
Before S. S. Nijjar and Nirmal Yadav, JJ.

TARLOK SINGH,—*Petitioner*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

CWP. NO. 4377/CAT/2001

20th July, 2005

Constitution of India, 1950—Art. 226—Instructions dated 27th February, 1978—Indian Railways' Establishment Manual—Para 206.1—A senior Loco Inspector while on deputation abroad failing to appear in the interview for promotion—Persons junior to him promoted as Assistant Mechanical Engineer in Class II service—On return from deputation petitioner represented to the Railway Board and was granted promotion on ad hoc basis—Claim for Senior scale—Cl. (ii) of instructions dated 27th February, 1978 provides that only those Class II officers with not less than 3 years non-fortuitous service are to be considered for grant of senior scale—Petitioner retired before rendering non-fortuitous service of 3 years in Class II—Board declining to grant senior scale—Under para 206.1 petitioner was entitled to proforma promotion—Having included the name of petitioner in the panel 1980, he cannot be denied the consequential reliefs—Had the petitioner been promoted immediately on his return he would have even completed 3 years actual service on Class II post-Petition allowed while directing the respondents to release the proforma promotion to petitioner together with consequential benefits and the selection grade from the dates the same were given to persons junior to him.

Held, that gross injustice has been done to the petitioner by the respondents. The respondents seem to have given benefits to the petitioner with the right hand, which have been denied or taken away by the left hand. Very correctly, the respondents have empanelled the name of the petitioner with effect from 1980 when persons junior to him were promoted. Having granted the aforesaid empanelment, it would be wholly unjust and inequitable to deny the consequential benefits to the petitioner. The Tribunal committed an error of law in basing its decision on the Railway Board's letter dated 27th February, 1978. Clause (i) of the aforesaid instructions lays down that the

promotion of Class II would be made on the basis of seniority, subject to fitness. Clause (ii) provides that only those Class II officers with not less than 3 years non-fortuitous service in Class II are to be considered for the ad hoc panel. Even the subject matter of the instructions deals with officiating promotion of Class II officers to Senior scale on the Railways. These instructions clearly deals with the situation where certain promotions are required to be made as a stop gap arrangement for emergency situations. The claim of the petitioner could not have been rejected under these instructions. The claim of the petitioner has to be considered under Para 206.1 of the Indian Railway's Establishment Manual. The respondents have actually considered the claim of the petitioner and empanelled his name with effect from 1980. Under para 206.1 the petitioner was entitled for the proforma promotion. In the aforesaid para, it is clearly laid down that suitable candidates shall be considered for proforma inclusion in the panel. The respondents having decided to empanel the petitioner with effect from 1980 cannot deny the consequential reliefs to the petitioner from the date his name was included in the Panel.

(Para 7)

Further held, that having given the benefit of empanelment to the petitioner with effect from 1980, the same cannot be taken away by holding that the same period would not be counted as service for the purposes of promotion and selection grade. Since the petitioner has been given deemed promotion and it is within the ambit of the rules, it cannot be termed to be fortuitous service. In other words it would even fall under the instructions contained in letter dated 27th February, 1978 as being non-fortuitous service. The petitioner was entitled to relief in equity. Therefore, the benefit of deeming clause cannot be permitted to be defeated by technicality of any rule or instructions. Had the petitioner been promoted immediately on his return, he would have even completed three years actual service on Class II post and would have been entitled to the selection grade.

(Para 10)

Rajiv Atma Ram, Sr. Advocate with.

H.B. Singh, Advocate, for the petitioner.

Puneet Jindal, Advocate for respondents No. 1 and 2.

JUDGMENT**S.S. NIJJAR, J. (ORAL)**

(1) In this write petition under Articles 226/227 of the Constitution of India, the petitioner seeks the issuance of a writ in the nature of Certiorari quashing the order dated 6th February, 2001 (Annexure P-4) passed by the Central Administrative Tribunal (hereinafter referred to as "the Tribunal") in O.A. 727/CH/1992 in as much as and to the extent that it hold the petitioner to be ineligible for the grant of senior scale. The petitioner also seeks the issuance of a writ in the nature of Mandamus directing the respondents to fix his pay in the Senior Scale equal to his junior S. S. Kapoor with effect from March, 1983 with all consequential benefits, such as fixation of pay, payment of arrears, re-fixation of pension and gratuity alongwith interest at the rate of 18% per anum.

