
(2013) 07 BOM CK 0004
In the Bombay High Court
Case No : Writ Petition (L) No. 1202 of 2012

Union of India and Another	Vs	APPELLANT
Karan Anant Purao		RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Citation : (2013) 6 ABR 465 : (2014) 2 ALLMR 798 : (2013) LabIC 4539

Hon'ble Judges : S.J. Vazifdar, J; M.S. Sonak, J

Bench : Division Bench

Advocate : Vinod Joshi, for the Appellant; Anjali Purav instructed by Anjali Purav and Co., S.R. Ate instructed by Anand D. Dugale, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sonak, J.

1 By an order dated 25.03.2013, the parties were put to notice that the entire group of matters will be taken up for final disposal at the stage of admission itself. Accordingly, Rule. With the consent of the parties, the Rule is made returnable forthwith.

As these batch of matters involve common question of law as well as fact, they are taken up together for disposal. The petitioners have challenged the orders of the Central Administrative Tribunal partly allowing the respondents' O.A. by granting the respondents benefit of services rendered by them on casual basis prior to the order of regularization for the purpose of financial up-gradation under a Assured Career Progress Scheme. All other employees in the same batch and identically situated have already been extended this benefit in proceedings pursuant to orders passed in Kerala and Maharashtra.

2. The material facts in all these petitions are that the respondent employees came to be appointed to various Group "C" posts at the Canteen Stores Department, Union of India, on daily rate basis between the years 1977 and 1986. The names of such respondent-employees were sponsored by the

employment exchange. In all, about 410 daily rated Lower Division Clerks (Group "C" employees) came to be appointed during the period 1977 to 1986.

3. (A) The Canteen Stores Department put forth a proposal to the Ministry of Defence (Union of India) for regularisation of services of such employees and in this regard there was protracted correspondence between the Ministry of Defence, Department of Personnel and Training and the Ministry of labour.

(B) In pursuance thereof, a decision was taken to regularise the services of such employees subject to certain conditions set out in the communication dated 20.06.1988 addressed by the Board of Control Canteen Services to the Canteen Stores Department. The conditions are as under:--

(a) Written departmental examination cum typewriting test may be conducted by the Ministry of Defence and regularization be made strictly on the basis of their qualifying the written examination and type-writing test.

(b) The services of those who do not qualify in the examination are liable to be terminated.

(c) This should not be quoted as a precedent for any future cases.

(d) Further vacancies should be filled up through the SCC only.

(C) This proposal was duly approved by the Department of Personnel and Training vide their UO dated 15.6.88 and by Ministry of Labour (DGET) vide UO dated 9th May, 88.

4. Upon successful fulfillment of the conditions of the aforesaid, the services of several such Group "C" employees including the respondent employees came to be regularized vide order dated 01.03.1989, which neither of the parties have placed on record. However, there is no dispute that the regularization of the Group "C" employees was after they fulfilled the conditions, including passing the written departmental examination cum typewriting test.

5. (A) A batch of 13 such regularized employees, upon being denied seniority and financial benefits from the dates of their initial engagement, approached the Central Administration Tribunal (CAT) Ernakulam Bench by preferring O.A. No. 58 of 1997. This O.A. was decided by the Ernakulam Bench of the CAT by judgment and order dated 24.09.1999. Paragraphs 7 and 11 whereof are as follows:

7. According to the respondents, the Ministry of Defence has permitted to regularize the services of all the 410 daily rated Clerks subject to the fulfillment of the conditions. There is absolutely no case for the respondents that the applicants do not satisfy the conditions. The applicants have specifically stated in the O.A. that they have come out successful in the departmental test conducted. This is not denied. The position therefore, is that the applicants fully satisfy all the conditions stated in their reply statement for regularization.

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11. Accordingly, the O. A. is allowed. A-9 is quashed. It is declared that the applicants are entitled for regularization in service from the date of their initial appointment. Respondents are directed to regularize the services of the applicants from the date of their initial appointment as daily rated Lower Division Clerks under the Department with all consequential benefits. This exercise shall be completed within three months from the date of receipt of a copy of this order. No costs.

