

(2014) 08 DEL CK 0035
In the Delhi High Court
Case No : W.P.(C) 7107/2013

Shiv Kumar Kaushik

APPELLANT

Vs

Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 11-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 08 DEL CK 0035

Hon'ble Judges : Vipin Sanghi, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : M.K. Bhardwaj, Advocate for the Appellant; Zubeda Begum, Standing Counsel and Sana Ansari, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

S. Ravindra Bhat, J.—The writ petitioner challenges an order passed by the Central Administrative Tribunal ("CAT"), dated 14.02.2013 in O.A. No.3983/2011. The CAT had found that, contrary to the petitioner's arguments, his year of employment, for the purposes of financial upgradation under the Assured Career Progression Scheme (ACP) was 1988, and that the rejection of his representations for upgradation were justified, since he had not yet completed the requisite number of years (twenty-four) in service.

2. In 1982-83, the Delhi Administration notified 654 vacancies for Trained Graduate Teachers ("TGTs"), and asked the Employment Exchange to prepare a list of suitable candidates. A list of around 4000 names was prepared by June 1984, which was whittled down by a Staff Selection Board, working under the Director of Education, to 1492 names ("the Panel"). The Delhi Administration made two batches of appointments. First, it appointed 527 TGTs, and then 127 more. Subsequently, it issued an advertisement inviting fresh applications.

3. At this point, the candidates on the Panel of 1492, who had not been selected among the 654 appointees, approached this Court, under Article 226, arguing

that no fresh appointment could be made until the panel was exhausted. The matter was transferred to the CAT, which ruled in favour of the candidates. The CAT's order held that:

"all the candidates included in the panels of selected candidates prepared till June 1984... for the posts of Trained Graduate Teachers, shall be appointed against the existing or future vacancies and that the persons in the said panels shall have precedence in appointment over persons included in any subsequent panel and not so far appointed and further that no fresh panel for the appointment on the posts of Trained Graduate Teachers in the categories covered by the said panels, shall be prepared until the said panels are exhausted and offers for appointment have been made to all persons included in the said panel."

4. The CAT's order was challenged before the Supreme Court. The Court upheld the CAT, noting that:

"in the present case, it cannot be said that the anticipated vacancies arising up to the preparation of panels were not taken into consideration by the Selection Board while preparing the panels for recruitment. The Tribunal after examining the entire matter has concluded that the selection board headed by the Director of Education or the Additional Director on a few occasions was aware of the number of vacancies then available for finalization of the panels of selected candidates... therefore, in the premises we have to conclude that the selection Board prepared the panel containing 1492 candidates as against the then available vacancies. In view of this conclusion, it goes without saying that the selected candidates have a right to get appointment. We therefore see no reason to disturb the judgment of the Tribunal."

5. Pursuant to the Order of the Supreme Court, the Petitioner was appointed to the post of TGT in 1988. He was granted seniority as well as pay fixation w.e.f. 2.5.1984, along with the others on the panel.

6. In 1996, the Petitioner would have completed twelve years of service, if his date of employment were reckoned to be 1984. Consequently, he would have become eligible for payment on the Senior Scale and revised scale. However, an Order passed in 1997 omitted the Petitioner's name from the beneficiaries of the Senior Scale. The Petitioner filed an O.A., which was disposed off with directions to the Respondents to grant payment on the basis of the revised scale, taking into account the notional increments from 1984. On the Respondents' failure to do so, the Petitioner served a contempt notice upon them. Consequently, the Respondents issued an order on 12.9.2005, releasing the arrears.

7. Subsequently, the Respondents considered the Petitioner's representations for upgradation of pay under the ACP scheme. Taking his joining date as 1988, he was granted the 1st upgradation (on twelve years of service) by an order dated 14.02.2006.

8. While the Petitioner was engaged in attempting to obtain the arrears of

payments, the calendar year 2008 passed by. In the event that the Petitioner's date of appointment was 1984, he would have been entitled to a second upgradation, on having completed twenty- four years of service. The petitioner made multiple representations claiming the second upgradation, but it was not granted to him. By an order dated 22.09.2011, the petitioner's claim for a second upgradation was formally rejected.

9. On 24.11.2011, the Petitioner filed an application before the CAT, challenging the Respondents' 22.09.2011 order denying him the second upgradation.

10. Before the Tribunal, the Respondents argued that although the Petitioner belonged to the Panel of 1984, he only joined as a TGT in 1988 (pursuant to the aforementioned Supreme Court order). Therefore, he completed twelve years of service in 2000, and not as he alleged in 1996.

11. Agreeing with this contention, the Tribunal held that "for the purposes of ACP, service was to be counted from 1988 when the applicant physically joined and not from 1984, the year from which he was given seniority." The petitioner is aggrieved by this finding.

