

Reserved

**CENTRAL ADMINISTRATIVE TRIBUNAL
LUCKNOW BENCH
LUCKNOW**

**Original Application No.404/2010
This the 25th Day of May 2012**

Hon'ble Mr. Justice Alok Kumar Singh, Member (J)

Om Prakash Gupta, aged about 60 years s/o Late Shri Jagat Lal, r/o---Savitry Enclave, Narayanpuri, Alinagar Sunehra, Manas Nagar, Krishna Nagar, Lucknow.

...Applicant.

By Advocate: Sri Praveen Kumar.

Versus.

1. Union of India, through the General Manager , North Eastern Railway, Gorakhpur.
2. The Divisional Railway Manager, North Eastern Railway, Ashok Marg, Lucknow.
3. The Sr. Divisional Finance Manager, North Eastern Railway, Ashok Marg, Lucknow.
4. The Sr. Divisional Mechanical Engineer (O&F) , North Eastern Railway, Ashok Marg, Lucknow.

.... Respondents.

By Advocate: Sri S. Verma.

(Reserved on 18.05.2012)

ORDER

By Hon'ble Mr. Justice Alok Kumar Singh, Member (J)

This O.A. has been filed for the following relief's:-

- "1. To quash the impugned order dated 10.08.2010 posting the applicant as Crew Controller with retrospective effect, order dated 19.08.2010 proposing recovery, fixation chart dated 10.08.2010 and order

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dated 30.08.2010 directly adjusting amount from the Gratuity of the applicant contained as Annexure No.1-1, A-2, A-3 and A-4 with all consequential benefits.

2. To refix the pensionary benefits of the applicant in view of calculation given in para 4.19 of the OA and release arrears thereof alongwith interest @ 12 % from the date of accrual and till the actual date of payment.

3. To release the withheld/ adjusted amount from the Gratuity alongwith interest @ 12 % from the date of accrual and till the actual date of payment.

4. Any other relief, which this Hon'ble Tribunal may deem fit, just and proper under the circumstances of the case, may also be passed.

5. Cost of the present case may also be awarded as the applicant has unnecessarily been dragged into litigation."

2. The case of the applicant is that he was initially appointed as Engine Cleaner in the year 1972. Thereafter, he received various promotions on the post of Fireman-I, Fireman II, Shunter and then Loco Pilot (Goods) in the year 2003. On 19.8.2005, he was sent for periodical medical examination where operation of his eyes was recommended for cataract. After operation of both the eyes he was declared fit for A-2 category vide order dated 08.11.2005 (Annexure No.A-5) and by means of an order dated 11.11.2005, it was directed that till the absorption of the applicant on some other post, he shall work on the post of Crew Controller (Annexure-A-6). Therefore, whatever benefits were admissible on account of working as Crew Controller being running staff i.e. Loco Pilot (Goods), were paid to him by the respondents. As per rules, once such person is declared medically de-categorized, he has to be offered an alternative post or he has to be continued on supernumerary post, although, he is not allowed to perform the actual duties related to running staff. The rules also provide for taking option in

such cases and such persons can also opt for voluntary retirement. The applicant remained a Loco Pilot (Goods) and as per temporary arrangement he was asked to work as Crew Controller vide order dated 11.11.2005. Therefore he was also paid kilometerage of 120 kms, per day. He was due to retire on 31.08.2010. All of a sudden, the impugned order dated 10.08.2010 was passed posting the applicant on the post of Crew Controller with retrospective effect just before three weeks of his retirement without following the rules. Similarly, on 19.08.2010 recovery was also proposed.

3. The respondents have contested the O.A. by filing counter affidavit. It has been conceded that keeping in view his category A-II, till he could be absorbed in an alternative post, he was asked to work as Crew Controller. But it is further said that in terms of railway board letter dated 14.1.2004 (RBE.No.12/2004) medically de-categorized drivers (Loco Pilot) drafted to perform the duties of crew controllers ceased to be running staff (Annexure-C-1). Thus, he was though not entitled, but was wrongly paid allowance in lieu of kilometerage for 120 km. per day. Similarly, his pay was also wrongly fixed. Therefore, impugned orders were passed.

4. A Rejoinder Affidavit has also been filed in this case reiterating the pleadings contained in the O.A.

5. I have heard the learned counsel for the parties at length and perused the material on record.

6. From the side of the applicant reliance has been placed on the following Rules/provisions/case laws;-

(i). Para-1301 to Para-1306----Absorption of Medically Incapacitated Staff in Alternative Employment, it has

been provided in para-1306 of Indian Railway Establishment Manual Volume-I, 1989 as under;-

(1). With a view to determine the categories in which a medically incapacitated railway servant is suitable for absorption, a Committee should examine him. The Committee may consist of two or three officers posted at the headquarters of the officer under whom the medically incapacitated railway servant was working, the railway servant's immediate officer being one of the members of the committee. After the Committee has examined the railway servant and determined his suitability for certain categories of posts, the officer under whom the railway servant was working will proceed to take further action to find suitable alternative employment for him."

