

(2009) 05 SC CK 0114

In the Supreme Court Of India

Case No : Civil Appeal No. 3311 of 2009 (Arising out of SLP (C) No. 12451 of 2006)

Chief Engineer/Operation Dakshini Haryana Bijli Vitran Nigam
Ltd. and Another

APPELLANT

Vs

Mauj Khan and Others

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Constitution of India, 1950 — Article 136

Citation : AIR 2009 SC 2564 : (2009) AIRSCW 4474 : (2009) 122 FLR 456 : (2009) 7 SCALE 470 : (2009) 7 SCC 355 : (2009) 2 SCC(L&S) 339 : (2009) 8 SCR 321 : (2009) 1 SLR 471

Hon'ble Judges : S. B. Sinha, J;Cyriac Joseph, J

Bench : Division Bench

Advocate : Arvind Nayar, Vikar Kumar and T.V. George, for the Appellant; B.K. Satija, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—Leave granted.

2. Interpretation of a rule governing the conditions of service of the employees of the appellant-Corporation, is the question involved in this appeal which arises out of a judgment and order dated 28th October 2005 passed by a learned Single Judge of the High Court of Punjab & Haryana at Chandigarh.

The basic fact involved in the matter is not in dispute.

3. Respondent No. 1 was appointed directly in the cadre of Upper Division Clerk (U.D.C.) on 06th May 1975. The terms and conditions of the said offer of appointment in the scale of Rs. 150-8-166/10-216/230-10-300 were:

3. It should be noted that the first two years of your service in the Board will be treated as probationary period for the purpose of D.A. Examination which you will be required to pass within two years of your joining this Department.

4. You will be considered for confirmation against permanent vacant post after you have completed two years probationary period and passed the Departmental Accounts Examination.

5. The failure to clear the examination within five successive chances held immediately after six months of your joining the service of the Board, may involve the loss of your appointment.

4. Indisputably, the respondent never appeared in the Departmental Examination. The rules prescribed for appearance at the Departmental Examinations are contained in the Manual of Orders of the Haryana State Electricity Board, of which the appellant-Corporation was a constituent before its bifurcation. Clause 13 thereof reads as under:

13. Confirmation, grant of Annual Increment, Retention in Service, Promotion etc.:

(i) Promotion. A junior clerk, a Meter Clerk or a Cashier in the Scale of Rs. 50-3-8-/4-100 (or such other scale for such posts as may be hereafter introduced or substituted for the scale of Rs. 50-3- 80/4-100) shall not be appointed to a post carrying a scale higher than that of the junior Clerk, Meter Clerk or Cashier, until and unless he has passed the examination in papers I to IV. The maximum number of chances allowed to take the examination in one's service is fixed as five.

Note: Those Junior Clerks, Meter Clerks or Cashiers who have already passed in papers III and IV of the examination according to the old rules will have to appear in papers I and II of these Rules only in order to qualify themselves for the promotion to the grade of a Senior Clerk.

(ii) Confirmation: A Senior clerk if he has been directly recruited as such, will not be appointed in a substantive capacity in his post unless he has passed the examination in papers I to IV. If he fails to pass the examination in papers I to IV within three years of his appointment in the Branch, his increments falling due after the first two increments from his first appointment, will be withheld until he passes the examination and will not be granted with retrospective effect on his passing the examination. On passing the examination he will with effect from the date following that on which the examination ended, be entitled to the date of pay which would have been admissible to him had his increment not been withheld for his failure to pass the examination.

The failure of the senior clerk to pass the examination in five successive examinations held immediately after the expiry of six months from the date of his first appointment may involve the loss of his appointment

5. Indisputably, inter alia, on the premise that he had not passed the Departmental Examination and thus was not entitled to obtain the benefit of the increment, the same was not granted. Indisputably again, the services of the respondent No. 1 were not confirmed.

6. The Haryana State Electricity Board issued a circular letter pursuant where to all the employees were to be granted the benefit of additional increment on completion of 8/18 years of regular satisfactory service and higher standard pay scale on completion of 10/20 years or more regular satisfactory service and promotion to the next higher post.