(2) Brief facts as pleaded are that the petitioner joined as Cleaner in the Indian Railways on 4th October, 1947. He earned promotion in due course on various posts. His last promotion was as Senior Loco Inspector with effect from 2nd May, 1962. In April, 1979 whilst working as such, he was sent on deputation to Nigeria for establishment and running of railways for a period of three years. On his return in April, 1982, he was posted as Senior Loco Inspector at Diesel Loco Shed, Ludhiana. He joined on 13th May, 1982. Whilst the petitioner was on deputation, about 31 persons junior to him had been promoted as Assistant Mechanical Engineer in the Class II service, on regular basis with effect from March, 1980. Some other persons junior to the petitioner were also promoted as Assistant Mechanical Engineer on adhoc basis. The claim of the petitioner for promotion was not considered at the time when persons junior to him were promoted. The petitioner thereafter submitted a number of representations for the necessary relief. He was granted promotion on ad hoc basis pending selection by order dated 13th July, 1984 (Annexure R-2 to the written statement). The petitioner took the charge of AME Diesel (the promotional post) on 15th August, 1984. Subsequently, he cleared the selection of AME in Group (B) services and was placed on the panel on 12th October, 1984. His name was also included in the panel of 1980 with effect from the date his juniors were empanelled by order dated 16th June, 1993. Before the petitioner could render non-fortuitous service of three years in Group (B), he retired on attaining the age of superannuation on 31st December, 1985. At that time, he had

rendered service as AME in Group (B) only with effect from 15th August, 1984 to 31st December, 1985. According to the respondents, for the condition of eligibility for grant of senior scale in Group (B), the minimum of 3 years of non-fortuitous service is required. The minimum years of non-fortuitous service was not fulfilled by the petitioner. Therefore, by order dated 13th March, 1992, the Railway Board declined to grant the senior scale to the petitioner. The respondents have also stated that at the time when his juniors were considered for promotion, he was also invited to appear for the interview. He could not appear as he was on deputation to Nigeria. Thus, 31 candidates who were impanelled for promotion on 31st December, 1980, included persons junior to the petitioner. Para 206.1 of the *Indian Railways' Establishment Manual* deals with consideration for promotion of the cases of employees on deputation. We may reproduce the provisions at this stage for ready reference :—

“206.1 Consideration of employees on deputation. In cases where employees are eligible to take the selection are abroad on deputation/secondment are not likely to return, they should be called for the first selection with thereafter and on the basis of their performance in the selection they should be considered for proforma inclusion in the panel framed during their absence abroad. If any employee is thus included in the panel no arrears would be payable to him and entitlement to pay in Group B would be commenced only from the date of his actual officiating promotion for the panel thus enlarged Board's approval should be obtained. In respect of eligible employees who are on deputation to offices/establishments within the country. It should be ensured that adequate advance notice is given to such employees and they are considered at the selection without fail.”

In the written statement, the respondents have also reproduced the relevant extract from the instructions contained in Letter No. E (GP) 75/1/58, dated 27th February, 1978 laying down the conditions of three years non-fortuitous service for the grant of selection grade which we may also reproduce as under :—

- “(i) As suitability of Class II Officer for officiating promotion to Senior Scale is to be adjudged on the basis of his seniority

subject to fitness, the field of consideration will be restricted to as many Class-II Officers as the number to be impanelled. In case the required number is not found from among those so considered, the number to be considered may be increased corresponding to the short fall. (ii) Only Class II Officer with not less than 3 years non-fortuitous service in Class II are to be considered for the ad hoc panel.”

The petitioner, however, relies on Fundamental Rule 30 which is as under :—

“Rule : When an officer in a post (whether within the cadre of his service or not) is for any reason prevented from officiating in his turn in a post on higher grade or scale, borne on the cadre of the service to which he belongs he may be authorised by special order of the appropriate authority. Proforma officiating promotion in to such scale or grade and thereupon be granted the pay of that scale or grade if that be more advantageous to him on such occasion on which officer immediately junior to him in the cadre of his service draws officiating pay in that scale or grade.”

