

(2009) 03 DEL CK 0142

In the Delhi High Court

Case No : Writ Petition (C) No. 2847 of 1998

Dr. Ashok Kumar Taneja and Others

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Employees State Insurance Act, 1948 — Section 17(3)

Citation : (2009) 03 DEL CK 0142

Hon'ble Judges : Suresh Kait, J;A.K. Sikri, J

Bench : Division Bench

Advocate : P.P. Khurana and Amit Anand, for the Appellant; Rekha Palli and Poonam Singh, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Petitioners in all these writ petitions who are medical doctors by profession, were initially engaged by the respondent i.e. Employees State Insurance Corporation (ESIC) as IMO, Grade-II initially for a period of six months on contractual basis in July, 1987. After the contractual period/extended period was over, their services were dispensed with. Advertisement was issued by ESIC in the year 1991 for appointments of IMO, Grade-II on regular basis. The petitioners applied against those posts and were selected. They were, thus, offered the posts as fresh entrants. After some time, the petitioners laid their claim for grant of seniority from the date of ad-hoc appointment. They also wanted benefits by way of annual increments, arrears of salary, time-bound promotion in the pay scale of Rs. 3000-5000 after four years of service and other fringe benefits, which are available to regularly appointed doctors, even for the period they served on ad-hoc/contractual basis. Since this request was not acceded to by the department, these petitioners approached the Tribunal and filed OA No. 2343/1993. During the pendency of this OA, on 14.5.1996 they withdrew their prayer for grant of seniority from the date of ad-hoc appointment. On other reliefs sought by the petitioners, matter was argued before the Tribunal

and by reason of judgment dated 4.11.1997, the Tribunal has been pleased to dismiss the said OA. This OA was filed by 24 persons. One of them, namely, Dr. Ashok Kumar Taneja has filed Writ Petition (Civil) No. 2847/1998 impugning the judgment of the Tribunal. Eight other persons have filed second writ petition. Thus, in both the writ petitions, petitioners are questioning the validity of same judgment.

2. Ms. Khurana, learned senior counsel appearing for the petitioners submitted that though these petitioners were appointed on ad-hoc and contractual basis, the appointments were made after following the regular procedure as per Recruitment Rules and therefore, the benefit of increments and counting of the service for the purpose of pension could not be denied to them. We may note that these are the only two reliefs which were pressed at the time of arguments. For this purpose, learned senior counsel also referred to the orders dated 14.5.1996 passed in the OA as per which the counsel for the respondent had made a statement that the respondent would have no objection to grant the petitioners retiral benefits from the date of their ad-hoc appointment. Operative portion of this order reads as under

After hearing O.A. No. 2343/93 for some time Shri Ashok Aggarwal prayed for permission to amend the relief clause in the O.A., in the light of submissions made during hearing that applicants would not press for grant of seniority from the date of ad hoc promotion of the applicants. Shri Nayyar stated that respondents would have no objection to the prayer of the applicant to amend the OA, in the light of the submissions made by Shri Aggarwal above, and further stated that the respondents would also have no objection to grant applicants retiral benefits from the date of their ad hoc appointment. Shri Aggarwal is granted 4 wks. time to file MA to amend the OA-2343/93, which should be listed on 31.7.96.

3. He also referred to the office order No. 446/1995 (M) dated 15.6.1995 as per which certain other similarly situated doctors had been extended the benefit of regular pay scale and the increments in the said pay scale from the date of their ad-hoc appointment plus other service benefits of leave, maternity leave, increment on completion of one year of service. His submission was that there was no reason to meet out different treatment to the petitioners herein and inaction of the respondents in not giving the same benefits to the petitioners amounted to invidious discrimination.

4. Learned Counsel for the respondent, on the other hand, submitted that though these petitioners were initially appointed for six months only on contract basis. After the expiry of that period, their services were sought to be terminated. However, they approached the Tribunal and got ex-parte stay which was subsequently modified permitting the respondent to terminate the services of the petitioners and ultimately all those OAs filed by the petitioners were dismissed.

In these circumstances, it was not permissible for the petitioners to say such a

claim moreso when their fresh appointments on regular basis were on the basis of proper selection and therefore it is the date of such appointments which would govern all the service conditions. She also submitted that statement given by the counsel for ESIC on 14.5.1996 was without any authority and that is a reason that it was not acted upon later and matter was considered by the Tribunal on merits whereafter OA was dismissed finding no substance therein.

5. After hearing the counsel for the petitioners, we are of the opinion that petitioners are not entitled to any relief as claimed. The Tribunal has looked into the matter at great length and discussed all the intricacies of the issues involved. We recapitulate that following factual position is not in dispute:

(1) The initial appointments of the petitioners were on contract basis. These appointments were made locally on a purely temporary basis as stop gap arrangement pending the availability of regular candidates selected through UPSC.

(2) Regular selection is made through UPSC. Such appointments are made u/s 17(3) of the Employees State Insurance Act 1948. Therefore, it cannot be said that the earlier appointment on contract basis were made after following the regular procedure laid down under the rules and the provisions of ESI Act.

