

CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH.

Original Application No. 1237/1996.

Friday, this the 27th day of July, 2001.

Shri S.L.Jain, Member (J),
Shri V.K.Majotra, Member (A).

D.H.Hodekar,
C/o. G.S.Walia,
16, Maharashtra Bhavan,
Bora Masjid Street,
Fort,
Mumbai 400 001.
(By Advocate Shri G.S.Walia)

...Applicant.

v.

1. Union of India, through
Collector,
Central Excise & Customs,
P.M.C.'s Commercial Building,
Hira Baug,
Tilak Road,
Pune - 411 002.

2. Assistant Collector of Customs
& Central Excise, Jail Road,
Ratnagiri - 415 612.
(By Advocate Shri M.I.Sethna)

...Respondents.

: ORDER (ORAL) :

Shri V.K.Majotra, Member (J),

The applicant was appointed as a Seaman under the Respondents in August, 1972. Vide order dt. 1.9.1981 (Annexure A) he was temporarily posted on trial basis as Tindel Class - II and his services were to be utilised as Tindel Class - II when/where essential. Vide (Annexure - C) dt. 22.11.1985, the applicant was detained and appropriated in the post and appointed as Tindel on ad-hoc basis and was to be regularised subject to medical fitness and verification of antecedents. The applicant has claimed that Respondents have not paid him salary in the pay scale of Rs. 380-560 ^{and 1/2} that he has continuously been working as

Tindel - II from 1.9.1981 till 6.6.1993, after which date he was regularly appointed as Tindel Class - II. Thus, he has sought a direction to the Respondents to fix his salary in the pay scale of Rs.380-560 (R) as Tindel Class - II from 1.9.1981 to 6.6.1993 with consequential benefits. He has claimed arrears for having worked as Tindel Class - II from 1981 to 6.6.1983 as a result of fixation of his pay in the aforesaid pay scale with interest thereon.

2. In their counter, the Respondents have denied the claims of the applicant. According to them, the services of the applicant was essentially as a Seaman, but were utilised as Tindel Class - II only occasionally and not continuously. Therefore, he is not entitled to placement in the pay scale of Tindel Class - II. Although the applicant was appointed and posted as Tindel on regular basis vide order dt. 22.1.1985, the same order was kept in abeyance vide order dt. 3.12.1985 as adequate number of sanctioned posts of Tindel Class - II were not available to accommodate all the Officers. The applicant, later on, promoted as Sukhani vide order dt. 28.12.1990 and he joined as such on 3.1.1981 and had requested for promotion to the post of Tindel retrospectively from 1.9.1981. Therefore, he was appointed temporarily as Tindel vide order dt. 31.5.1993 and he was relieved on 7.6.1993 from the post of Sukhani to take the charge of Tindel Class - II on regular basis. Whereafter, he has been receiving payment in the scale of Tindel on regular basis.

3. We have heard Learned Counsels on both sides and considered the material available on record. The Learned Counsel of the applicant Shri G.S.Walia contended that the applicant has been

working as Tindel Class - II in terms of the order dt. 1.9.1981 continuously till his services were regularised as Tindel Class II on 7.6.1993. He stated that, it is true that the Ships are not always on sail and whenever they were on sail work on the post of Tindel Class - II was taken from the applicant. However, the applicant was not reverted to the post of Seaman whenever the work of Tindel was not being taken from him. He referred to Ex. 'B' dt. 2.4.1992 which is a certificate from Marine Engineer, Ratnagiri certifying that the applicant has been performing duties of Tindel since 1.9.1981 and that he has been performing very efficiently. As per order dt. 22.11.1985, the services of the applicant were retained and appropriated in the post as Tindel. Though the Respondents have contended that this order was kept in abeyance, no proof has been furnished regarding abeyance of these orders. As to the point of limitation, Shri G.S.Walia relied on the case of M.R.Gupta Vs. UOI & Ors. (1995 SCC (L&S) 1273), where it has been held that grievance relating to a Government employee joining a higher service seeking proper fixation of his pay after several years is a continuing wrong giving rise to a recurring cause of action every month on the occasion of payment of salary. Such application to the extent of proper pay fixation was held as not time-barred, although the applicant's claim to consequential arrears was made subject to the law of limitation.

