

**CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH**

No. O.A. 350/299/2014

Date of order: 21.02.2018

**Present: Hon'ble Ms. Manjula Das, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member**

**Shri Sumit Chatterjee,
Son of Late Chittaranjan Chatterjee,
Aged about 35 years,
Working as Assistant Driver (E/D),
South Eastern Railway,
Adra Division and
Reside at Village : Nandua (Ward No. 11),
P.O. & P.S. - Raghunathpur,
District - Purulia,
Pin - 723133.**

.. Applicants

Vs.

- 1. Union of India,
Through the General Manager,
South Eastern Railway,
Garden Reach,
Kolkata - 700 043.**
- 2. The Secretary to the Government of India,
Ministry of Finance,
Department of Economic Affairs,
North Block,
New Delhi - 110 001.**
- 3. The Secretary,
Railway Board,
Rail Bhawan,
New Delhi - 110 001.**
- 4. The Chief Personnel Officer,
South Eastern Railway,
Garden Reach,
Kolkata - 700 043.**
- 5. The Chairman,
Railway Recruitment Board, Kolkata,
Metro Railway A.V. Complex,
Chitpore, Opposite to R.G. Kar Medical
College & Hospital,
Kolkata - 700 037.**
- 6. The Divisional Railway Manager (P),**

South Eastern Railway,
Adra Division,
Pin – 723121.

7. The Divisional Railway Manager (Mechanical),
South Eastern Railway,
Adra Division,
Adra,
Pin - 723 121.

8. The Senior Divisional Personnel Officer,
South Eastern Railway,
Adra Division,
Adra,
Pin - 723 121.

.. Respondents

For the Applicant : Mr. S.K. Dutta, Counsel
Mr. B. Chatterjee, Counsel

For the Respondents : Mr. A.K. Guha, Counsel
Mr. M.K. Bandyopadhyay, Counsel

ORDER

Per Dr. Nandita Chatterjee, Administrative Member:

An application has been filed under Section 19 of the Administrative Tribunal Act, 1985 challenging by way of relief the New Pension Scheme of 2004 and also for directing the respondents to treat the applicant as an appointee, who is subject to the Pension Rules of Railways, 1993 prevalent prior to 1.1.2004 with consequential benefits, specifically seeking the relief sought are as under:-

“(a) An order holding that the New Pension Scheme of 2004 is bad in law and not sustainable.

(b) An order holding that the New Pension Scheme of 2004 is not applicable to the applicant and the applicant is entitled to the benefits of Railway Pension Rules, 1993 and he is covered by the said Rule of 1993.

(c) An order directing the respondents to treat the applicant as an Recruit for the year 2002 or at least 2003 and directing them to extend all

benefits to the applicant accordingly including the benefits by treating the applicant as an Appointee covered by the Pension Rules of the Railways of 1993 which was prevalent prior to 1.1.2004.

(d) An order directing the respondents to grant all consequential benefits to the applicant including the benefits of increments without insisting for the applicant to exercise any option for the New Pension Scheme of 2004 and further directing them to grant all consequential benefits thereof.

(e) An order directing the respondents to produce/cause production of all relevant records.

(f) Any other order or further order/orders as to this Hon'ble Tribunal may seem fit and proper."

II. The submission of the applicant, as canvassed through his Ld. Counsel, is as follows:-

That, pursuant to an Employment Notice dated 25.5.2002, the applicant had applied for the post of Trainee Assistant Driver (E/D) through Railway Recruitment Board, Kolkata, that the applicant preferred his application with all requisite documents before the closing date and thereafter, a written test was held on 29.9.2002.

That, the applicant qualified in the written test and was consequently subjected to a psychological test on 19.2.2003.

That, on the basis of result of the written report and psychological test, the applicant was asked to appear for verification of the original certificates and a vision test on 17.11.2003 and 18.11.2003 respectively.

That, thereafter, the applicant was asked to appear in the medical examination vide letter dated 18.11.2003 and the medical fitness certificate was finally made available on 15.6.2004.

That, although the applicant was asked to appear for medical examination on 18.11.2003, his offer of appointment was delayed without any reason by the concerned authorities and he was issued with an offer of temporary appointment on 8.4.2004, subject to the results of the prescribed

medical examination.

That, his actual appointment as Trainee Assistant being unnecessarily delayed for two years and due to the prolonged process of selection, the applicant could undergo his training only on 2004.