(ii).

Para-1310.

" Offer of alternative employment to be in writing :-The alternative employment must be offered in writing, stating the scale of pay and the rate of pay at which it is proposed to reabsorbed in service. On no account should the Railway servant be posted to an alternative appointment until he has accepted the post. A railway servant is at liberty to refuse an offer of alternative appointment and the leave granted to him will not be terminated pre-maturely merely because of his refusal. The Leave must run its course. He will continue to remain eligible for other alternative offers of appointment till his leave expires and efforts to find such appointment should, therefore, continue throughout the currency of his leave."

(iii). **Munna-II vs. Union of India and Others reported in 1997 (7) ATJ-357;-**

Indian Railway Establishment Manual, Vol I, Rule 1306---Superannuation---Medical Incapacitation---Applicant was working as Shunter---Declared unfit for the post on 1.12.1992---Given the post of Shedman Grade I on 17.3.1993---Informed his inability to work as Shedman Grade I on the ground that he was incapable to write and read which is essentially required for the said post--- Screening Committee never examined his suitability for any other alternative post--- Authorities failed to follow the procedure warranted under the guidelines issued by the Railway Board---Held applicant was never offered the alternative job as warranted under the Schedule and he is treated to be retired on medical incapacitation w.e.f. 31.5.1993 i.e. after the expiry of 6 months from the date he was medically declared unfit with all consequential benefits."

(iv). PS No.11109/95.

"No.E(NG) II/95/RC-94

N. Delhi dt.22.9.95

Sub:-Employment on compassionate grounds medical decategorisation of ex. Railway employee.

In terms of the instructions contained in para-I 9iv0 of board's letter no.; e9nd 0iii/78/rc-1/1 dated 07.04.93 and 3.9.83, appointment on compassionate grounds is permissible where a railway employee becomes medically decategorised for the job he is holding and no alternative job with the same emoluments can be offered to him and also where a railway employee is offered alternative employment on the same emoluments but it is not accepted by the employee and the chooses to retire from service.

2. The question whether appointment on compassionate grounds can be considered in the case of a medically decategorised employee who does not wait for the administration to identify an alternative job for him but chooses to retire and makes a request for such appointment has been under consideration of the board.

3. After careful consideration of the matter board have decided that in partial modification of Board's letter No.; E (NG) III/78/RC-1/1 dated 03.9.83, in the case of medically decategorised employee, compassionate appointment of an eligible ward may be considered also in cases where the employee concerned does not wait for the administration to identify an alternative job for him and chooses to retire and makes a request for such appointment.

4. Please acknowledge receipt. "

(v). **Baij Nath Ram vs. Union of India and Others. Reported in 2001 (3) ATJ-616.**

"Central Civil Service (Pension) Rules 71---Recovery---Death cum Retirement Gratuity--- Recovery of excess payment made from the DCRG amount---No assessment of the dues was made before the retirement of the applicant--- Even applicant was not at fault for over payments---Held no recovery can be made from the DCRG of the applicant---Direction given to make payment of the amount so recovered from the applicant's DCRG."

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7. From the side of the respondents reliance has been placed on the following case law;-

(i). **The Railway Board and Others Vs. P.R. Subramaniam and Others reported in (1978) 1 SCC-158.**

"Government Servants---Between Rules in Indian Establishment Code framed under Article 309 and Circulars of Railway Board issued under Rule 157 of that Code, held, the latter will prevail---Rule 20 (b) therefore subject to letter of Railway Board dated March 2, 1962 relating to promotion and seniority of Clerks Grade II to Clerks Grade I"

8. There is no quarrel on the point that after serving for about 33 (Thirty three) years (from 18.1.1972 to 19.8.2005) the applicant was sent for periodical medical examination in accordance with rules where he was advised cataract operation in both the eyes. Therefore, he was declared fit for A-2 category only vide order dated 8.11.2005. Within 3 days i.e. 11.11.2005, an order (Annexure-A-6) was passed by the respondents to the effect that on being found fit, till his absorption on the next post, work of Crew Controller would be taken from the applicant. For this purpose he was sent to Chief Crew Controller, Charbagh, Lucknow. Probably, on account of the fact that since the work of Crew Controller was being taken from him till his absorption on a suitable post, whatever benefits are admissible on account of working as Crew Controller being running staff for example Loco Pilot (Goods), the same were paid to the applicant w.e.f. the date of the above order i.e. 11.11.2005. For working on the post of Crew Controller, an allowance of kilometrage of 120 kms per day is paid. From the relevant rules and provisions cited and relied upon from the side of the applicant, it also appears that after an