7. As all these benefits were denied to the respondent No. 1, he filed a suit before the Civil Judge, Gurgaon which was marked as Civil Suit No. 464 of 1999 for declaration with consequential relief of mandatory injunction. The learned trial Judge, while declining the relief of grant of increments in the scale of pay, opined that failure to appear in the Departmental Accounts Examination would not stand in the way of the plaintiff from obtaining the benefit of additional increment and/or higher scale of pay stating:

16. The only stand taken by defendants in declining the above said benefits to plaintiff is that he has not passed the Departmental Accounts Examination. In my considered opinion, said ground taken by defendants is that without any basis in as much as grant of additional increments on completion of 8/18 years of service and grant of higher standard pay scale on completion of 10/20 years or more of regular service is not subject to the passing of Departmental Accounts Examination. Ld. Law Officer appearing for defendants could not quote any provision of law which require UDCs to clear said examination for the purpose of grant of above said benefits. Even in the rules of 1952 of anywhere also, there is no provision regarding requirement of passing of Departmental Examination for availing the above said benefits. With regard to grant of additional increments and higher standard pay scale, the relevant documents which have been placed on file are Ex.PW1/8, Ex.PW1/11 and Ex.PW1/12. Perusal of said documents shows that an employee is entitled to additional increments and higher standard pay scale on completion of regular satisfactory service as defined in the policy of the Government.

In this situation, it was argued by Ld. Law Officer that since plaintiff did not clear the Departmental Accounts Examination, therefore, as per the terms and conditions of offer of appointment, he shall be deemed to be on probation till the time he clears the Departmental Examination and as such, he cannot be said to be confirmed as UDC. Thus, above service benefits as claimed shall not be admissible in favour of plaintiff.

There is no merit in this contention in as much as the service of plaintiff were not dispensed with by defendants on the ground of his non- passing the Departmental Accounts Examination. He has been continuing in the services of department for the last more than 29 years and as such, notwithstanding the non-passing of Departmental Accounts Examination, he shall be deemed to have been confirmed in the post of UDC. Thus, plaintiff is entitled to be considered for the benefit of additional increments, higher standard pay scale and promotion.

17. On the same reasons, plaintiff is also entitled to be considered for promotion

to the next higher post as there is no embargo against promotion of plaintiff for not passing the Departmental Accounts Examination. An employee is to be promoted to next higher post taking into consideration the length of service, his performance and act and conduct in the post he is working just prior to promotion.

8. On the aforementioned finding, it was directed:

18. In the facts and circumstances of present case, no direction can be issued to defendants for giving the above said benefits to plaintiff straight away. Rather in my opinion, plaintiff is entitled to be considered for the said benefits because before conferment of above benefits in favour of plaintiff, defendants would be required to see as to whether plaintiff has regular satisfactory service to his credit as per the policy of State Govt. and whether he is fit for promotion. However, it is made clear here that while considering the entitlement of plaintiff to above said benefits, defendants shall not take non- passing of Departmental Accounts Examination as a ground to reject the claim of plaintiff for above said benefits.

9. Both the parties preferred appeals thereagainst. By a judgment and order dated 30th October 2004, the learned Additional District Judge, Gurgaon, dismissed both the appeals. A second appeal preferred thereagainst by the appellants has been dismissed by the High Court by reason of the impugned judgment.

10. Mr. Arvind Nayar, learned Counsel appearing on behalf of the appellants would submit:

(i) Having regard to the stipulations contained in the offer of appointment, respondent No. 1 was not entitled either to increment or to confirmation in service or promotion to the next higher post; and

(ii) Thus, period of probation would be deemed to have been extended as respondent No. 1 was not entitled to any increment in the scale of pay and thus having not put in a regular service was also not entitled to the benefit of additional increment on completion of 8/18 years of regular satisfactory service or higher standard pay scale on completion of 10/20 years of regular satisfactory service and promotion to next higher post.

11. Mr. B.K. Satija, learned Counsel appearing on behalf of the respondent No. 1, on the other hand, would urge that failure of the senior clerk to pass the examination would not debar him from obtaining the benefit of the policy decision adopted by the Haryana State Electricity Board in regard to obtaining additional increment and/or higher scale of pay on completion of 8/18 years of regular satisfactory service and/or higher standard pay scale on completion of 10/20 years or more of regular satisfactory service.

12. Our attention has also been drawn to a clarification issued by the State Government in respect of the following question:

21. Employees who were not being 21. Yes, the benefit of promoted to the next higher posts due higher standard pay to not qualifying prescribed test or non scales is to be possession of essential qualifications given in such like cases. for promotion to the next post, whether benefit of Higher standard pay scale is to be given to such employee or not?

The said clarification has been accepted by the Haryana State Electricity Board by issuance of Circular No. 117 dated 26th February 1996.

It was urged that the learned trial Judge as also the appellate court having directed consideration of the grant of benefit of the said circulars only, this Court, keeping in view the fact that the respondent No. 1 had been in service of the appellant-Corporation for a period of more than 33 years, should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

13. Respondent No. 1 was appointed directly to the post of officiating Upper Division Clerk on a salary of Rs. 150/- per month in the scale of pay of Rs. 150-8-166/10-216/230-10-300. Indisputably, he was put on probation for a period of two years. The said probationary period was fixed for the purpose of passing the Departmental Accounts Examination.