(3) It was pleaded that S. S. Kapoor was promoted and appointed as Assistant Mechanical Engineer Class II in March, 1980. He being junior to the petitioner would entitle the petitioner to proforma promotion from the same date. The petitioner filed OA in the Tribunal claiming proforma promotion and the grant of selection grade. During the pendency of the proceedings before the Tribunal, it was stated that the claim of the applicant for proforma fixation of pay in Group (B) with respect to his junior is under consideration. The Tribunal, therefore, issued a direction to the respondents to decide the matter as early as possible and preferably within a period of two months from the receipt of a copy of the order. The claim of the applicant for grant of Senior Scale has been rejected, on the basis of the instructions dated 27th February, 1978. It has been held that since the petitioner had been on deputation and was placed in the Panel in 1984, he did not have the occasion of rendering three years non-fortuitous service in Class II. Even though this name had been “interpolated in the panel of 1980 selection, but that will not make him eligible for the selection grade”. It is this part of the order of the Tribunal that the petitioner has challenged in the present write petition.

(4) We have heard the learned counsel for the parties and carefully gone through the paper-book.

(5) Mr. Rajive Atma Ram, learned Sr. Advocate submits that the petitioner being on deputation was entitled to be considered for promotion alongwith his juniors. The respondents have accepted the entire claim of the petitioner having included his name in the Panel of 1980. Now the consequential relief cannot be denied on the ground that he did not have three years actual service under Class II Post. The non-fortuitous service clause would not be applicable in the case of the petitioner who had been sent on deputation by the respondents. In support of the submission, learned Sr. Counsel has relied on a judgment of the Supreme Court in the case of **Union of India and others versus K. B. Rajoria (1)** and a judgment of Division Bench of this Court in the case of **Ram Lal Aggarwal versus The State of Punjab and others, (2)** Learned Sr. Counsel further submits that the respondents having sent the petitioner on deputation, cannot now be permitted to deny the benefit of proforma deemed promotion from the date person junior to him was promoted. The respondents having empanelled the petitioner with effect from 1980 cannot deny the benefit of aforesaid period to be counted as actual service for the purposes of all consequential benefits. In support of the aforesaid submission, learned Sr. Counsel has relied on a judgment of this Court in the case of **Asha Rani Lamba versus State of Haryana, (3)** Even otherwise on return from deputation, the petitioner resumed duties on 13th May, 1982. He retired from service on 31st December, 1985. Had the actual promotion been released to the petitioner on his return, he would have completed actual service of three years on 12th May, 1985. Therefore, under no circumstances, the respondents can deny the relief of proforma promotion and the selection grade to the petitioner.

(6) Mr. Puneet Jindal, learned counsel appearing for the respondents vehemently argues that in view of the provisions contained in the instructions, the petitioner cannot be granted the proforma promotion or the selection grade. In support of his submission, learned counsel relies on a judgment of the Supreme Court in the case of

(1) J.T. 2000 (4) S.C. 213

(2) 1968 S.L.R. 800

(3) 1983 (1) S.L.R. 400

Rudra Kumar Sain and others *versus* Union of India and others, (4) and S. N. Dhingra and others *versus* Union of India and others, (5).

(7) Having considered the submissions of the counsel for the parties, we are of the opinion that gross injustice has been done to the petitioner by the respondents. A perusal of the facts narrated above would show that the respondents seem to have given benefits to the petitioner with the right hand, which have been denied or taken away by the left hand. Very correctly, the respondents have empanelled the name of the petitioner with effect from 1980 when persons junior to him were promoted. Having granted the aforesaid empanelment, it would be wholly unjust and inequitable to deny the consequential benefits to the petitioner. In our opinion, the Tribunal committed an error of law in basing its decision on the Railway Board's letter dated 27th February, 1978. Clause (i) of the aforesaid instructions lays down that the promotion to Class II would be made on the basis of seniority, subject to fitness. Clause (ii) provides that only those Class II officers with not less than 3 years non-fortuitous service in Class II are to be considered for the ad hoc panel. Even the subject matter of the instructions deals with officiating promotion of Class II Officers to Senior scale on the Railways. These instructions clearly deal with the situation where certain promotions are required to be made as a stop-gap arrangement for emergency situations. The claim of the petitioner could not have been rejected under these instructions. The claim of the petitioner has to be considered under para 206.1 of the Indian Railway's Establishment Manual. The respondents have actually considered the claim of the petitioner and empanelled his name with effect from 1980. Under para 206.1 the petitioner was entitled for the proforma promotion. In the aforesaid para, it is clearly laid down that suitable candidates shall be considered for proforma inclusion in the panel. The respondents having decided to empanel the petitioner with effect from 1980, cannot deny the consequential reliefs to the petitioner from the date his name was included in the Panel. Any other interpretation of the instructions and para 206.1 would subject the employees who are sent on deputation, to a break in service. It is a well settled principle of law that a person who is on deputation, continues to maintain the lien in his parent department till it is cancelled or revoked. We are of the considered opinion that the observations made by the Division Bench in **R. L. Aggarwal's case**