That, after completion of training, the applicant was posted as Assistant Driver at Chakradharpur Division of S.E. Railway vide a letter dated 14.5.2005.

That, due to the unnecessary delay caused by the authorities in finalising the selection in deputing the applicant for training, the applicant has been put to unnecessary disadvantage and that he was deprived of the Railway Pension Rules of 1993 and was asked to exercise his option for the New Pension Scheme of 2004.

That, although the process of selection started with respect to the applicant in May, 2002 due to such undue delay of the respondents, the applicant was made to suffer by treating him as eligible for the New Pension Scheme of 2004.

That, as because the applicant had preferred applications for the post of Trainee Assistant Driver, the post was governed by Railway Pension Rules of 1993 and that there was no condition to the effect that he would be governed by any rules afterwards and that in terms of the relevant closing date for submission of application i.e. 1/7/2002, no subsequent rules or schemes can be made applicable to him.

Being aggrieved at the fact that he was made subject to the New Pension Scheme, 2004, the applicant has preferred this application under Section 19 of the Administrative Tribunal Act, 1985.

III. The respondents, as represented by their Ld. Counsel, argued as follows:-

The arguments advanced on behalf of respondent No. 5 namely, the Chairman, Railway Recruitment Board, Kolkata was that the applicant with Roll No. 104910 was a candidate for the post of Trainee Assistant Driver vide Employment Notice No. JEN/1/2002 and that, pursuant to the said employment notice, an initial panel for the said post was issued on 17.9.2003 to the General Manager (P)/S.E. Railway/ Garden Reach. The said recruitment was conducted jointly by Railway Recruitment Board/Kolkata and Railway Recruitment Board/Bhubaneswar. The vision test was also a part of recruitment. Hence, at the time of verification of testimonials, candidates had to undergo Vision Test which was of qualifying nature. So the candidates declared unfit by the Railway Medical Authority in Vision Test were not considered for empanelment to the Zonal Railways. In view of the above, firstly candidates, as per merit equal to the number of vacancies and community, were called for verification of testimonials followed by vision test. In the instant matter, a large number of candidates did not qualify in the prescribed vision test. Apart from this, there were some other reasons of shortfall. Therefore, to make good the necessary shortfall, candidates below the initial merit as fixed were subsequently called going further down the merit list. The instant applicant was one of such candidates who was initially not in the zone of consideration but for shortfall as indicated above. This subsequent panel was sent to S.E. Railway on 9.12.2003.

No written reply on behalf of Respondent Nos. 1 to 4 is found on record.

ISSUES

IV. Two issues which need to be resolved to adjudicate upon the instant application are as follows:-

(i) Whether the New Pension Scheme, 2004 is bad in law as submitted by the applicant in 8(a) of the relief.

(ii) Whether the applicant is entitled to retrospective status in appointment given that the vacancies have been advertised in 2002 and consequently can the applicant claim entitlement to the Railway Pension Rules, 1993.

FINDINGS

V. In order to adjudicate on the first issue the details of the New Pension Scheme is referred to as follows:-

“G.I. M.F., Notfn. No. 5/7/2003-ECB&PR, dated 22.12.2003 - published in the Gazette of India, Extraordinary, Part-I, Section I, dated 22.12.2003

Introducing a new restructured defined contribution pension system for new entrants to Central Government Service - The Government approved on 23rd August, 2003 the proposal to implement the budget announcement of 2003-2004 relating to introducing a new restructured defined contribution pension system for new entrants to Central Government service, except to Armed Forces, in the first stage, replacing the existing system of defined benefit pension system.

(i) The system would be mandatory for all new recruits to the Central Government service from 1.1.2004 (except the Armed Forces in the first stage). The monthly contribution would be 10 per cent of the salary and DA to be paid by the employee and matched by the Central Government. However, there will be no contribution from the Government in respect of individuals who are not Government employees. The contributions and investment returns would be deposited in a non-withdrawable pension Tier-I account. The existing provisions of defined benefit pension and GPF would not be available to the new recruits in the Central Government service.

(ii) In addition to the above pension account, each individual may also have a voluntary Tier-II withdrawable account at his option. This option is given as GPF will be withdrawn for new recruits in

Central Government service. Government will make no contribution into this account. These assets would be managed through exactly the above procedures. However, the employee would be free to withdraw part or all of the 'second tier' of his money any time. This withdrawable account does not constitute pension investment, and would attract no special tax treatment.

