

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, (13)

JAIPUR

**

Date of decision: 23-11-1995

OA No. 166/93

Prabhu Lal Nagar

.. Applicant

VERSUS

Union of India and others

.. Respondents

CORAM:

HON'BLE MR. GOPAL KRISHNA, VICE CHAIRMAN

HON'BLE MR. O.P.SHARMA, MEMBER (ADMINISTRATIVE)

For the applicant

.. Shri R.N.Mathur

For the Respondents

.. Shri M.Bhandari

ORDER

PER HON'BLE MR. O.P.SHARMA, MEMBER (ADMINISTRATIVE)

In this application under section 19 of the Administrative Tribunals Act, 1985, Shri Prabhu Lal Nagar has prayed that the order dated 29-6-92 (Ann.A1) rejecting the applicant's claim for seniority from due date may be declared illegal and be quashed and that respondents Nos. 1, 2 and 3 may be directed to count the officiating period of the applicant on the post of Catering Superintendent Gr.III/Assistant Catering Manager for the purpose of seniority and thereafter assign him due seniority with all consequential benefits.

2. The case of the applicant as stated in the OA is that he was earlier working as "Commission Bearer" in the Catering Department of the Railways and was regularised on the post of Waiter on 10-10-1979. He has been working as a Bill Issuer since 10-10-1979. The next promotion from the post of Bill Issuer is to the post of Catering Supervisor Gr.III/Assistant Catering Manager scale Rs. 260-430/Rs.975-1540. This is a non-selection post and is

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required to be filled up on the basis of seniority-cum-suitability. The applicant was promoted to officiate on this post as per his seniority w.e.f. 16-12-1984 by oral order and he has been continuing on the said post since then. Due fixation of his pay has been made vide order dated 10-1-1989 (Ann.A3). The formal order of promotion of the applicant to the said post was issued on 22-2-1990 (Ann.A4). Thereafter he has been regularised on the said post vide order dated 6-12-1991 (Ann.A5). However, even though the applicant was promoted to the said post in accordance with his seniority and suitability and has since been regularised on the said post, he has not been given benefit of service rendered prior to the date of his regular promotion on the said post. Respondents 4 to 12 were also ordered to be promoted vide order at Ann.A4 dated 22-2-1990 but they had not officiated on the said post prior to their above promotion. The applicant by his letter dated 17-4-1990 (Ann.A6) requested the competent authority to assign him seniority from the date of his continuous officiation. The applicant sent reminders and also cited the case of one Shri B.N.Panda of Ratlam Division, who had been assigned seniority in the same manner in which it has been sought by the applicant. The applicant also took up the matter with the Assistant Labour Commissioner but there was no redressal of his grievance. The Departmental authorities have refused to extend the benefit of continuous officiation on the post of Assistant Catering Manager for the purpose of determining the applicant's seniority on the above post. Communication in this regard addressed to Labour Enforcement Officer by the Departmental authorities on 29-6-1992 is at Ann.A1. By the above communication, the respondents have also refused to extend the benefit claimed by the applicant as per the order of the Jabalpur Bench of the Tribunal, though, in fact the benefit of the order of the Jabalpur Bench of the Tribunal passed on 9-10-1986 is very much available to the applicant, inasmuch as the applicant possessed the requisite qualification at the time of his initial officiation on the post

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of Assistant Catering Manager and had also completed more than two years' satisfactory service and was subsequently regularised on the said post.

3. Therefore, the applicant has prayed that he is entitled to get seniority by counting the period of officiation on the post of Assistant Catering Manager from 16-12-1984, as per normal rules. The respondent's rejection of his claim in this regard is illegal and not sustainable in the eyes of law.

4. The respondents in their reply have stated that the applicant was not promoted on the post of Assistant Catering Manager w.e.f. 16-12-1984 but was asked to officiate on the said post on ad-hoc basis and was paid officiating allowance for the period for which he worked as Assistant Catering Manager. He was promoted to the post of Catering Supervisor Gr.III in 1990 vide Ann.A4 and was thereafter regularised on the said post vide Ann.A5 dated 6-12-1991, after completion of all the formalities. As per Ann.A3, the applicant had officiated on the post of Assistant Catering Manager till 1988 and thereafter he was given ad-hoc promotion in 1990. Regarding the case of Shri B.N.Panda, benefit to him was given under the directions of the Tribunal. The respondents have added that the applicant made his first representation with regard to his grievances in the year 1990 and, therefore, the present OA (having been filed on 17-3-1993) is barred by limitations. He is not entitled to seniority from the year 1984 because he was not promoted to the post of Assistant Catering Manager as per rules or after due selection in the year 1984. Further, the judgement of the Jabalpur Bench of the Tribunal is also not applicable in this case because the applicant had not completed two years' service as on 9-10-86. Also if the applicant had to obtain the benefit of the judgement of Jabalpur Bench of the Tribunal and it was not given by the administration then he should also filed a contempt application. On this ground also, the OA is not maintainable. The applicant entered the grade of Catering Supervisor Grade.III only from 1990 and, therefore, there is no basis for the claim for counting