(4) (2000) 8 S.C.C. 25

(5) (2001) 3 S.C.C. 125

(*supra*) are squarely applicable to the case of the petitioner. Considering the interpretation of Rule 4.13 of the Punjab Civil Services Rules known as “next below rule”, the Division Bench held as follows :—

- “11. Note 4 quoted above elaborates what is well known in official parlance as the “next below rule”. Though the import of this rule is well understood in service rules all over the country, yet no definition thereof appears in the Punjab Civil Services Rules. No precise definition of this rule need be laid down. However, what is intrinsically indicated by the “next below rule” is that an officer out of his regular line (including deputation etc.) is entitled to be promoted to be shown as holding a higher post in the parent department if the Government servant next below him has been so promoted. This rule ensures to the officer within his regular line or serving on deputation in an other department that he shall be resorted to the position he would have occupied in his parent department had he not been so deputed. Though the language in which the provisions of Note 4 are couched is rather ambiguous, yet it clearly emerges therefrom that it is directed to protect the interests of an officer who though entitled to officiating promotion cannot in fact avail of the opportunity due to his being, what the rule states as out of the “regular line” or outside the ordinary line of service. The provisions of Note 4 further provide that the proper course should be to make arrangements to enable those officers, who are out of the regular line or on deputation to other departments, to be released from such special posts in order not to deprive them of the chances of officiating promotions which may accrue to them for a substantial period. Thus a requirement is cast on the Government to arrange to recall an officer to whom a chance of officiating promotion is likely to accrue. However, it is provided that where in public interest or other exigencies of service an officer cannot be recalled then in such a case he would be entitled to be compensated by the parent department with the pay of the Higher paid post. In substance, therefore, the provisions of Note 4 imply that either the Government recalls an officer eligible for officiating promotion back to the regular line or failing that, provision is made for compensating such an officer if he is not, or cannot be so recalled.”

(8) In the case of **K. B. Rajoria** (*supra*) the Supreme Court considered and interpreted the term "Notional promotion". One Krishnamoorti had been given notional promotion with effect from 22nd February, 1995 by order dated 10th June, 1998. For promotion to the post of Director General (Works), the requirement under the Rules was by promotion from amongst, *inter alia*, Additional Director General (Works) with two year's regular service in the grade'. Krishnamoorti was considered for promotion. K. B. Rajoria filed an application before the CAT claiming that he was also eligible to be considered for the post. He claimed that if the DPC had been held in 1995-96, he could have been appointed to the post of Additional Director General which had fallen vacant on 1st May, 1995. Therefore, he should have been given notional promotion with effect from 1st May, 1995. He would then have been eligible for promotion to the post of Director General. The Tribunal dismissed Rajoria's application which he challenged in the High Court. The High Court held that neither Rajoria nor Krishnamoorti were eligible on the cut off date i.e. 1st July, 1997 for promotion on the post of Director General. According to the High Court, the word "regular service" in the Rules means actual service and that fiction of notional promotion would not amount to two years experience necessary under the Rules. The High Court was of the view that notional seniority granted to Krishnamoorti by order dated 10th June, 1998 was no substitute for the requirement of two years' regular service as Additional Director General (Works). The Supreme Court observed that the High Court had overlooked the concession made by Rajoria before the Tribunal that he was not challenging the eligibility of Krishnamoorti. Consequently, it was held that the High Court erred in not dismissing the writ petition on the ground of lack of locus standi in Rajoria. It was further held that the High Court erred in construing the words "regular service in the grade" as "actual physical service". If that was so, then ad hoc appointee who actually served on the post would also claim to be qualified to be considered for the post of Director General (Works). The High Court itself held that as hoc service rendered by any of the parties would not count towards eligibility. The observations made by the Supreme Court in paragraphs 10 to 14 which are relevant to the present case, may be reproduced as under :—

"10. Third, the High Court erred in construing the words "regular service in the grade" as actual physical service. If that were so, then an *ad hoc* appointee who actually serves in the post could also claim to be qualified to be considered

for the post of Director General. The High Court itself held that "ad hoc service rendered by any of the parties would not count towards eligibility."