(iii) Individuals can normally exit at or after age 60 years for Tier-I of the pension system. At exit, the individual would be mandatorily required to invest 40 per cent of pension wealth to purchase an annuity (from an IRDA-regulated life insurance company). In case of Government employees, the annuity should provide for pension for the life time of the employee and his dependent parents and his spouse at the time of retirement. The individual would receive a lumpsum of the remaining pension wealth, which he would be free to utilize in any manner. Individuals would have the flexibility to leave the pension system prior to age 60. However, in this case, the mandatory annuitization would be 80% of the pension wealth.

Architecture of the New Pension Scheme:

(iv) It will have a Central Record Keeping and Accounting (CRA) infrastructure, several Pension Fund Managers (PFMs) to offer three categories of schemes, viz., options A, B and C.

(v) The participating entities (PFMs and CRA) would give out easily understood information about past performance, so that the individual would be able to make informed choices about which scheme to choose.

2. The effective date for operationalization of the new pension system shall be from 1.1.2004."

The following has been stated in para 7 & 8 of the New Pension Scheme:

(7) Till the regular Central Record Keeping Agency and Pension Fund Managers are appointed and the accumulated balances under each individual account are transferred to them, it has been decided that such amounts representing the contributions made by the Government servants and the matching contribution made by the Government will be kept in the Public Account of India. This will be purely a temporary arrangement as announced by the Government.

(8) It has also been decided that Tier - II will not be made operative during the interim period."

VI. The salient features of the New Pension Scheme has been laid down in detail vide **G.I., M.F., F. No. 1(7)(2)/2003/TA/11, dated 7.1.2004 read with O.M. No. 1(7) (2)/2003/TA/67-74, dated 4.2.2004.**

VII. In his submission and also during the hearing, the applicant, however, as represented through his Ld. Counsel, has,

(i) nowhere specified those salient features of the New Pension Scheme, 2004 which are held to be bad in law and not sustainable.

(ii) Nowhere has the architecture of the New Pension Scheme been challenged with justification or reasoning by the applicant.

(iii) The applicant has claimed that the New Pension Scheme could not have superseded and/or replaced the Pension Rules of 1993 made under Article 309 of the Constitution of India as the said Pension Scheme of 2004 is not framed under Article 309 of the Constitution of India nor framed by Parliamentary Legislation. We find, however, that the Ministry of Law and Justice which is the concerned Ministry of the Government of India has not been impleaded as a respondent. As the relevant Ministry has not been impleaded to defend the legality of the policy decision of the Government of India, it is not possible to conclude on the illegality of the policy or otherwise.

Hence in the absence of reasoning, we are unable to conclude that the New Pension Scheme, 2004 is bad in law. On the other hand, in SLP (C) 3106-3107 of 2012 in **T.M. Sampath & ors. Vs. Secretary, Ministry of Water Resources & ors.** as pronounced on 20th January, 2015, the Hon'ble Apex Court had held as follows:-

“The Appellants had raised the issue of the New Pension Scheme which was notified in 2008 and whose cut-off date was 1.1.2004 in the writ petition and the SLP. In any case, they have claimed that the New Pension Scheme, is also discriminatory and that the said cut-off date is arbitrary. The learned Counsel for the appellants submitted that the New Pension Scheme is not at par with the Pension Scheme under 1972 Rules as it does not have provisions for death gratuity, family pension and medical benefits. Also, the two tier system of the New Pension Scheme was challenged. We have carefully perused the judgment of the High Court of Jharkhand in WP. 4946 of 2008 against which SLP (C) No. 19102/2012 has been filed and we concur with the view of the High Court. The cut-off date is a domain of the employer and so the introduction of new scheme of pension will be done considering all the relevant factors including financial viability of the same. No interference is warranted unless there is gross injustice is perpetrated. The Appellants have failed to prove any arbitrariness and discrimination with respect to the New Pension Scheme.”