14. The service of the employee was to be considered for confirmation only upon completion of the said two years' probationary period as also passing of the Departmental Accounts Examination. For the said purpose, only five successive chances were required to be given to him to appear in the examination which were to be held after six months of his joining of service. It has not been denied or disputed that the matter relating to passing of the examination as also the other conditions of service is governed by the service rules. Rule 13 provides for confirmation, grant of annual increment, retention in service, promotion etc. For the purpose of obtaining any benefit in terms thereof, passing of the examination in papers I to IV is imperative. Even those who had earlier appeared and passed papers III and IV of the examination in terms of the old rules, were required to appear in papers I and II in terms of the said rules in order to qualify themselves for promotion to the grade of a senior clerk. The rules further, in no uncertain terms, state that appointment in a substantive capacity in the post held by the employee was subject to his passing of the said examination. It was furthermore stipulated that in the event he failed to pass the said examination within a period of three years of his appointment in the Branch, his increments falling due after the first two increments from his first appointment, shall be withheld until he passed the examination. Even after passing the examination, increment was to be granted prospectively and not retrospectively.

It, as noticed hereinbefore, further stipulated that failure to pass the examination would entail loss of his appointment.

15. Indisputably, the matters relating to recruitment to a post, the period of probation, confirmation subject to passing of the Departmental Examination are governed by the statutory rules. Only on successful completion of the

probationary period and passing of the examination, the services of an employee could be confirmed. Unless, services of an employee are confirmed, he could not be treated to be in the regular service of this Board.

16. The learned trial Judge as also the appellate Court, in our opinion, thus, have rightly held that as the respondent No. 1 did not pass the Departmental Accounts Examination, he was not entitled to be confirmed in service. The learned Judges, however, in our opinion, committed a serious error in opining that the circular letter relating to grant of additional increment and/or higher standard pay scale would be applicable in the case of the respondent No. 1.

17. Although, neither the circular letter, in terms whereof the said benefits were to be granted, was brought to our notice nor the connected rule was placed before us, but, on a plain reading of the judgment of the learned trial Judge as also the first Appellate Court, it is evident that the aforementioned benefits could be conferred on the respondent No. 1 only if he had completed the period stipulated therein in regular service. Unless, the services of an employee are confirmed so as to bring him on the cadre of regular employees, the question of completion of 8/18 years, 10/20 years of regular satisfactory service would not arise. In that view of the matter, it was wholly unnecessary for the appellants to mention about the passing of the Departmental Examination by the concerned employee for the purpose of availing the said benefit. The purported clarification issued by the State of Haryana to which our attention has been drawn, in our opinion, is also not relevant. The clarification furnished by the State Government was in relation to those employees who were not being promoted to the next higher post. The same must have reference to those junior clerks whose services were confirmed but who had not been promoted to the post of U.D.C. or higher posts. Once services are confirmed, an employee would be borne on the regular cadre. He thus being in the regular service, satisfactory completion of the stipulated period therein would entitle him to the benefits thereof.

18. We, therefore, are of the opinion that the impugned judgment cannot be sustained.

The question, however, remains that the appellants deliberately or otherwise despite a clear provision contained in the rules did not terminate the services of the respondent No. 1. He was allowed to continue in service. It is neither denied nor disputed that despite the fact that he did not pass the Departmental Accounts Examination, he was otherwise a competent officer. In fact, he has been permitted to officiate on a higher post. In a situation of this nature, in our opinion, the appellants had a duty to give him a warning. His case should have been treated in terms of the rules. Failure on the part of the State to do so, in our opinion, has seriously prejudiced him. Had such warning being given, he could have appeared in the examination.

It is the case of the appellants that the respondent No. 1 did not appear at the examination at all. It has been held that the respondent is not entitled to the

benefit claimed. He was bound to pass the test within the prescribed period. On failure to pass the test, his services were liable to be terminated. Under the Rules, he was not entitled to any warning regarding the failure to pass the test.

However, he was allowed to continue in service and received the salary. What is denied is only the benefit of additional increment which can be granted on fulfilling certain conditions. In such circumstances, there may not be justification for payment of compensation. Instead, the appellants should be directed not to deny pensionary benefits to the respondent on the ground that his services were not regularized/confirmed. Such direction is necessary only if there is a move to deny pensionary benefits.

19. The appeal is allowed subject to the aforementioned order. However, in the facts and circumstances of the case, there shall be no order as to costs.