(B) The Union of India challenged this order by filing O.P. No. 32410 of 1999 before the High Court at Kerala. By a judgment and order dated 04.08.2003 the Division Bench of the Kerala High Court dismissed O.P. After referring to the said conditions for regularizing the services of such employees the Division Bench held:--

The Departmental Test was conducted. They passed the test and service of all those candidates were regularized immediately. So, if they were regularized immediately after passing the test, it cannot be stated that their earlier service will not be counted for the purpose of pay fixation, seniority etc. Those petitioners were appointed subject to fulfillment of the conditions and all those conditions were fulfilled by them. There is no quarrel for that averment and when they have complied with all the conditions, their services were to be counted from the date of their initial appointment and it cannot be stated that the order of the Tribunal is prima facie illegal or findings are perverse so as to attract the extraordinary jurisdiction of this Court under article 227 of the Constitution of India. The writ petition is dismissed.

(C) The Supreme Court disposed of the Union of India's Civil Appeal No. 5121 of 2005 by an order dated 31.03.2010, which reads as under:--

Heard learned appearing counsel for the parties. On the facts of the case, we are not inclined to exercise our discretion under Article 136 of the Constitution of India.

The Civil Appeal is dismissed accordingly. No costs. However, we direct that the impugned judgment shall not operate as a precedent in future.

6. (A) In the month of July 2010, the respondent employees in the present petitions made representations seeking inter alia the benefit of seniority from the date of initial appointment/engagement and to count services from the dates of initial appointments/engagements for the grant of financial up-gradation and other consequential benefits under the Assured Career Progression Scheme (ACPS). The representations were turned down by the petitioners vide its order/communication dated 10.12.2010 inter alia on the ground that the Supreme Court whilst disposing of civil appeal No. 5121 of 2005 challenging the grant of benefits by the CAT (Ernakulam Bench) and the High Court at Kerala had specifically observed that:--

However, we direct that the impugned judgment shall not operate as a precedent

in future.

(B) Aggrieved, the respondent employees filed a batch of Original Applications which were disposed of by the impugned order of the Central Administrative Tribunal, Mumbai Bench dated 12.09.2011.

7. The Central Administrative Tribunal held that the respondent employees were entitled to the benefit counting their services from the date of their initial appointment/engagement for the purposes of grant of financial up-gradation under the ACPS. However, the relief regards seniority was declined on the basis that the issue of seniority of similarly placed employees was sub judice before the High Court in some other proceedings." Liberty was granted to the respondent employees to approach the appropriate forum as per law as and when eventuality arises after the disposal of the matter before the High Court. The relevant observations are as under:--

9.4 In this connection, we note that a careful reading of the whole ACP Scheme clearly points out that there is no bar for counting the benefit of service rendered by an employee before he is conferred permanent status for the purpose of grant of financial up-gradation under the ACP Scheme. In fact, the underlying philosophy in granting two financial up-gradations in question to the employees is to remove their stagnation in the same grade. There is no dispute that the service, which the applicants pray for counting for the purpose of grant of benefits under the ACP Scheme, is rendered by each of the applicants in the same grade, although on ad hoc basis before their formal regularization.

10. In the circumstances, we have no doubt that all the applicants are duly entitled to count the benefit of ad hoc/casual service in question for the purpose of ACP. It is also worthwhile to note that the said ACP Scheme of 09.08.1999 has been remodeled as "Modified Assured Career Progression Scheme" (hereinafter referred to as the "MACPS") by O.M. Dated 19.05.2009. The opening lines of this O.M. provide that the final up-gradation will be available in the next higher grade-pay whenever an employee has completed 12 years" (later on modified by the Government as 10 years while accepting the recommendations of the Sixth CPC.) continuous service in the same grade. It is, therefore, evident that what is required for grant of financial up-gradations under the ACPS or MACPS is "regular" or "continuous" service of 12/10 years, used almost interchangeable in the Scheme, which has been rendered by an employee in the same grade.

11. Turning to the pleadings once again, it is noted that the applicants were initially appointed through Employment Exchange. On facts, therefore, it is not a case of back-door entry. They were allowed to continue for considerable time as daily rated L.D.Cs. In view of their good work and conduct, the respondents conducted an examination for regularizing them and only those candidates who stood successful in the said examination/test were regularized as L.D.C. The breaks, etc., if any, were condoned by the respondents at the time of regularization of the applicants. Undoubtedly, the regularization is in continuation

of previous service rendered by the applicants on casual/daily rate basis as L.D.Cs. We, therefore, find no reason to deny the applicants the benefit of that service, at least for the purpose of grant of financial up-gradation under the ACP Scheme, which is a beneficial provision.