In **Sudhir Kumar Consul v. Allahabad Bank, (2011) 3 SCC 486**, the Hon'ble Apex Court held as follows:-

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“18. Moreover, the fixing of the cut-off date for granting retirement benefits such as gratuity or pension under the different schemes incorporated in the subordinate legislation, thereby, creating two distinct and separate classes of employees is well within the ambit of Article 14 of the Constitution. The differential treatment of two sets of officers appointed prior to the notified date would not offend Article 14 of the Constitution. The cut-off date may be justified on the ground that additional outlay as involved or the fact that under the terms of appointment, the employee was not entitled to the benefit of pension or retirement.”

In **All India Reserve Bank Retired Officers 'Assn. V. Union of India**, the Retired Officers 'Association of Reserve Bank of India questioned the validity of introduction of pension scheme in lieu of Contributory Provident Fund Scheme. The bank employees, who retired prior to 1.1.1986, had not been given benefit of the said Pension Scheme. The Hon'ble Apex Court held that the said cut-off date was neither arbitrary nor artificial or whimsical.

It was further observed: (SCC pp. 677-78, para 10) “10.... The underlying principle is that when the State decides to revise and liberalise an existing pension scheme with a view to augmenting the social security cover granted to pensioners, it cannot ordinarily grant the benefit to a section of the pensioners and deny the same to others by drawing an artificial cut-off line which cannot be justified on rational grounds and is wholly unconnected with the object intended to be achieved. But when an employer introduces an entirely new Scheme which has no connection with the existing scheme, different considerations enter the decision making process. One such consideration may be the financial implications of the scheme and the extent of capacity of the employer to bear the burden. Keeping in view its capacity to absorb the financial burden that the scheme would throw, the employer would have to decide upon the extent of applicability of the scheme.”

In **UGC v. Sadhana Chaudhary** the Hon'ble Apex Court has observed: (SCC p. 546, para 21) “21. ... It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that is very wide off the reasonable mark.”

In **State of Bihar v. Bihar Pensioners Samaj** the Hon'ble Apex Court held: (SCC p. 71, para 17) “17. We think that the contention is well founded. The only ground on which Article 14 has been put forward by the learned counsel for the respondent is that the fixation of the cut-off date for payment of the revised benefits under the two notifications

concerned was arbitrary and it resulted in denying arrears of payments to certain sections of the employees. This argument is no longer res integra. It has been held in a catena of judgements that fixing of a cut-off date for granting of benefits is well within the powers of the Government as long as the reasons therefor are not arbitrary and are based on some rational consideration.”

Regarding the second issue as to whether the applicant is entitled to retrospective benefits, we refer to the appointment letter at Annexure A-4 to the O.A. whereby the following is stated:-

“

SOUTH EASTERN RAILWAY

**OFFICE OF THE
CHIEF PERSONNEL OFFICER
GARDEN REACH, CALCUTTA-43**

No. P/L/13/MECH/ELECT/TRG/RRB/KOL/31

DATED: 8.4.04

To

**Shri Sumit Chatterjee,
S/o. Chittaranjan Chatterjee,
Vill. Nandua (Ward No. 11),
P.O. & P.S. - Raghunathpur,
District : Purulia, Pin - 723133**

**Sub: Temporary appointment as Tr. Asstt. Driver
(Elect/Diesel) Nature of appointment Gr. Rs.
950-1500/- (RPS) / 3050-75-3950-80-4590 (RSRP)
Plus D.A. as admissible.**

1. I have to inform you that you have been selected to undergo training in Elect / Diesel / Traction as a Tr. Asstt. Driver for a period of 18 months subject to your passing the prescribed medical examination by the Authorized Medical Officer of the Railway, and production of your original certificates and satisfactory proof in support of your age (date of birth) or Matriculation certificate etc.

2. Training will commence from the date to be advised in due course. You will have to complete all the formalities as indicated in this letter before joining the training. It must be clearly understood that although effort will be made to absorb you in the regular grade of this Railway, if there is any vacancy after your successful completion of training but no such guarantee is however given herein.

3. You will be held responsible for the charge and care of the Government Money, Goods and Stores and all other property that must be ensured to you.

4. This appointment is terminable on 7 days 'notice on either side but no such notice will be required if the training period is terminated due

to your mental or physical incapacity or failure in examination or to your removal or dismissal as a disciplinary measure.