(3) The services of the petitioners did not continue uninterruptedly till their appointments on regular basis. On the contrary, after the contractual period was over same were dispensed with. No doubt, the petitioners worked beyond the said contractual period for some time but the same was under the orders of the Tribunal in earlier OAs. Those orders were also vacated and even the OAs filed by the petitioners were ultimately dismissed. Therefore, the regularization which the petitioners were claiming in the first round of litigation was denied to them.

Once we view present cases in the light of above admitted facts, obvious answer would be that the petitioners cannot be allowed the increments during the ad-hoc period nor can such a period be counted towards pension.

6. No doubt, counsel for the respondents had made the statement before the tribunal on 14.5.1996. However, there is no reason to disbelieve that such a statement was without any authority from the respondents more so when thereafter matters was argued on merits and decided vide impugned judgment after considering the arguments on both the sides and not on the basis of said statement. Interestingly, perusal of the judgment of the Tribunal would show that it was nowhere pleaded by the petitioners that they should be given the benefit of increment etc. on the basis of said statement. That apart, concession of the counsel on the point of law can be withdrawn and explained away.

7. In so far as reliance upon the office order dated 15.6.1995 concerned, we find that those orders were passed following the judgment of the Tribunal against which SLP was dismissed and those orders were passed under altogether different circumstances. The Tribunal has dealt with this aspect in detail and has

found that appointment of doctors in those cases were even initially made u/s 17(3) of the ESI Act which is not position in the present case.

8. It is also noted by the Tribunal that interpretation given by the Tribunal in the said case with regard to Section 17(3) of the ESI Act was not accepted by the Supreme Court and the Supreme Court expressed doubts on the correctness thereof. However, as the doctors were eventually regularized, the Supreme Court thought it appropriate not to decide the said appeals on merits. As against those judgments, Tribunal took note of subsequent decisions rendered by it wherein such benefits were refused which is clear from the following discussion contained therein:

12. After Dr. (Mrs.) Prem Lata Choudhary's case was decided there were two other decisions of this Tribunal in the cases of Shri (Dr.) Surender Singh Negi v. Employees State Insurance Corp. O. A. 581 of 1987 decided on 10.9.1992 and Dr. (Mrs.) Sunita Goel v. Union of India through the Employees State Insurance Corporation O. A. No. 1048 of 1987 decided on 11.12.1992. In the both the O.As. the Tribunal took notice of the decision in the case of Dr. (Mrs.) Prem Lata Choudhary (supra) and dismissed the claims of the applicants relying on a decision of the Hon'ble Supreme Court in the case of Director, Institute of Management Development, U.P. Vs. Smt. Pushpa Srivastava, . That was a case dealing with the appointment on ad hoc basis for a contractual period of six months. Their Lordships held that in such situation violation of Articles 14 and 16 of the Constitution of India does not take place because the appointment was for a specific contractual period. Because of this Apex Court's decision, Dr. (Mrs.) Prem Lata Chaudhari's case was not considered and, therefore, termination was not interfered with.

On the basis of aforesaid principle of law the claim of the petitioners herein was turned down by the Tribunal by following:

16. In this background of the law laid down by the Apex Court, we have to examine the claims in the amended O. A. for conferring certain other benefits. In O. A. 951 of 1997 decided on 6.5.1997, the second Dr. (Mrs.) Prem Lata Choudhary's case, a Division Bench of this Tribunal held that she is not entitled to count her ad hoc service for purposes of seniority. The same order No. 446/95 dated 15.6.1995, placed before us at the time of hearing, was referred to wherein Dr. (Mrs.) Prem Lata Choudhary was given certain other benefits. This Tribunal said as the respondents already passed this order, their action cannot be faulted with and did not find any reason to interfere with the same. With regard to the applicants in this O. A. also if the respondents on their own want to grant retiral benefits and other benefits for the adhoc service we would not interfere; but since we are asked to decide this issue of grant of these benefits we are afraid we cannot agree to these claims. The applicants want annual increments, leave benefit, time bound promotion, medical benefits, LTC, allotment of accommodation and retiral benefits. These are all the benefits that accrue only when the person is considered regularly appointed from the date of initial ad-hoc

appointment. By granting these benefits we will be ignoring the contractual nature of the job and the termination made after every 90 days or six months. These benefits accrue only to a person who is a regular member of the service. The difference in the nature of appointment between a regular appointee and ad hoc appointee will be evident from a comparison of the terms of appointment in both the situations. As mentioned above in a contract appointment the appointee was denied private practice, travelling allowance for joining the post, medical care, LTC, leave etc. but in the case of a regular employee all these restrictive conditions and clauses do not exist. Para 4 (c) of the counter affidavit clearly states that the applicants were dismissed and were re-appointed after some time. These were not specifically denied in the rejoinder. As the applicants were dismissed and as they have not impugned those dismissal orders, the applicants cannot compare themselves with the appointees regularised during 1984, We are of the considered view that granting leave, promotion benefits and other benefits prayed for would be inconsistent with the view taken that a contractual service cannot count for total length of service; and that appointees of such service are not members of the service and they cannot be given seniority over the regularly selected persons. Therefore, we are not in a position to agree with the submissions for grant of these benefits. The moment the applicants accepted their contractual nature of appointment, all the conditions in the contract are applied to them. We, therefore, hold that there is no merit in the relief claimed even in the amended O. A.

9. We are in agreement of the aforesaid view and accordingly dismiss these writ petitions. There shall, however, be no orders as to cost.