8. The petitioners main contention is that though the Supreme Court had not interfered with the grant of some reliefs by the CAT (Ernakulam Bench) and the Kerala High Court whilst disposing of civil appeal No. 5121 of 2005, the Supreme Court had itself made it clear that its decision was not to be treated as a precedent and inasmuch as the CAT (Mumbai Bench) has applied the decision of the Supreme Court for award of benefits to the respondent employees, there is a jurisdictional error which needs to be set right by this Court in exercise of its power under Articles 226 and 227 of the Constitution of India. The petitioners also contended that regularization having been granted with effect from 01.03.1989, there was no question of permitting the respondent employees to count their services prior to the said date for the purpose of financial up-gradation under the ACPS.

9. On behalf of the respondent employees, it was pointed out that there were several instances where similar orders came to be passed by the CAT, Mumbai Bench itself and that the same were implemented by the petitioners without any demur or challenge. Reliance was placed upon the decisions of the Supreme Court in Dwijen Chandra Sarkar and Another Vs. Union of India and Another, and Union of India (UOI) and Others Vs. M. Mathivanan, . Both the decisions deal with the Time Bound Promotional Scheme (TBPS) which is akin to the Assured Career Progression Scheme (ACPS) which is involved in the present petitions.

10. Having considered the submissions of the parties, we are of the opinion that these petitions deserve to be dismissed.

11. The CAT in granting limited relief to the respondent employees has taken cognizance of the circumstance that the Mumbai Bench as also other Benches of the CAT have granted very similar relief to employees placed in identical circumstances and that such decisions have been implemented by the petitioners without any challenge or demur. At paragraph 19, the CAT notes that the case of the respondent employees is squarely covered by the judgments and orders delivered in the aforesaid original applications and that there is no dispute that these judgments and orders have been implemented by the same department i.e. the petitioners.

12. From the record, it therefore appears that the petitioners have accepted and implemented decisions virtually identical to the impugned judgment and order, and in the present petitions, however, the petitioners seek to impugn the decision. Ordinarily, the extra ordinary, equitable and discretionary jurisdiction shall not be exercised in such a situation. In the event discretion is exercised, the same may give rise to an inequitable situation wherein some employees from the class shall continue to enjoy the benefit of counting their services from the date

of initial engagement for the purpose of grant of financial up-gradation under ACPS whilst others from out of the same class shall be left out. When facts and circumstances are virtually identical, the petitioners cannot adopt an attitude of "pick and choose". In any case, where the petitioners adopt such an attitude, there is no warrant for exercise of extra ordinary jurisdiction, equitable and discretionary jurisdiction under Articles 226 and 227 of the Constitution of India in favour of such petitioners. The view taken by the CAT promotes substantial justice between the parties. Accordingly, there is no warrant to interfere with such view in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India.

13. The Mumbai Bench and Ernakulam Bench of the CAT as also the Kerala High Court have recorded findings of fact to the effect that the regularization of services of the employees was subject to fulfillment of specified conditions and that such conditions were duly fulfilled by the employees. Further it is recorded as a consequence the services of such employees were regularized from the dates of their initial engagement. The CAT has also recorded that the respondent employees had not secured employment through the back door but were candidates sponsored from employment exchange and that the employees had worked continuously without interruption or in some cases with artificial breaks. Based upon such factual matrix, which has not even been disputed by the petitioners in the present petitions, the limited relief came to be granted to the respondent employees, so that they are brought on par with identically placed employees. Even the communication dated 20.06.1988 addressed by the Board of Control of Canteen Services to the Canteen Stores Department refers to the proposal "to regularize 410 Daily Rated LDC working with them since 1977 till 1986" and adds that such proposal has been approved by the Department of Personnel and Training vide UO No. 14034/7/87- Estt(D) dated 15.6.88 and Ministry of Labour (DGET) UO No. U-11014/12/88-EE.I dated 9th May, 88. In the light of such material available on record, it cannot be said that the findings of fact arrived at by the Tribunal are in any way perverse, thereby warranting interference under Articles 226 and 227 of the Constitution of India.

