

(2018) 11 CAT CK 0017

In the Central Administrative Tribunal

Case No : Original Application No. 060, 01062 Of 2016

Ashwani Kumar

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 30-11-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Administrative Tribunals Act, 1985 — Section 21

Citation : (2018) 11 CAT CK 0017

Hon'ble Judges : Sanjeev Kaushik, J;Ajanta Dayalan, J

Bench : Division Bench

Advocate : Rohit Seth, Sanjay Goyal

Final Decision : Dismissed

Judgement

1. The present Original Application (O.A.) has been filed by the applicant Ashwani Kumar seeking quashing of order dated 13.8.2014 (Annexure A-1) whereby the applicant has been informed that only regular service is counted for grant of ACP benefit in terms of DOPT O.M. dated 9.8.1999. He has also claimed discrimination vis-a-vis Assistant Compilers and Peons who were similarly appointed for Census of 1981 and 1991, but their services were regularized from the retrospective dates. He has also sought direction to the respondents to regularize his adhoc service with all consequential benefits including fixation of pay, arrears of pay etc. alongwith interest @ 12%.

2. The facts leading to filing of the instant O.A. are that the applicant was initially appointed with the respondent department as Draftsman vide letter dated 30.10.1981 (Annexure A-2) on purely temporary and on adhoc basis through Employment Exchange. He was appointed in a temporary capacity as Draftsman on regular basis w.e.f. 2.9.1992. The applicant was granted benefit of financial upgradation under 1st ACP in the scale of Rs. 5500-9000 w.e.f. 2.9.2004 after completion of 12 years of service by counting his regular service only. The MACP Scheme was introduced by Central Government vide circular dated 19.5.2009

(Annexure A-8) made effective from 1.9.2008. On 1.10.2013, the applicant was granted benefit of financial upgradations under MACP in Pay Band-2 Rs. 9300-34,800+GP of Rs. 4600/- and Rs. 4800/- w.e.f. 1.9.2008 and 2.9.2012 respectively.

3. According to the applicant, on 31.8.1992, respondent no. 2, in consultation with DOPT, had decided that adhoc appointees be regularized and allowed to count their adhoc service in respect of seniority and eligibility for promotion to the higher grade. On 6. 9.2013 (Annexure A-9) respondent no. 2 called for data of adhoc appointees for 1981 Census.

4. The applicant made representation on 28.6.2011 (Annexure A-7) which was forwarded on 11.7.2011 (Annexure A-7 colly) to the respondent no. 2. The representation was made in the light of decision of 29.11.2010 rendered by the Bombay Bench of this Tribunal in O.A. No. 6 of 2011- Suresh Kumar and another vs. Secretary, Ministry of Shipping & others wherein it was held that adhoc service rendered by employees preceding date of regularization without any break has to be counted for the purpose of ACP and cannot be denied on the basis of clarification dated 10. 2.2000. The applicant again submitted representations dated 2. 7.2014 and dated 17.9.2014 (Annexure A-11 & A-12) seeking outcome of his earlier representation dated 28.6.2011. On 13. 8.2014 (Annexure A-1), respondent no. 2 informed the applicant that 'only regular service is counted for ACP from the date of appointment'. However, no reference was made to regularization of adhoc service in their decision. Later, on 19.5.2015 (Annexure A-13), respondent no. 2 issued orders regularizing Assistant Compilers and Peons who were appointed for 1981 and 1991 Census from retrospective dates. On 4.8.2015 (Annexure A-14), respondent no. 2 again called for case of Draftsman/Cartographers appointed for 1981 and 1991 Census for the purpose of regularizing their adhoc services. The case of applicant alongwith another employee (Smt. Neelam Lakhnpal) and his representations were forwarded on 27.9.2016 (Annexure A-15 colly). However, there is no decision on this as yet by the authorities leading to unnecessary delay and harassment to the applicant as well as discrimination and violation of Articles 14 & 16 of the Constitution of India. The applicant has also placed reliance upon number of judgments rendered by High Courts and by this Tribunal in support of his claim. Hence this O.A.