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seniority by including the period prior to that date. The applicant has also not submitted any order which he wants to challenge. Annexure-A1 is only the letter addressed to the Labour Enforcement Officer by the General Manager, Western Railway declining to assign seniority to the applicant w.e.f. 16-12-84. Since the applicant had also sought a remedy under the Industrial Disputes Act, once the applicant had raised the dispute, he is not entitled to file the present OA because he has given up the alternative remedy of pursuing the matter under the Industrial Disputes Act midway.

5. During the arguments, the learned counsel for the respondents drew our attention to Ann.A3 dated 10-1-89 which gives details of the applicant's working from 16-12-84 onwards. These details, according to him, show that there was no continuity in the working of the applicant prior to the issue of formal order of promotion of the applicant to the post of Catering Supervisor Grade-III on 20-2-90. As per this Annexure, after the applicant had worked from 1-12-87 to 31-7-88, he was re-engaged on 1-12-88 and thereafter he has not mentioned the date up to which he continued prior to 20-2-90. Regardless of the other aspects of the case an official who had not continuously officiated on the post prior to the date of his regular appointment was not entitled to count the prior officiating service for the purpose of seniority. In any case, working on the post prior to 20-2-90 was only ad-hoc without the applicant having been selected for appointment to the post as per rules. He also drew our attention to the paras 302 to 309 of the Indian Railway Establishment Manual, Vol.I, which regulate seniority of non-gazetted railway servants. As per para 302, seniority in the case of promotees has to be reckoned from the date of regular promotion after due process of selection. In the applicant's case, prior to 20-2-90 his appointment was not by any due process of selection and it was not a regular appointment but was only ad-hoc in nature. In fact he had been granted only officiating allowance on

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the said post prior to 20-2-90. Therefore, the applicant was not entitled to seniority from 16-12-84 as claimed by him. The judgement of the Jabalpur Bench of the Tribunal is also not applicable in this case because the benefit of their judgement, if it is to be made available at all, would be to those who had put in two years or more of continuous satisfactory service as Assistant Catering Manager, whereas the applicant had not put in two years regular service in the post of Assistant Catering Manager on 9-10-86, which is the date of the judgement delivered by the Jabalpur Bench of the Tribunal. Hence, according to him, the applicant is not entitled to any relief.

6. We have heard the learned counsel for the respondents and carefully gone through the material on record. There is no force in the preliminary objections raised by the respondents in their reply. No doubt, the applicant had agitated the matter under the Industrial Disputes Act but eventually he has chosen to pursue his remedy before this Tribunal, because as stated by him, he failed to get any relief under the said Act. Where the applicant failed to get any relief under Industrial Dispute Act, he is entitled to agitate the matter by filing a OA before the Tribunal. Although Ann.A1 dated 29-6-92 is not a communication addressed to the applicant, yet it makes a mention about the examination of the case of the applicant and contains reasons why the applicant is not entitled to the relief claimed by him. We are of the view that in the circumstances of the present case, the applicant is entitled to file an OA on the basis of cause of action having been arisen to him with reference to Ann.A1 dated 29-6-92. The applicant filed the present OA on 17-3-93 i.e. within the period of one year from the date of issue of communication Ann.A1 dated 29-6-92. In these circumstances and in the interest of justice we entertain this application for adjudication on merits and do not propose to reject it on the ground that it is time barred.

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7. The applicant has not filed any rejoinder. The averment of the respondents that the applicant had not been promoted to the post of Assistant Catering Manager on a regular basis from 16-12-1984 remains unrebutted. The respondents have in fact stated in the reply that the applicant was asked to officiate on ad-hoc basis on the post of Assistant Catering Manager from 1984 and for this purpose he was paid allowances for the period for which he worked as Assistant Catering Manager. The applicant's selection to the post of Assistant Catering Manager prior to 20-2-90 was not after due selection as per rules. Also Ann.A3 dated 10-1-89 does not suggest that the applicant had continuously officiated on the post of Assistant Catering Manager prior to 20-2-90 without any break. For this reason also the applicant was not entitled to count his service prior to 20-2-90 for the purpose of reckoning his seniority on the post of Assistant Catering Manager.