14. The Division Bench of the Kerala High Court held that where employees were regularized immediately after passing the test, it cannot be said that their earlier services will not be counted for pay fixation, seniority. It was held that once the employees complied with all conditions prescribed for the purpose of regularization, their services were to be counted from the date of their initial appointment. These were findings of fact in respect of the employees from out of the same class and in fact group of employees identically placed. In the circumstances, we do not feel compelled to take any contrary view particularly since the CAT in the present case has granted only the limited relief of counting past services for the purposes of financial up-gradation under the ACPS and further employees from the very same class and identically placed have been extended such benefit.

15. In a matter where two views are reasonably possible, it is not for the writ Court to exercise extra ordinary jurisdiction for the purposes of substituting the plausible view taken with another. Similarly, in a situation where two views are possible then the view which promotes substantial justice as between the parties and restores benefits upon a class of employees identically placed is certainly to be preferred. The circumstances that several employees from out of the class of regularized employees are already in receipt of benefit of counting their services from the date of their initial engagement for the purposes of first up-gradation under ACPS is a relevant circumstance in deciding whether we should exercise our extra ordinary jurisdiction and interfere with the judgment and order of the CAT, which has the effect of granting similar benefit to those left out from the class. In our judgment, therefore, this is not a fit case where we should interfere with the impugned judgment and order.

In the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , the Supreme Court explained the sweep of Article 226 of the Constitution of India at paragraphs 72 and 73 in the following words:--

72. Once we assume that the jurisdiction of the Arbitrator to enquire into the alleged misconduct was exercised, was there any ground under Article 226 of the Constitution to demolish that holding? Every wrong order cannot be righted merely because it is wrong. It can be quashed only if it is vitiated by the fundamental flaws of gross miscarriage of justice, absence of legal evidence, perverse misreading of facts, serious errors of law on the face of the order, jurisdictional failure and the like.

16. In the case of Roshan Deen Vs. Preeti Lal, , the Supreme Court held that the look out of the High Court should not be to merely pick out any error of law through an academic angle but to see whether injustice has resulted on account of erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law. The observations of the Supreme Court at paragraph 12 are reproduced herein below:--

12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. Vs. District Judge, Unnao and Others, . The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by product

of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

17. The circumstance that the Supreme Court while dismissing the civil appeal No. 5121 of 2005 stated that the decision should not be treated as a precedent only means that in future, matters involving similar points may not be decided relying upon the presidential value of the judgment and that there should be independent application of mind as to whether the applicants are indeed entitled to the reliefs claimed. The impugned judgment and order passed by the Mumbai Bench of the CAT indicates that the same is not the result of according any presidential value to the judgment of the Supreme Court in civil appeal No. 5121 of 2005. Rather, it is clear that there has been an independent application of mind to the facts and circumstances involved prior to the grant of limited relief in favour of the respondent employees. In fact the relief granted by the CAT (Ernakulam Bench) or the Kerala High Court was much wider, inasmuch as even the benefit of seniority from the date of initial engagement came to be granted to the employees involved in the said proceedings. The impugned judgment and order passed by the CAT, Mumbai Bench, however declines relief in such wide terms. The relief is restricted to the counting of service from the date of initial engagement for the purposes of ACPS and consequential benefits upon said basis. In the circumstances, it cannot be said that there is any jurisdictional error or perversity involved in the impugned judgment and order.

18. The Supreme Court in the case of Dwijen Chandra Sarkar and Another Vs. Union of India and Another, considered and explained the scope of Time Bound Promotional Scheme (TBPS), which is akin to ACPS, at least in so far the principle is concerned. In the said case the issue was whether the employees were entitled to TBPS by combining the service in the rehabilitation department of the Government rendered by them before being declared surplus and being administratively transferred to the Post and Telegraphs Department, notwithstanding the fact that the transfer order made it clear that the transferee employees will not be entitled "to count their past service for the purpose of seniority." In this context the Supreme Court observed as under:--

11. However, the position in regard to "time-bound" promotions is different. Where there are a large number of employees in any department and where the employees are not likely to get their promotion in the near future because of their comparatively low position in the seniority list, the Government has found it necessary that in order to remove frustration, the employees are to be given a higher grade in terms of emoluments-while retaining them in the same category. This is what is generally known as the time-bound promotion. Such a time bound promotion does not affect the normal seniority of those higher up.