12. Learned counsel for the petitioner relied upon a judgment reported as Director of Education v. Krishna Kumari 2009 Law Suit(Del) 384 (W.P.(C) 13987/2009). It was submitted that in that case, similar TGTs who had been appointed with effect from 1984, even though they joined later, were directed to be treated as having been in service. Pointedly, the following observations were relied upon:

"4. Once the respondent had been granted notional seniority from 1984, i.e. she is being treated as being in service from 1984 onwards, the said fiction has to be given its full effect, including for purposes of pay fixation. Therefore, the pay of the respondent ought to have been fixed as if she had joined in the year 1984 and on the basis that she had earned the increments, and benefited from wage revision, which may have taken place in the meantime. She would also be entitled to benefits under the Assured Progression Scheme."

13. It was urged that this decision was based on the judgment of the Supreme Court in Union of India (UOI) and Others Vs. Ishwar Singh Khatri and Others, . It was submitted that pursuant to the above judgment in Krishna Kumari (supra), the Respondents even implemented the order on 01.07.2013. Learned counsel also submitted that the concept of regular service, contrary to the CAT's findings, can include notional service or else service benefits would be denied for no fault of the officer or the employee. In this regard, reliance is placed on the decision reported as Union of India and Others Vs. K.B. Rajoria, .

14. The Respondents state that the claim for grant of Sr. Scale w.e.f. 1996 does not arise at all because the applicant has joined physically w.e.f. 1988. It is urged, besides that the Petitioner did not work from 1984 and the Supreme Court's order to treat the appointment from the earlier point in time was a

notional benefit.

15. The arguments of the Respondents, and the conclusion of the Tribunal, cannot be sustained. In *Union of India v. K.B. Rajoria* (supra), the Supreme Court drew a distinction between "regular service" and "actual service". In that case, an employee who had been given notional promotion through an order dated 1998, w.e.f. from 22nd February 1995, was held to have met the requirements for appointment to a post that fell vacant on 1st July 1997, and stipulated "two years of regular service". The High Court held that "the words regular service in the Rules means actual service and that the fiction of notional promotion could not amount to the two years experience necessary under the Rules." Reversing, the Supreme Court held that for the purposes of seniority "by giving him notional promotion as Additional Director General with effect from 22.2.95, Krishnamoorti was in fact regularly appointed to the post on that date."

16. Therefore, following the law laid down in *K.B. Rajoria* (supra), the term "regular service" (which is at issue here) must include notional promotion/employment, and be taken to commence from the date of such notional employment (and not from the date of physical employment).

17. The Respondents also argued that the Petitioner's claim is barred by limitation under the Administrative Tribunals Act, which sets an outer period of one year to bring a grievance to Court. In support of this proposition, they rely upon the cases of *State of Punjab and Others Vs. Gurdev Singh*, and *Ratan Chandra Sammanta and others Vs. Union of India and others*, .

18. In *M.R. Gupta Vs. Union of India and others*, , the Supreme Court held that the payment of a wrong salary amounts to a recurring cause of action, to which limitation does not apply. The Court noted that:

"The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other

consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action.

The Tribunal misdirected itself when it treated the appellant's claim as "one time action" meaning thereby that it was not a continuing wrong based on a recurring cause of action. The claim to be paid the correct salary computed on the basis of proper pay fixation, is a right which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a Government servant to be paid the correct salary throughout his tenure according to computation made in accordance with rules, is akin to the right of redemption which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished. It is settled that the right of redemption is of this kind."

19. Thus, the ratio of M.R. Gupta (supra) is that erroneous pay creates a recurring cause of action every time the payment is made, on a periodic basis, to an aggrieved party. It is clear that the law laid down in M.R. Gupta (supra) applies squarely to the facts of the case. In so far as the Petitioner is correct in arguing that for the purposes of the ACP scheme, he ought to have received upgraded pay from 2008 (when he completed twenty-four years of service, counting from 1984). Therefore, the cause of action arose and has remained alive since 2008, which is the time from when the erroneous payments would have begun. Furthermore, he approached CAT once his representations were rejected. Therefore, the Respondents' arguments on limitation cannot be sustained.

20. Therefore, neither of the two grounds urged by the Respondents is correct in law. The order of the CAT is incorrect, and ought to be set aside.

21. For the above reasons, this Court is of the opinion that the impugned order has to be and is accordingly set aside. Accordingly, it is directed that the Respondents shall treat the petitioner's entry to the grade of TGT with effect from the relevant date in 1984 instead of 1986 and grant him the benefit of second upgradation after completion ears service, i.e. in 2008. It is clarified that no direction is given with respect to the grant of first ACP benefit and that arrears, if any, would be granted to the petitioner on the basis of his second upgradation as contained in the present order. No arrears to be granted for the period before 2008. The Respondents shall notionally fix the first ACP benefits that would have been admissible to the petitioner on the basis of his having joined the services in 1984. The above exercise shall be completed within a period of two months.

22. The petition is partly allowed in the above terms.