law of limitation is three years prior

to the filing of the OA as held by the Apex Court in the case of *Jai Dev Gupta v. State of H.P.*, (1997) 11 SCC 13 wherein the Apex Court has held as under:-

"2. Learned counsel appearing for the appellant submitted that before approaching the Tribunal the appellant was making a number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May 1989. We do not think that such an excuse can be advanced to claim the difference in back wages from the year 1971. In *Administrator of Union Territory of Daman and Diu v. R.D. Valand* this Court while setting aside an order of the Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned counsel for the appellant that the difference in back wages should be paid right from the year 1971. At the same time we do not think that the Tribunal was right in invoking Section 21 of the Administrative Tribunals Act for restricting the difference in back wages by one year.

3. In the facts and circumstances of the case, we hold that the appellant is entitled to get the difference in back wages from May 1986. The appeal is disposed of accordingly with no order as to costs."

23. The Apex Court in the case of *Union of India v. Tarsem Singh*, (2008) 8 SCC 648, relating to the limitation aspect held has under:-

"7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a **continuing wrong**. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the **reopening of the issue would affect the settled rights of third parties**, then the claim **will not be entertained**. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion,

etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

24. From the above decisions, it is clear that limitation would be a reckoning factor in those cases where arrears of pay and allowances beyond three years from the date of filing of the O.A are claimed. In the instant case, we make it clear that the applicant having not approached the Tribunal earlier, he having approached the Tribunal only in 2011, his claim for pay and allowances has to be restricted to a period three years anterior to filing of the O.A. Thus, limitation is not coming in the way of the applicant in respect of fixation of pay and payment of part of arrears for the period three years anterior to the filing of the O.A.

25. In view of the above, the O.A succeeds. It is declared that the applicant is entitled to be considered for financial upgradation with effect from 21.12.2001 on his completion of 12 years of services if he is found eligible/suitable, the same should be afforded to him by way of notional fixation of pay from December 2001 and actual fixation from May 2007. Respondents are directed to consider the case of the applicant for ACP by referring the same to the constituted committee and on its recommendation, if the applicant is found fit, his pay after first financial upgradation from 2001 shall be fixed in the grade of Rs.4500-7000. Arrears arising out of such fixation shall be calculated and paid to the applicant as under.

- a) From 21.12.2001 on notional basis. Increment accrued therein shall be added every year on notional basis.
- b) From May 2007, the financial upgradation shall be on actual basis and the arrears arising out of such financial upgradation become

due and payable to the applicant.

26. The entire drill in this order shall be complied with within a period of three months from the date of receipt of copy of this order.

27. There shall be no order as to costs.


K NOORJEHAN
ADMINISTRATIVE MEMBER


Dr K.B.S.RAJAN
JUDICIAL MEMBER

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