12. If that be the true purpose of a time-bound promotion which is meant to relieve frustration on account of stagnation, it cannot be said that the Government wanted to deprive the appellants who were brought into the P&T Department in public interest-of the benefit of a higher grade. The frustration on

account of stagnation is a common factor not only of those already in the P&T Department but also of those who are administratively transferred by the Government from the Rehabilitation Department to the P&T Department. The Government while imposing an eligibility condition of 16 years' service in the grade for being entitled to time bound promotion, is not intending to benefit only one section of employees in the category and deny it to another section of employees in the same category. The common factor for all these employees is that they have remained in the same grade for 16 years without promotions. The said period is a term of eligibility for obtaining a financial benefit of a higher grade.

19. In the case of Union of India (UOI) and Others Vs. M. Mathivanan, the Supreme Court in the context of Time Bound Promotional Scheme (TBPS) observed as under:--

13. Reading of the above two paragraphs makes it abundantly clear that so far as placing of an officer in the "next higher grade" is concerned, what is relevant and material is that such official belonging to basic grades in Groups "C" and "D" must have completed "sixteen years of service in that grade". The said paragraph nowhere uses the connotation "regular" service. Para 2 which provides for the Departmental Promotion Committee and consideration of cases of officials for "promotion", provides for sixteen years of "regular" service. The Tribunal, therefore, rightly considered para 1 as relevant and held that basic eligibility condition for being placed in the next higher grade is that the officer must have completed sixteen years of service in the basic grade in Group "C" and Group "D". Though in other paragraphs, the service was qualified by the adjective "regular", the said qualification was not necessary for the purpose of para 1. Since the employees wanted the benefit of placement in "next higher grade", what was required to be established by him was that he had completed sixteen years of service in the grade and the said requirement had been complied with in view of the fact that with effect from 30-9-1983 he was appointed as Warrant Officer. He was, therefore, entitled to the benefit of "next higher grade" under para I from 1999. The authorities were, therefore, not justified in rejecting the claim and accordingly the petition was allowed. The High Court rightly upheld the direction of CAT.

14. to 18.....

19. Since the respondent had completed sixteen years of service in 1999, he would be entitled to the benefit of para 1 of the Time-bound Promotion Scheme and the action of the authorities in not granting the said benefit was illegal and contrary to law. The Central Administrative Tribunal as well as the High Court were, therefore, right in setting aside the said action and by directing the authorities to extend the benefit of the Scheme to the respondent. We see no infirmity in the reasoning adopted and conclusion recorded by CAT or by the High Court and find no substance in the appeal of the appellants.

20. The Supreme Court in the case of State of Maharashtra and Others Vs. Uttam Vishnu Pawar, , taking note of its previous decisions in the case of Dwijen Chandra Sarkar and Another Vs. Union of India and Another, Union of India (UOI) and Another Vs. V.N. Bhat, , A.P. State Electricity Board and Others Vs. R. Parthasarathi and Others, , Scientific Advisor to Raksha Mantri and Another Vs. V.M. Joseph, and Smt. Renu Mullick Vs. Union of India and another, , held that it has been the consistent approach of the Supreme Court and it is no more res integra that an incumbent on transfer to a new department may not get seniority but his experience of the past service rendered will be counted for the purposes of other benefits like higher pay scale as per TBPS of the Government. In this judgment, the Supreme Court has taken the view that merely because such past service is not liable to be counted for the purpose of seniority is no ground for taking into account such service for award of benefits under TBPS. In case of Dwijen Chandra Sarkar and Another Vs. Union of India and Another, , the Supreme Court explained that the true purpose of such schemes is to relieve frustration on account of stagnation and the scheme does not involve the actual grant of promotional post to the employees but merely monetary benefits in form of next higher grade subject to fulfillment of qualifications and eligibility criteria.

21. In the light of the aforesaid judgments of the Supreme Court, we are of the opinion that the view taken by the CAT, Mumbai Bench does not call for any interference, particularly since limited relief of counting the service from initial date of engagement for the purpose of financial up-gradation under ACPS has been granted to the respondent employees by taking into consideration the peculiar facts and circumstances of the case. In the result, the petitions are dismissed. Rule, in each of the petitions is discharged. There shall, however, be no order as to costs.