5. *You are to make arrangement for your Boarding and Lodging.*

6. *If you intended to take up the appointment on these conditions please signify your acceptance and return this form a duplicate copy of which is enclosed for retention by you. In that event of your acceptance please call at this office by 15.5.04 at the latest, failing which this offer will lapse and will not be renewed.*

7. *You are required to submit two Character Certificates from two Gazetted Officers and attestation Forms duly filled in. You will be required to produce a certificate from the Head of Institution where you have studied last, duly attested by the officer as shown in the specimen enclosed.*

8. *As per advertisement made, you will have to execute an agreement Indemnity Bond to the effect that you will work on this Railway, for five years, after successful completion of the training.*

9. *At the end of training for 18 months, you will be subjected to a test and your absorption in a working post will depend upon your performance in the test. Failure in the test would, however, render you liable to discharge.*

10. *If after completion the course of training of 18 months, your progress is not, considered satisfactory, it will be open to the Admn. To extend the period of your training at the discretion of the competent authority or to subject you to a "REPEAT" course without payment of stipends. It is, however, open to the administration to terminate your employment with or without extending the period of training of giving a "REPEAT" course or in the event of your progress being considered unsatisfactory even at the end of the "REPEAT" course.*

11. *No travelling allowance will be granted for your journey.*

12. *A IInd Class Free Pass Ex..... to Howrah to cover your journey on the home line is enclosed, the receipt foil of which may please be returned to this office when you report here.*

13. *You will confirm to all rules and regulations applicable to your appointment.*

14. *Every individual appointed to the above post, shall if so required, be liable for military service in the Railway Enqrs. Unit of the T.A. for a period of 7 years service & 8 yrs. in the Territorial Army Reserve or for such period as may be laid down in this behalf from time to time.*

15. *You will have to deposit Rs. 24/- (Rupees Twenty Four only) as pre-recruitment Medical Examination Fee under Head of Allocation Abstract "Z" to the Chief Cashier, S.E. Railway, Garden Reach, Calcutta - 43, before sending you for medical examination. You will also have to bring two copies of your pass-port size photo for the said purpose.*

16. *This offer of appointment is subject to the condition of satisfactory verification report of your character and antecedents being received from the Civil Authorities. In case of any adverse report in this regard being received, at a later date, your traineeship as Asstt. Driver will be terminated then and there. You will not be posted against a working post of Asstt. Driver after the training is over, till such time satisfactory*

verification report of your character and antecedents is received from the Civil Authorities.

Sr./Asstt. Personnel Officer (P&T)

S.E. Railway, GRC, Calcutta

I accept the offer on the terms detailed above.

Sumit Chatterjee

Signature of the Candidature”

While referring to the said order of temporary appointment, in particular, the following is highlighted:-

“ XXXXX XXXXXX XXXXX

(6) If you intended to take up the appointment on these conditions please signify your acceptance and return this form a duplicate copy of which is enclosed for retention by you. In that event of your acceptance please call at this office by 15.5.04 at the latest, failing which this offer will lapse and will not be renewed.

 XXXXX XXXXXX XXXXX

(9) At the end of training for 18 months, you will be subjected to a test and your absorption in a working post will depend upon your performance in the test. Failure in the test would, however, render you liable to discharge.

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(13) You will confirm to all rules and regulations applicable to your appointment.”

VIII. The following is established upon the applicant's acceptance of the temporary appointment order dated 8.4.2004 annexed as Annexure A-4 to the O.A.

(i) The applicant did not object; rather he had accepted the terms 'and conditions unconditionally in response to clause (6) of the temporary

appointment order.

(ii) The applicant's appointment dated 8.4.2004 was temporary in nature.

The said appointment had made it clear that the applicant had to undergo training for 18 months at the end of which he would be subjected to a test and that he will be absorbed depending upon his performance in the said test. Hence, the applicant's performance and any claim for pensionary benefits will arise only from the date of absorption, which in this case, was 14.5.2005, a date that is well beyond 1.1.2004.

(iii) The applicant was purportedly furnished with a format for preferring his option for the New Pension Scheme, 2004, the format of which is annexed as Annexure A-6 to the application. Nowhere has the applicant affirmed that he has not submitted such option for the New Pension Scheme.