employee is declared medically unfit he is decategorised, then he will have to face Screening Committee where his suitability to the post, which is proposed to be offered as alternative job without loss of emoluments, is examined and after taking option and willingness of the employee concerned he is offered that post. Though, from the other side this point was contested in view of para-2 (G) of R.B.E. No.9/1998 saying that alternative job has to be offered where performance is not found satisfactory. This submission appears to be meaningless. A careful perusal of this provision shows that medically decategorised persons are entitled to be drafted to perform the duties of Power Controllers/Crew Controllers. The offering of the alternative job is not of much importance as far as present case is concerned. For the present let us confine to the point of drafting only. In the present case from perusal of the above order dated 11.11.2005 (Annexure-A-6) it clearly comes out that the applicant was not finally drafted on some post. Instead, till the period he is absorbed on the next post, it was decided to take work of Crew Controller from him and accordingly, that work was taken. The use of words "till the period he is absorbed" clearly indicates that on the date of this order i.e. 11.11.2005 he was not absorbed or drafted. This absorption or drafting was to take place in future and till that time this temporary arrangement was done. But, in future no such absorption or drafting appears to have ever taken place. It appears that thereafter the officials concerned slept over the matter for about 5 years. Then suddenly in the month of August, 2010 when the retirement of the applicant approached very near i.e. on 31.08.2010, all of a sudden just before three weeks i.e.

on 10.08.2010 the impugned order (Annexure-A-1) was passed saying that two officials including the applicant were drafted Crew Controller (while the applicant was in fact never drafted till passing of this impugned order as said above). Besides, in the relevant Column the date of absorption on the said post was also mentioned as 11.11.05 (on that date the order Annexure-A-6 only says about taking duty of Crew Controller till absorption on next post). It was further mentioned in it that now in view of the railway Board Circular dated 14.1.2004 such persons are not entitled to get any benefit of running category for the performance of work in the running category. Accordingly, pay fixation was made as per details given in this order. As said above in this order the date of drafting has been wrongly shown as 11.11.2005 whereas, he was never drafted. On 11.11.2005, only a temporary arrangement was made till his absorption on the subsequent post. But neither any formal screening was made nor any post was offered nor any option was taken from him in accordance with rules or provisions. All this was required to be done in accordance with the principle of natural justice and fair play also. In any case at least no formal or final order for drafting was passed. The official of the respondents, probably in order to save their skin, mentioned the above date of 11.11.2005 presuming as his date of drafting on the post of Crew Controller in the said pay fixation chart/slip just before three weeks of his retirement and on that basis after about a week i.e. 19.8.2010 another order (Annexure-A-2) was passed for recovery of whatever allowances were paid to the applicant in respect of running staff. This amount of recovery is mentioned in the above order as

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Rs.244409/- to be deducted from payments. This alleged over payment of Rs.244409/- has been also shown in the letter dated 30.08.2010 (Annexure-A-4) addressed to the applicant in respect of the details of retiral benefits. In fact, this amount has also been actually deducted from DCRG. The above action on the part of the respondents is therefore definitely unreasonable and unjust. Let us see it from another angle also. If rightly or wrongly the allowance payable to the staff of running category was being paid by the respondents themselves for the last 5 years, all of a sudden without giving any opportunity to show cause, no such adjustment/recovery can be made in an arbitrary manner. The law settled on the point requires that even if pay etc. has been wrongly fixed by the department concerned for no fault of the employee and he has retired, then normally recovery/adjustment cannot be permitted to be made unless there is allegation of any fraud or misrepresentation on the part of the employee concerned. In the present case there is no such allegation. In the case of **Baij Nath Ram (Supra)** of this Tribunal also it was held that if no assessment of the dues was made before the retirement of the applicant and applicant was not at fault for over payments, no recovery can be made from DCRG of the applicant. It has been specifically mentioned in para-8, 9 and 15 of the O.A. that neither any required screening nor any consequent absorption etc. was ever made. These points have not been specifically and categorically denied in the corresponding paragraphs 10, 11 and 16 of the counter affidavit. For this reason also the pleadings of the applicant on the above point stand proved.

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9. In view of the above the O.A. is allowed. The impugned order dated 10.08.2010 showing the posting of the applicant as Crew Controller with retrospective effect from 11.11.2005 and consequential fixation of pay as shown in the said order dated 10.08.2010 (Annexure-A-1) and order dated 19.08.2010 proposing recovery (Annexure-A-2) and order dated 30.08.2010 directing for adjustment of the alleged over paid amount from the gratuity of the applicant (Annexure-A-3 and A-4) are hereby quashed to the extent it relates to the applicant. The respondents are directed to pass necessary and appropriate orders in respect of drafting and absorption etc. on the relevant post in accordance with the relevant rules and provisions and thereafter, refix his pensionary benefits afresh as mentioned in Para-19 of the O.A. or whatever pensionary benefits are admissible in accordance with the relevant rules and provisions and also release arrears thereof alongwith interest @ 8% from the date of accrual till the actual date of payment. Respondents are also directed to release the withheld/adjusted amount from the gratuity alongwith interest at the above rate in the same manner. No order as to costs.


 (Justice Alok Kumar Singh) 25.5.12

Member (J)