11. Finally, while considering the definition of the word "regular" in the Concise Oxford Dictionary, Ninth Edition, the High Court noted that it meant :

"(1) conforming to a rule or principle, systematic ; (2) harmonious, symmetrical ; (3) acting or done or recurring uniformly or calculably in time or manner, habitual, constant, orderly ; (4) conforming to a standard of etiquette or procedure, correct, according to convention ; (5) properly constituted or qualified, not defective or amateur, pursuing an occupation as one's main pursuit."

12. The word "regular" therefore does not mean "actual" and the first question the High Court should have considered was whether the appointment of Krishnamoorti was regular and in accordance with the Rules or was it irregular in the sense that it was contrary to any principle of law ?

13. The decision which is somewhat apposite is the case of **K. Madhavan versus Union of India**, (JT 1987 (4) SC 43 = 1987 (4) SCC 566) where the eligibility requirement was eight years in the grade "on a regular basis". In that case it was held :

"In our view, therefore, the expression on a regular basis would mean the appointment to the post on a regular basis in contradistinction to appointment on ad hoc or stopgap or purely temporary basis."

14. It is nobody's case that the notional promotion granted to Krishnamoorti was "irregular". By giving him notional promotion as Additional Director General with effect from 22nd February, 1995, Krishnamoorti was in fact regularly appointed to the post on that date."

(9) The observations reproduced above of the Division Bench in the cases of R.L. Aggarwal (supra) and of the Supreme Court in the case of Rajoria (supra) would show that the proforma service of the petitioner from March, 1980 has to be counted for all service benefits, including promotion, selection grade and retiral benefits.

(10) We are further of the opinion that having given the benefit of empanelment to the petitioner with effect from 1980, the same cannot be taken away by holding that the same period would not be counted as service for the purposes of promotion and selection grade. Since the petitioner has been given deemed promotion and it is within the ambit of the rules, it cannot be termed to be fortuitous service. In other words, it would even fall under the instruction contained in Letter No. E(GP)75/1/58, dated 27th February, 1978 as being non-fortuitous service. The petitioner was entitled to relief in equity. Therefore, the benefit of deeming clause cannot be permitted to be defeated by technicality of any rule or instructions. Had the petitioner been promoted immediately on his return, he would have even completed three years actual service on Class II post and would have been entitled to the selection grade. We are of the considered opinion that the judgments relied upon by Mr. Jindal do not support the submissions made by the learned counsel. In the case of **Rudra Kumar Sain** (*supra*), the Supreme Court was interpreting Delhi Higher Judicial Service Rules, 1970 as amended from time to time. The judgment notices that the terms “*ad hoc*”, “stopgap” and “fortuitous” are in frequent use in service jurisprudence. The meaning to be assigned to these terms while interpreting provisions of Service Rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. It is not possible to lay down any straight jacket formula. In the case of **S. N. Dhingra** (*supra*), again it has been held that whether any appointment fortuitous or stopgap had to be decided in the facts and circumstances of the case and no universal principle can be laid down. In the present case, the respondents themselves have held the petitioner entitled to empanelment from 19th March, 1980. Therefore, there can be no justification in denying the consequential relief to him.

(11) For the reasons stated above, we allow this writ petition, quash the observations made in the order dated 6th February, 2001 (Annexure P-4) passed by the Central Administrative Tribunal with regard to the non-grant of proforma promotion in the selection grade to the petitioner. A direction is issued to the respondents to release the proforma promotion, if not already released, together with all consequential benefits and the selection grade from the dates the same were given to persons junior to the petitioner. Since the petitioner has already retired, the respondents are directed to recompute the retiral benefits. This consequential relief be granted to the petitioner within a period of three months of the receipt of a certified copy of this order.

R.N.R.