5. The respondents have contested the claim of the applicant and supported their order dated 13.8.2014 in terms of DOPT O.M. dated 9.8.1999. They have stated that as per para 3 of this O.M., only regular service is to be counted for the purpose of ACP from the date of appointment. They have further stated that in a sense the applicant is seeking direction to regularize his adhoc service as has been done in the case of Assistant Compilers and Peons. However, they have clarified that these posts fall in different cadres with different pay scales, qualification and nature of duties. Further, the applicant was appointed on 23.10.1981 against temporary posts created for 1981 Census and he could be

regularized only after availability of core posts of Draftsman which were available in the year 1992 i.e. on 2.9.1992 and accordingly he was regularized on 2.9.1992. They have stated that as per guidelines received from Registrar General of India (Respondent no. 2) vide letter dated 31.8.1992 (Annexure A-4), earlier service of the applicant could not be regularized on account of non-availability of core posts. The respondents have also annexed an application dated 1.1.1987 (Annexure R-1) from the applicant himself wherein he has requested that he may be appointed as Draftsman in Directorate of Census Operations, U.T. Chandigarh, to save him from any retrenchment in future.

6. The respondents have also stated that the case of the applicant for regularization of his adhoc service from 1981 is time barred. The cause of action lies in 1981 when he was initially appointed or in 1992 when he was regularized from prospective date. He should have appealed during that period. However, at that time he did not make any case for retrospective regularization and after 36 years when he is going to retire shortly, he is staking this claim, which is clearly time barred.

7. The respondents have argued that consequential relief also includes seniority and promotion. However, during the period of 11 years from his initial appointment to his regularization, number of employees have joined and have been regularized. These people are figuring at higher positions in seniority and have consequently been promoted to higher scale. Retrospective claim of the applicant will affect position of these employees without making them a party to the case. Further, after so many years of service, depriving them of their promotional post is time barred.

8. The respondents have further argued that the post of Draftsman as per Recruitment Rules is a non-ministerial post. It is a Group-C non-technical post for which Staff Selection Commission is the designated recruitment authority. The Commission vide its letter dated 24.4.1979 (Annexure R-2) has categorically directed that the post of Geographer/Cartographer (which is equivalent to the post of Draftsman) may not be filled from other permissible channels and the requisition for filling these posts needs to be sent to the Commission. As the initial appointment of the applicant was only on adhoc basis for short period, the same was done by nomination through Employment Exchange without consideration of reservation. But, at that stage, being on adho basis and for short period, he could make way for eligible candidate to be appointed through the Commission on direct recruitment. Thereafter, when core posts became available, the adhoc appointment was made permanent. Yet, the applicant did not stand the test of merit with candidates in open market for regular permanent appointment.

9. The respondents have also relied on the judgment of Hon'ble Apex Court rendered in the case of State of Orissa vs. Sukanti Mahapatra (AIR 1993 SC 1650), wherein it has been held that assuming that their having served for long years is a valid reason for regularization, that without anything more. Further the

Govt. of India instructions dated 29.10.1975 and dated 23.7.2001 also provide that an adhoc appointment does not bestow on the person a claim for regular appointment and service rendered on adhoc basis does not count for the purpose of seniority in that grade and for eligibility for promotion to the next higher grade.

10. The respondents have further stated that the respondent department vide letter dated 12.11.1986 (Annexure R-3) requested respondent no. 2 that the applicant be considered for adjustment in any other local Census Directorate wherever vacancy is available, due to non-availability of core posts of Draftsman in the office of answering respondent no.3. In response to this, it was informed (Annexure R-4) that his services could not be regularized as his appointment was against temporary posts against Census 1981 and that too without nomination from the Commission. It was also informed that respondent no. 2 was taking up the case of the applicant for regularization of his service with DOPT. Accordingly, the services of the applicant were regularized w.e.f. 2.9.1992 as per guidelines received from respondent no. 2 vide letter dated 31.8.1992 with the consent of DOPT (Annexure A-4). However, adhoc service cannot be regularized. The respondents have also relied upon judgment of High Court of Punjab and Haryana dated 1.3.2013 rendered in RSA No. 1537 of 2011 in the case of Municipal Council, Rohtak vs Madan Lal and Others, wherein it has been held that adhoc service would not be counted towards the grant of ACP scales, promotion and seniority (Annexure R-5).

11. The respondents have also clarified that services of the two others employees Ms. Anju and Ms. Neelam quoted by the applicant were regularized earlier on 1.3.1984 due to availability of core posts. They have also stated that the retrospective benefits claimed by the applicant shall disturb the settled relative position of these two employees as well as other employees of their cadre vis-à-vis the applicant.

12. Accordingly, the respondents have concluded that the applicant is not eligible for regularization of service from the date of his adhoc appointment and that the case needs to be dismissed both on ground of being barred by limitation and on merit.