(iv) On the other hand, during hearing the Respondents have drawn attention to the circular RBE 225/2003 dated 13.1.2004 whereby the following has been stated:-

**“ Introduction of New Pension Scheme for new
Entrants to Central Government service,
Including Railway service**

(Railway Board's letter No. F(E)III/2003/PN1/24 dated 31.12.2003

(RBE No. 225/2003) is as under:-

A copy of the Gazette Notification No. 5/7/2003-ECB&PR dt. Dec. 22, 2003 published by the Ministry of Finance, Department of Economic Affairs, introducing a new restructured defined contribution pension system for all new entrants to Central Government service including Railway service from 1st of Jan., 2004 along with a copy of the Resolution dt. 10th October, 2003 constituting the interim, Pension Fund Regulatory and Development Authority (PFRDA) is circulated for information and necessary action. As a result of this decision, the existing Railway Services (Pension) Rules, 1993 including Commutation of Pension Rules and Extraordinary Pension Rules and State Railway Provident Fund Rules as contained in Indian Railway Establishment Code Vol. I, (1985 Ed.) 1995 Reprint shall not be applicable to the new recruits entering into Railway service from 1.1.2004. Necessary amendments to these Rules are being issued separately.”

(v) In Clause (13) of his temporary appointment letter, the applicant was directed that he would confirm to all rules and regulations applicable to his appointment; a condition that was accepted by the applicant.

(vi) As RBE No. 225 of 2003 was an existing rule/regulation/instruction during the time of issue of the temporary appointment letter, the applicant is necessarily bound by the contents of the said instructions.

(vii) Ld. Counsel for applicant in his support has referred to two decisions of the Coordinate Bench of Ernakulam as well as Jabalpur Bench in this regard.

In O.A. No. 180/00020/2015 the Ernakulam Bench had ordered as follows:-

“9. In view of the above the O.A. is allowed. It is declared that the applicants are deemed to have been promoted from the date the vacancy arose and thus notional date of promotions is only for the purpose of reckoning the qualifying service for pension under the CCS (Pension) rules, 1972. The respondents are directed to pass suitable orders in this regard and make necessary entry in the service book of the applicants indicating clearly the date of notional promotion and the purpose of reckoning the same.

10. Further, the respondents shall collect necessary subscription under the provident fund rules during the rest of their services and stop any recovery to the contributory provident fund.”

In O.A. No. 203/00290/2017 the Jabalpur Bench had directed as follows:-

“8. In view of the limited prayer made by the applicants and without going into the merits of the case, we dispose of this Original Application with a direction to the respondents to consider and decide the representations of the applicants in the light of ratio laid down by Ernakulam Bench in O.A. Nos. 724/2012 & 180/00020/2015 and in Special Appeal No. 330 of 2013 by the Hon’ble High Court of Uttrakhand, within a period of two months from the date of receipt of a copy of this order by passing a reasoned and speaking order.”

Upon close perusal of the order of the Ernakulam Bench whose ratio was also upheld by Jabalpur Bench, it is seen that the matter relates to

Postal Assistant appointed in the year 2005 against the vacancies that arose in the year 2002.

8. It is stated here that the pension Rules in case of EDA/GDA are distinct from that in the case of regular appointees such as Trainee Assistant through RRB. The applicants have nowhere in their submission proved that the applicants are similarly circumstanced with the applicants in O.A. No. 180/00021/2015. In fact, the order of the Pension Section of the Department of Posts dated 1st February, 2007 clarifies the position as follows:-

“
No. 99-7/2017-Pension
Government of India
Department of Posts
(Pension Section)

Dak Bhawan, Sansad Marg,
New Delhi - 110 001
1st February, 2017

Sub: Handling Court cases on the issue of applicability of CCS (Pension) Rules instead of NPS in respect of GDS appointed to regular Departmental posts after 1.1.2004 - reg.

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“(g)The provisions under Rule 13 of CCS (Pension) Rule, 1972 are also relevant. It mentions that qualifying service of a Government Servant shall commence from date he takes charge of the post to which is first appointed either substantively or in an officiating or temporary capacity provided that officiating or temporary service is followed without interruption by substantive appointment. Since such applicants were holding a non-governmental post on 1.1.2004 and they were appointed to a Departmental Post after the cut-off date, as per Government decision, NPS will be applicable in all such cases.

(h) Rule 14(1) of CCS (Pension) Rules, 1972 mentions that ‘Service’ of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government. Under Rule 14(2) further provides that ‘for the purposes of sub rule (1), the expression ‘Service’ means service under the Government and paid by that Government from consolidated fund of India or a local fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government. Extra Departmental Agents are provided to be specifically excluded from the application of pension under the GDS rules and the Government has also not provided counting of a part of the service rendered by them in the capacity of EDA/GDS on absorption to regular departmental posts.

