

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

ORIGINAL APPLICATION NO. 180/00719/2016

Tuesday, this the 10th day of April, 2018

CORAM

HON'BLE DR. K.B. SURESH, JUDICIAL MEMBER

K.C. Jose,
Poozhikunnel House
Elambulassery Post,
Palakkad District,
Kerala Pin 68 595.

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Applicant

[By Advocates Mr. Abraham Vakkanal (Sr.
Mr.T.V. Ajayakumar)]

V.

1. Chief Personal Officer,
Southern Railway,
Headquarters, Madras.

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Respondents

(By Advocate Mr P.R. Sreejith, ACGSC)

This application having been finally heard on 10.04.2018, the Tribunal on the same day delivered the following in the open court.

O R D E R (ORAL)

PER: DR.K.B.SURESH, JUDICIAL MEMBER:

Heard.

2. The facts are not in dispute. The matter is factually covered by the judgement of the Hon'ble High Court of Kerala in OP No. 27626 of 2000 dated 18.2.2003 between the same parties which is quoted below:

“ Petitioner was working as Constable in the Railway Protection Force from 1977 onwards. He completed the promotion course training and became fully qualified for promotion to the post of Naik. This is evident from Ext.P1 order dated 15.4.1994. By order dated 1-9-1994 issued by the Divisional Security Commissioner of Railway Protection Force, Thiruvananthapuram Division, he was promoted as

Naik in the scale of pay of Rs.950-1400 along with six others.

2. As he was suffering from pain on his knee which ultimately led to a declaration to the effect that he was medically unfitted to continue as Constable, he could not report for duty in the promoted post of Naik. Ext.P3 dated 22.2.1995 of the Divisional Security Officer, Trivandrum shows that the Petitioner "was medically unfitted to continue as constable and found fit in Bee One and below in jobs not involving long distance walking, squatting, and other hard manual job w.e.f. 8.2.1995". Ext P3 further said that pending absorption in alternate appointment the petitioner was granted X EXL from 8.2.1995 to 6-8-1995. Ext. P3 further shows (see the bottom portion) that the petitioner's name should be continued in the rolls for claiming salary, availing passes etc. till absorbed in an alternate post according to his medical fitness or till his services are terminated.

3. By office order dated 23.12.1997 issued by the 2nd respondent copy of which is produced as Ext P4, the Petitioner was absorbed as Peon in the scale of pay of Rs. 2550-3200 (pre-revised scale of \rs. 750-940) and charged against a vacancy at X/C/TVC subject to regularisation of his EOL beyond the intervening period from 7-8-1995 to the date of his joining as Peon. Ext. P13 is the combined regulations issued by the Railway authorities. The said guidelines stipulate that member of the non-gazetted staff medically de-categorised may be considered for absorption in a suitable post available in the same department and if no such post is available he may be absorbed in an alternate post in other departments of the Railway. According to the petitioner, a de-categorised employee has to be first considered for absorption in a ministerial post belonging to that department itself, for which he may be medically fit. The main grievance of the petitioner is that though clerical and other posts in the ministerial wing were/are available in the department, the respondents adopted a hostile attitude towards his claim which resulted in issuing Ext. P4 order dated 23.12.1997. Ext. P.1 order was issued by the 2nd respondent on 23.12.1997 absorbing him as Peon in the scale of R.2550-3200 as already stated.

4. Though felt aggrieved, the petitioner accepted the post and was working as Peon. It is seen that the petitioner was earlier offered

the post of Retiring Room Assistant. But he did not accept that offer due to the reason that it required movement from one place to another and having regard to the injury on his knee which was the reason for de-categorising and declaring him medically unfit. It was not possible for him to work as Retiring Room Assistant. It will be relevant to consider Ext. P4 order passed by the 2nd respondent along with Ext. P20 order dated 9-10-1997 issued by the very same officer. It is stated there that the petitioner who was medically de-categorised for FPF with effect from 8-2-1995 was absorbed in DSC/O/TVC against a vacancy of Record Sorter by charging him as Peon.