13. The applicant has filed rejoinder whereby he has mostly reiterated the grounds taken in the O.A. He has also brought out that the fact remains that Assistant Compilers were regularized from retrospective date vide order dated 19.5.2015 which resulted in grant of benefit of financial upgradation too. It is argued that the respondents cannot carve out an exception in one case only causing hostile discrimination. Further, similar claim has been upheld by the Rajasthan High Court in 4 writ petitions vide its judgment dated 3.1.2018 (Annexure A-16). It is also stated that no one's promotion will be affected and the applicant will only get financial upgradation from the due date like other similarly placed employees. Also the fact whether the employment is through the Commission or through the Employment Exchange does not make any difference so long as it is against a regular post.

14. We have heard the learned counsels for both the parties, gone through the pleadings available on record, and given our thoughtful consideration to the entire matter.

15. The two core issues for consideration before this Tribunal in the instant O.A. are (1) whether the adhoc service is to be counted for the purpose of grant of benefit under ACP/MACP Schemes introduced by the Government of India; and (2) whether adhoc service of the applicant can be regularized with retrospective effect at this point of time.

16. The applicant is claiming this benefit mainly on the ground that similar benefit has been granted to other employees in the cadres of Assistant Compilers and Peons by the same department and non grant of the same benefit to the cadre of Draftsman will cause hostile discrimination and violation of Articles 14 & 16 of the Constitution of India. He has also relied on judgments rendered by the Hon'ble High Courts and this Tribunal where under this benefit has been granted to the petitioners in those cases.

17. On the other hand, the respondents have strongly contested the claim of the applicant. First and foremost, they have stated that the claim is hopelessly time barred as the cause of action, if any, arose to the applicant way back in 1981 when he was initially appointed on adhoc basis or in 1992 when he was appointed in temporary capacity on regular basis. They have also stated that the cadres of Assistant Compilers and Peons and that of Draftsman are different cadres. Their mode of recruitment, Recruitment Rules, qualification and nature of duties are different and hence are not comparable. They have further argued that grant of this benefit to applicant will lead to unsettlement of seniority position and 3rd party rights may arise. It is also stated that regularization of adhoc service was dependent on availability of core posts and the applicant was regularized once core post was available.

18. We note that no doubt the cause of action, if at all, arose either in 1981 when the applicant was initially appointed on adhoc basis or at best in 1992 when he was regularized with prospective date. The applicant chose not to agitate his cause at that point of time. Then it is not within his right to agitate his claim after lapse of over two decades of original cause of action -even counting this from 1992.

19. M.A. 060/1217/2017 for condonation of delay was filed quoting delay of only 467 days and was allowed on 11.1.2018.

However, it is not clearly stated therein as to how this delay has been worked out. This could only be with reference to the date of impugned order. Whatever be the case, there can be no denial that original cause of action accrued only in 1992 when the services of the applicant were regularized with prospective effect. The law on this issue is very clear and is settled by catena of judgments. The fact that some other persons were granted this benefit recently does not revive the claim of the applicant which, if at all it existed, arose in 1981 or on 2.9.1992

when he was regularized prospectively.

20. Section 21 of the Administrative Tribunals Act, 1985 is very clear and is worded in negative terms. If an application is not received within the prescribed time limit, the same cannot be admitted by the Tribunal unless the delay is explained as owing to sufficient cause, to the satisfaction of the Tribunal. No such sufficient explanation for such unusual delay seems to be forth-coming in the instant case. In case of Union of India and Ors. vs. M.K. Sarkar (2010) 2 SCC 59, the Apex Court has held that even an order passed by the executive in compliance of a judgment by the court/tribunal does not extend the period of limitation or erase delay and laches which should be considered only with reference to original cause of action. In case of Rattam Chandra Samantha vs. Union of India (1994 SCC L & S 184), the Hon'ble Supreme Court has held that delay deprives the person of remedy available in law and a person who has lost his remedy by lapse of time loses his right itself. The M.A. allowed is only for 467 days delay whereas in view of the position given above, the delay is of over 20 years-even after ignoring the period of delay already condoned.