(i) *It is also added that in CA No. 13675-13676/2015 in UOI & others v. the Registrar & ors., Hon'ble Supreme Court, considering the rules governing GDS and the fact that GDS employees do not come under the category of full time casual employee, has held that the directions to the Department for formulation of scheme for giving some weightage to GDS service to make good the shortfall in minimum qualifying service of 10 years in regular employment, ought not to have been passed by the learned Tribunal and approved by the High Court. The Apex Court further observed that the matter pertains to policy and involves financial implications.*

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Hence, the analogy stops short thereof and the conclusion arrived at in 180/00020/2015 cannot be held to be applicable in the instant application.

IX. In his rejoinder, the applicant has pointed out that one Shri Santosh Mahato and one Shri Chandan Kumar Dutta, who have been empanelled at Srl. No. 151 and 212 have been appointed prior to 1.1.2004 whereas the applicant, who is at Srl. No. 37 (wrongly stated as Srl. No. 31), has been left out of the zone of consideration. Here we refer to the reply and the arguments of the respondents i.e. respondent No. 5, which stated clearly as follows:-

“That at time time of verification of testimonials, candidates have to undergo vision test which is qualifying in nature and candidates declared unfit by medical authority in medical test were not entitled to appointment in zonal Railways.”

Hence, although candidates as per merit equal to number of vacancies and community were called for at the outset on account of the fact that large number of candidates did not qualify in the prescribed vision test to make the necessary shortfall, candidates below the initial merit were subsequently called going further down the merit. The instant applicant was one of such candidates, who was not in the zone of consideration at the initial stage but subsequently entered the zone of consideration on account of candidates

who failed in vision test from the first panel. This contention of the respondents is borne out by the fact that the first panel was published on 26.7.2003 and the subsequent panel was published on 9.12.2003. Chronologically speaking, 27.7.2003 precedes 9.12.2003 and it is corroborated by records that Shri Santosh Mahato and Shri Chandan Kumar Dutta, two incumbents as pointed out by the applicant in his rejoinder had occupied positions at Srl. Nos. 151 and 212 in the first panel published in 27.7.2003. Consequently, the applicant's contention that candidates below him were offered appointment prior to 1.1.2004 fails corroboration as per records.

X. Hence upon consideration of the two issues, we are of the view that:

(i) The NPS 2004 cannot be held to be as bad in law or non-sustainable as there is not a single reason, justification, rationale, logic or submission made by the applicant to prove as to how the architecture or salient features of the NPS 2004 is bad in law or is not sustainable. The relevant Ministry of Law & Justice has not been impleaded in the application. Hence there was no scope for the respondents to defend the legality of the policy decision in not drafting the NPS under Article 309 of the Constitution. The ratio laid down by Hon'ble Apex Court in T.M. Sampath (supra) is cited in support of the fact that no arbitrariness or discrimination has been proved with respect to the New Pension Scheme.

(ii) Regarding the issue as to whether the candidate's entitlement arises from the date of announcement of vacancies, as the candidate himself has accepted the terms and conditions of his appointment order dated 8.4.2004, he is now estopped at a later stage to raise objections about the same. Further RBE No.

225/2003 being an extant instruction prior to offer of such appointment letter, is binding on the applicant.

(iii) The issue that the candidate was appointed after 1.1.2004 on account of delay on the part of the respondents does not hold good as because the candidate was low in merit and did not find place in the first merit list and was only taken up for consideration when certain candidates qualifying in the first merit list failed the vision test. The ratio laid down by the Ernakulam Bench is not applicable in this case as clarified by the Department of Posts vide their order dated 1st February, 2017.

XI. Accordingly, we hold that the O.A. fails to succeed and is dismissed on merits.

XII. In spite of directions dated 29.11.2017 and 17.1.2018, however, the Respondents have failed to furnish the documents to the Bench. Consequently, we express our displeasure at the non-compliance and impose Rs. 2,000/- (Rupees Two thousand only) on the Respondents payable to the Bar Association, Kolkata Bench of Central Administrative Tribunal.

(Dr. Nandita Chatterjee)
Administrative Member

(Manjula Das)
Judicial Member

SP