5. Counsel for the petitioner Smt. Moly Jacob submits that the above order issued as per Ext. P 20 has got some significance because if the post of Record Sorter was thus admittedly available, the Railway administration ought to have absorbed him in that post instead of absorbing him as Peon. If the petitioner was absorbed in the post of Record Sorter it would have enabled him to draw higher pay than that of Peon. The post of Record Sorter is in Scale No. 3 which carries a pay scale of Rs. 800-1150 (pre-revised) and Rs. 2650-4000 (revised) whereas the pay scale of Peon is Rs. 750-940 (pre-revised) and R.2550-3200 (revised). The above action of the respondents is pointed out as a glaring instance of the hostile attitude adopted by the authorities towards the petitioner.

6. While the petitioner was thus working as Peon he came to know that one Abdul Rasheed, admittedly junior to the petitioner in the rank of Constable, on de-categorisation, was absorbed against the post of office clerk which is otherwise known as junior clerk. This fact is evident from Ext. P5 Office order No. 2/99/PG issued by the Divisional Officer and endorsed to the other officers of the Railway on 12.1.1999. It is seen from Ext. P5 that the above named Abdul Rasheed was appointed as Office Clerk in the scale of Rs. 3050-4590 as per a decision taken by the committee which met on 1-12-1998.

7. Immediately on coming to know about Ext. P5 order, Petitioner submitted Ext. P6 representation before the Railway authorities including the respondents. But that representation did not evoke any response. Ext. P6 was followed by Ext. P7 representation filed on 4.8.1999 to the 2nd respondent. It is seen from Ext. P8 that Ext. P6 representation was forwarded to the higher authorities for appropriate action. However, nothing transpired. This compelled the petitioner to approach this Court. He filed O.P. No. 15315 of 2000. That O.P. Was disposed of by Ext. P9 judgment

dated 1-6-2000. Thereafter Ext. P10 communication was sent by the 2nd respondent to the 1st respondent so as to enable the 1st respondent to take a decision as directed by this Court in Ext. P9 judgement.

8. Finally, Ext. P11 order dated 29-8-2000 was passed by the 1st respondent rejecting the request made by the petitioner Ex.P11 is a detailed order which apparently attempts to meet all the contentions and claims made by the Petitioner in support of his case. This O.P. Is filed seeking to quash Ext. P11 and for a direction to the respondents to absorb him a junior clerk in the vacancy specified in Ext. P10 forthwith. He also sought for a direction to the respondents to refix his pay duly taking into account his promotion as per Ext. P2 and revision of scale of pay effected as per Ex. P13 and to pay him arrears including increments, bonus and other pay revision benefits.

9. The respondents have filed a detailed counter affidavit. A perusal of the counter affidavit would show that the reasons stated therein are in tune with the stand taken by the 1st respondent in Ext. P11 order. According to the respondents the claim made by the petitioner and the contentions raised in support of that, are unsustainable. Placing reliance on Ext. R1(A) dated 5-12-1994 it is pointed out that since the promotion given to the petitioner was not carried out, the said promotional transfer orders along with similar such cases, was cancelled, treating that the incumbents concerned had declined the offer. Evidently, this contention of the respondents refers to the averment made by the petitioner in the O.P. That the decategorisation took effect at a time when the petitioner stood promoted from the post of Constable to that of Naik. In Ext. R1(A) it was stated that persons whose in that order including the petitioner are not eligible for promotion for a period of one year from the date of their refusal. Any way, the respondents would show that in the case of a person who is medically de-categorised the Railway is not bound to give him all the benefits which a medically fit person would be entitled to.

10. Counsel for the petitioner takes strong exceptions to the above contention taken by the Railway in the counter affidavit. Learned counsel relies on the provisions in the combined norms formulated by the Railway as per Ext. P13 as also the statutory provisions contained in Persons with Disabilities (Equal Opportunities, Etc.) Act, 1995 where specific provisions are there directing that a medically unfitted person shall not be sent out of service as far as possible and such persons must be given a suitable posting and if that is also not possible such persons must be accommodated against supernumerary post created for the purpose. According to the Railway the period in between de-categorisation and the date of joining duty in the new post will not be treated as duty. Petitioner has got a grievance against the said

stand thus taken by the Railway. Any way, the fact remains that the link between the petitioner and the respondents was not severed and the employer-employee relationship subsisted. That is evident from the subsequent conduct of the Railways themselves.