21. As regards the merits of the case, we note that the main reason for the applicant coming to Court is to get the benefit of ACP and MACP. In this connection, it is important to note that both ACP and MACP Schemes are clear and provide grant of benefit based on the length of regular service only. Para 3.1 of the ACP Scheme of DOPT dated 9.8.1999 (Annexure A-5) clearly provides that the benefit will be granted on completion of 12 years and 24 years (subject to condition no. 4 in Annexure -I) of regular service. This para goes on to further provide specifically that 'adhoc and contract employees shall not qualify for benefit under the aforesaid Scheme'. Para 3.2 further clarifies that 'regular service' for the purpose of ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in terms of relevant Recruitment/ Service Rules. Annexure-I laying down conditions for grant of benefits under ACP Scheme specifically mandates fulfillment of normal promotion norms (benchmark, departmental examination, seniority-cum-fitness in case of Group-D employees etc.) for grant of financial upgradations. Similarly, para 3 of MACP Scheme of DOPT dated 19.5.2009 (Annexure 8) clearly states that ' casual employee, including those granted 'temporary status' and employees appointed in the Government only on adhoc or contract basis shall not qualify for benefits under the aforesaid Schemes.' Also, condition 9 in Annexure -I of MACP Scheme specifies ' regular service for the purpose of MACP shall commence from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/re-employment basis'. From the above clear cut provisions (there are many others but are not being quoted for the sake of brevity) it is clear that both ACP/MACP Schemes envisaged and clearly provided for grant of benefit only with reference to regular service and not adhoc service. In fact, this is undisputed and even the applicant himself is not disputing it. Rather, he is making a request for his regularization itself to be pre-dated to allow the period of adhoc service to be counted for ACP/MACP Schemes. In

support of this, he has quoted the case of Assistant Compilers and Peons and not relied on the Scheme. As the provisions of the Scheme are very clear, we have no doubt that as per these provisions, adhoc service cannot be counted for the purpose of financial upgradations under the ACP/MACP Schemes.

22. As regards the Assistant Compilers and Peons case being quoted by the applicant, we are of the view that the respondents have explained the position very well in their written statement. It is undisputed that they are separate cadres with different pay scales, qualifications and nature of duties. Regularization in other cadres cannot be made as a ground for pre-dating of date of regularization of the applicant by 11 years at this point of time i.e. after 26 years of his regularization, as regularization on any post depends on availability of post and particular circumstances of the case. If such pre-dating is allowed, number of other similar cases will arise and there will be no end of such type of claims. In fact, the department has not created any discrimination; as discrimination can be caused only if same class of employees are treated differently. However, Draftsman are not in the same class as Assistant Compilers/Peons case. Even in case of Assistant Compilers and Peons, only regular service has been counted and not their adhoc service - just as in the case of Draftsman. Hence, on this account, no discrimination can be said to have been made.

23. As regards the judgments relied upon by the applicant, there is a judgment by our jurisdictional High Court quoted by the respondents clearly denying the claim for counting of adhoc service for grant of benefits under ACP/MACP Schemes.

24. Further, we observe that the Hon'ble Supreme Court in *Basawaraj and Another vs. Special Land Acquisition Officer* reported in (2013) 14 SCC 81 has held that any relief granted by an inadvertence or mistake cannot create a legal right to get the same relief. It is also a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decision made in other cases. If a wrong is committed in an earlier case, it cannot be perpetuated.

25. Besides we note that in fact, it was consequent to the office of Registrar General taking up the matter with DOPT that the services of the applicant were got regularized in 1992. His representation of 1987- that is after services of the two other employees namely Ms. Anju Sem and Ms. Neelam quoted in the O.A., were regularized - does not mention this fact or raise this issue. Hence, he cannot now claim discrimination or anomaly. In fact, we find that both of them were appointed as Draftsman on adhoc basis in 1980 itself - that is earlier to the applicant, and as such were senior to him.

26. We also note that our own jurisdictional High Court has rendered judgment in RSA No. 1537 of 2011 dated 1.3.2013 wherein it has been categorically held that adhoc service of an employee would not be counted for ACP Scheme, promotion and seniority.

27. In view of above, we are of the clear view that the answer to the first poser in para 15 is in negative. In other words - both in terms of provisions of the Scheme as well as in terms of law settled by the courts including the Apex Court - adhoc service cannot be counted for ACP/MACP Schemes.

28. As regards the retrospective regularization of the applicant's service based on the case of Assistant Compilers and Peons , the respondents have clearly pointed out that these are different cadres and are not comparable. Regularization of service depends on specific structure of the cadre , men-in-position and vacancies. Regularization can be done only based on vacancies and not irrespective of that. In case of Draftsman, the department has specifically stated that core posts were not available. In absence of core posts, we do not see how any regularization can be made. Even otherwise, regularization should normally be prospective and not retrospective. We, therefore, see no justification in this prayer of the applicant - that too after 26 years of his regularization and 37 years after his initial appointment on adhoc basis.

29. Hence our answer to second poser is also in the negative. In other words, there is no justification for regularizing the adhoc service of the applicant from 1981 i.e. the date of his initial appointment, at this point of time.

30. We also take note of our own order in O.A. No. 060/00585/2017 - Siloni Dhawan & Ors. vs. Union of India & Ors. decided on 1.10.2018 where similar prayer in respect of Data Entry Operators has been declined.

31. In view of all above, the O.A. is dismissed. No costs.