4. On the other hand, Shri M.I.Sethna, Learned Counsel for the Respondents reiterated the points made in their counter. He referred to the case of Ramesh Chandra Sharma etc. Vs. Udhamp Singh Kamal & Ors. (2000 (2) AISLJ 89) decided on 12.10.1999. It was held therein that an OA against the order of non-promotion

was time-barred when no application for condonation of delay had had been filed and the OA could not be decided on merits. The Learned Counsel further stated that the applicant had been promoted as Sukhani vide order dt. 28.12.1990 and he joined as such on 3.1.1991 which fact has not been rebutted by the applicant in any Rejoinder. Thus, the applicant had according to the Respondents functioned as Tindel Class - II on occasionally basis only from 1.9.1981 to 2.1.1991 only. The Respondents, however, admitted that since the applicant used to function as Tindel only on occasional basis, he was not paid any wages in the scale of Tindel Class - II.

5. In our view, the facts of the case in the matter of Ramesh Chandra Sharma (supra) are distinguishable and not similar to the facts of the present case. The ratio of the case of M.R.Gupta (supra) is certainly applicable to the present case. In our view, the applicant's prayer to fix his pay in the higher post as he had functioned as such relates to a recurring cause of action. From the facts of the case, we find that the applicant has started working as Tindel Class - II on temporary basis w.e.f. 1.9.1981 as per (Ex. 'A'). It may be that his services were utilised when/where essential in terms of that (Ex. 'A'). However, the applicant has filed a certificate of Marine Engineer dt. 2.4.1992 to state that the applicant has been performing the duties of Tindel since 1.9.1981 till that date. The Respondents have not furnished any record to dis-prove the claim stating that the records being very old, it would not be possible for them to verify as to during which period the applicant had functioned as Seaman and during which periods he had functioned as Tindel Class - II. Shri M.I.Sethna stated that though at present they do not

have the records in the Court, they would be able to produce the same by Monday, the 30th July, 2001. This case was fixed for final hearing on 30.5.2001, whereafter, there have been few adjournments for final hearing. It was part-heard on 26.7.2001 and again we have completed the hearing today the 27th July, 2001. If the Respondents wanted to produce any records in proof of their contentions, they could have brought them yesterday or today. He cannot be given any further opportunity. They have not filed any documents also along with their reply. In terms of Rule 12 of Central Administrative Tribunal (Procedure) Rules, 1987, the Respondents are required to file their documents on which they rely along with their counter reply. They have not done so. The applicant had been promoted as Sukhani vide order dt. 28.12.1990 and he joined on the post of Sukhani on 3.1.1991. This fact has neither been stated by the applicant in his application nor has he by way of Rejoinder rebutted the same. We therefore, find that the applicant has functioned as Tindel - II from 1.9.1981 till 2.1.1991 when he started functioning as Sukhani. He was relieved from the post of Sukhani on 7.6.1993 and thereafter he started working as Tindel Class -II on a regular basis.

6. For the reasons recorded and discussions made above, we find that the applicant has functioned as Tindel - II on a temporary basis from 1.9.1981 to 2.1.1991 and he was entitled to the same pay in the pay scale prescribed for the post of Tindel II. As he had ~~not~~ been promoted as Sukhani on 3.1.1991 and as Tindel on a regular basis from 7.6.1993, the applicant has failed to bring home his claim for having worked as Tindel Class - II

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from 3.1.1991 to 6.6.1993. Thus, in our considered view, the applicant is entitled to pay as Tindel Class - II from 1.9.1981 to 2.1.1991.

7. In the result, this OA succeeds partly and we direct the Respondents to fix applicant's pay in the scale of Tindel Class II from 1.9.1981 to 2.1.1991 on notional basis. He will, however, not be entitled to any back wages for the period. The applicant's pay ^{be fixed} ~~notionally~~ in the next scales of promotion whenever he was promoted by taking into account the notional pay fixed for the period 1.9.1981 to 2.1.1991 on notional basis. The pay fixed as above shall be taken into consideration and the monetary benefits will be available to the applicant on actual basis w.e.f. October, 1995.

V.K.Majotra
(V.K.MAJOTRA)
MEMBER(A)

S.L.Jain
(S.L.JAIN)
MEMBER(J)

B.