11. Learned Standing Counsel for the Railways fairly and in my view rightly too, conceded that the petitioner could be deemed to have continued in service though Ext. P11 order passed by the 1st respondent contains certain statements to the contrary. Regarding the claim of the petitioner that he should have been given a posting as Clerk in pursuance of his de-categorisation, it is contended by the respondents that they could not find out a suitable alternate post for him for quite some time and immediately on noticing that there was a vacancy of Retiring Room Assistant, that post was offered to him, but the petitioner declined. It was subsequently that the post of Peon arose. Petitioner agreed to accept that post. It was on that basis that he was given posting as Peon. Hence, according to the respondents, it is not fair on the part of the Petitioner to complain later that he was not posted as a clerk.

12. As regards Ext P5 by which the junior constable by name Abdul Rasheed was absorbed against the post of junior clerk, the contention in the counter affidavit is that the post of junior clerk against which Abdul Rasheed was posted arose after issuing Ext. P4 order by which the petitioner was posted as Peon and no such vacancy was available when the petitioner was posted as Peon. This contention of the respondents is effectively met by the counsel for the petitioner relying on Ext. P13 norms. In paragraph 9.4. of Ext.P13 the following provisions are made:

“If vacancies are not available in equivalent grades, a medically de-categorised employee has to be offered absorption in a lower grade. The employee may accept or refuse absorption in a lower grade. However, when an employee accepts the absorption in a lower grade he may accept it with the request, that if a vacancy in a grade equivalent to what he/she held before de-categorisation occurs in the same cadre, he/she should be considered eligible for the same in preference to a junior medically de-categorised employee. While the employee can be expected to put in an application when this contingency occurs, it is necessary for the Railway administration suo motu when considering a subsequent de-categorised employee for absorption in a cadre, to look into cases when senior de-categorised employees may have been absorbed in the same cadre during the previous 3 years and initiate a review.”

According to the Standing Counsel for the Railways 9.4 will not go to the benefit of the petitioner since the petitioner did not make a request that if a vacancy in a grade equivalent to what he/she held before de-categorisation occurs in the same cadre, he/she should be considered eligible for the same in preference to a junior medically de-categorised employee.

13. I am unable to accept the above contention in view of the immediately following provision, contained in the very same paragraph which says that while the employee can be expected to put in an application when the contingency occurs, it is necessary for the Railway administration, *suo motu*, when considering a subsequent de-categorised employee for absorption in a cadre, to look into cases when senior de-categorised employee may have been absorbed in lower grades in the same cadre during the previous 3 years and initiate a review. Due emphasis has to be given to the expression used in the above paragraph, viz., "while the employee can be expected to put in an application" as also the duty cast on the Railway to review the case of de-categorised employee *suo motu* when considering a subsequent de-categorised employee for absorption.

14. In the light of the above provision thecase of the petitioner for absorbing him against the vacancy that was filled up by absorbing Sri Abdul Rasheed. The respondents failed not only to do that but also to post him as Clerk in the vacancy pointed out by the petitioner as per Ext. P10. That being not done, I find substance in the submission of the counsel for the petitioner that the right of the petitioner guaranteed under Article 14 and 16 of the Constitution has been infringed by the hostile attitude shown to him by the respondents. In my view, the petitioner is entitled at any rate, to be absorbed as office clerk against the vacancy that was pointed out in Ext. P10. It should be medically de-categorised on a subsequent date was immediately absorbed in the post of office clerk and when the subsequent vacancy point out in Ext. P10 arose the said junior was working as office clerk and drawing a higher salary. The petitioner, who was admittedly senior, was overlooked for the simple misfortune that he happened to be de-categorised on an earlier date and on the ground as claimed by the Railway administration that no suitable vacancy existed then. But the fact remains that the petitioner is working as Peon while his junior is working as office clerk.