8. In the case of V.Sreenivasa Reddy and Others Vs Govt. of Andhra Pradesh and Others (1995) 29 ATC 495, the Hon'ble Supreme Court had occasion to consider the question whether persons appointed temporarily dehors the rules were entitled to count their temporary service for the purpose of seniority. The Hon'ble Supreme Court after noticing their earlier judgements in the cases of Direct Recruits Class-II Engineering Officers Association and various other judgements on the subject held that temporary appointees are not members of the service until they are duly appointed. The following observations of the Hon'ble Supreme Court are relevant in this regard:

"14. It is now well settled law that appointment/promotion must be in accordance with the Rules, direct recruit takes his seniority from the date on which he starts discharging the duty of the post borne on the cadre while a temporary appointee appointed dehors the rules or on adhoc basis or to a fortuitous vacancy gets seniority from the date of regular appointment.

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15. It is settled law by the judgement of the Constitution Bench in Direct Recruit Class II Engineering Officers Association Vs State of ~~Maharashtra~~ that appointment in accordance with rules is a condition precedent to count seniority. Temporary or adhoc or fortuitous appointments etc. are not appointments in accordance with the rules and the temporary service cannot be counted towards the seniority. See Delhi Water Supply and Sewage Disposal Committee Vs R.K.Kashyap, Masood Akhtar Khan Vs State of M.P., D.N.Agarwal Vs State of M.P., State of Tamilnadu Vs E.Paripoornam, Excise Commissioner, Karnataka Vs V.Sreekanta.

16. In Keshav Chandra Joshi Vs Union of India, the seniority was to be counted from the date on which appointment was made to the post in accordance with the rules. The previous temporary service should be considered to be fortuitous. In Union of India Vs S.K.Sharma, this court held that the approval of the U.P.S.C. for continuation in adhoc post for the purpose of granting pay and allowances would not amount to regular appointment and adhoc services cannot be counted for determining seniority by the selection by P.S.C. vide Vijay Kumar Jain Vs State of M.P. In Keshav Chandra Joshi case this court held that employee would become a member of service only from the date of his appointment according to rules. In A.N.Sehgal Vs Raje Ram Sheoram, this court held that where statutory rules link seniority with confirmation, seniority cannot be fixed according to length of service and confirmation to a post borne on the cadre is a condition to get seniority. In the State of West Bengal Vs Aghore Nath Dey, it was held that if adhoc service is followed by regular service, the benefit of adhoc service is not admissible if the appointment was in violation of rules. In D.N.Agrawal Vs State of

M.P., it was held that seniority cannot relate back to the date of temporary appointment."

Therefore, the applicant was not entitled to count his adhoc service for the purpose of seniority on the post of Assistant Catering Manager.

9. Now, question is whether the applicant is entitled to any benefit from the judgement of the Jabalpur Bench of the Tribunal to which a reference has been made in the OA. Copy of the said judgement has not been filed alongwith the OA and, therefore, we do not know what precisely is the ratio of said judgement and in which exact circumstances it is to be applied. Some directions of the Tribunal in the said judgement have been reproduced in Ann.A2 dated 25th June, 1987. It is not quite clear from the OA on which directions reproduced in Ann.A2, the applicant has placed reliance for seeking benefit of the judgement. However, apparently item-b at page-1 (running page 15) of Ann.A2 would be somewhat relevant.

This is reproduced below:

"(b) On the basis of action under (a) above the promotions made to the posts of Asstt. Catering Managers should also be reviewed and all persons, including the petitioner, who have put in two years or more continuous satisfactory service as Asstt. Managers subject to their possessing requisite qualifications should be absorbed as Asstt. Managers with effect from the date they were promoted/ appointed to that post (Asstt. Catering Managers) and their seniority lists as Asstt. Catering Managers revised accordingly with reference to the date of absorption. In the case of plaintiff J.N. Mishra this date will be 5.7.1976. If this process involves reversal of existing promotions of defendants other than 1 to 3 to that extent their existing promotions should be reviewed."

The above direction will have no applicability to the present case because firstly on the date of the judgement viz.

9-10-86, the applicant had not put in two years' total service as Assistant Catering Manager, because even according to him, he was appointed on the said post on 16-12-84.

Apparently, the directions of the Tribunal were in regard to those persons who had already worked on the post of Assistant Catering Managers on the date of the judgement.

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10. For all the above reasons we hold that the applicant is not entitled to reckon his seniority on the post of Assistant Catering Manager w.e.f. 16-12-64. The OA is dismissed with no order as to costs.

(O.P. Sharma)
Member (A)

C. Krishna
(Gopal Krishna)
Vice-Chairman