15. Counsel for the petitioner rightly submits that the case of a person who could not work as a Constable on account of the injury on the knee which fact is medically certified, will find it difficult to work as a Peon. It would be only proper that he is also given the post of office clerk so as to do justice to him. I therefore quash Ext. P11, in so far as, by that order the

petitioner's claim made as per Ext. P10 as office clerk as rejected. There shall be a declaration that the petitioner shall be deemed to have been working against the post of office clerk from the date from which the vacancy pointed out in Ext. P.10 arose.

16. Petitioner has got a grievance that the scale of pay legitimately due to him was not correctly determined by the Railway administration and he has been given pay in a lower pay scale than what he is entitled to. Based on the materials available before me in this O.P. I do not think that this Court will be in a position to decide as to whether what ought to have been the pay scale of the petitioner and at what stage it should have been fixed. These are matters primarily for the Railway administration to do and leave open those questions to be decided by the respondents. Petitioner will be freed to file appropriate representation before the 1st respondent who will consider the same in accordance with law expeditiously. If the petitioner makes such a representation within one month from today, the 1st respondent shall consider the same and shall take appropriate action thereon within three months thereof. In support of the claim made by the petitioner for fixation of pay in the appropriate pay scale learned counsel for the petitioner cited before me the decision of the Supreme Court in Narendra Kumar Chadla v. State of Haryana & Others (1994) 4 SCC 460. While deciding the question of pay fixation the 1st respondent shall take into consideration the above decision of the Supreme Court also along with other relevant rules and orders. Petitioner shall be posted as office clerk as early as possible.

Original petition is disposed of as above.”

3. The fact being thus, the applicant will be eligible to count the entire service with the respondents from the date of his entry into Govt. Service till today. Therefore, the matter is remitted back to the respondent to grant him the ACP and MACP benefits on the basis of his total service as we declare and hold that medical decategorisation and subsequent deployment in any other posts will not deprive the applicant of counting his total qualifying service entitling him to the ACP/MACP benefits as well as differentiation in pension and other DCRG benefits. Therefore, all the benefits will be recomputed and disbursed to the applicant within two months without interest and after that at the rate of 15%

4. O.A. is allowed. No costs.

**(DR.K.B.SURESH)
(JUDICIAL MEMBER)**

sj/*

List of Annexures of the Applicant

Annexure A1 - True copy of the judgment in O.P. No. 27626/2000 (L) dated 18.12.2003.

Annexure A2 - True copy of the Order No. X/P.11/Vol.VII/KCJ dated 08.07.2004.

Annexure A2(a) - True copy of the order of fixation of pay dated 08.07.2004.

Annexure A3 - True copy of the Pension payment order.

Annexure A4 - True copy of the Assured Career Progression Scheme for Railway Servants No. P.C.-V/99/I/1/1. Dated 01.10.1999.

Annexure A5 - True copy of the representation dated 01.06.2013.

Annexure A6 - True copy of the detailed representation for disbursal of arrears of salary and pensionary benefits dated 18.06.2015.

Annexure A7 - True copy of the legal notice dated 20.09.2015.

Annexure A8 - True copy of the revised order of the 3rd respondent dated 05.12.2016.

Annexure A9 - True copy of the Memorandum No. X/P536/NK.IX dated 05.12.1994.

Annexure A10 - True copy of the letter of the 2nd respondent dated 18.08.2017.

Annexure A11 - True copy of the letter issued by the 3rd respondent to the 2nd respondent dated 24.06.2017.

List of Annexures of the Respondents

Annexure R1 - True copy of the Memorandum dated 05.12.1994 of the 2nd Respondent debarring him for promotion for a period of one year.

Annexure R2 - True copy of the Memorandum dated 18.12.2003 of the 3rd Respondent.

Annexure R3 - True copy of the letter NO. P(S)11/XI/Vol.V dated 24-08-2006 issued by the 1st Respondent.

Annexure R4 - True copy of the letter dated 18.08.2017 of the 2nd Respondent.
