

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.606 OF 2014

(Subject : A.C.P.)

DISTRICT: KOLHAPUR

Dilip S. Warke,)
 Occ : Sr. Clerk, District Industries Centre,)
 Kolhapur.)
 S. No.71/2, Kirti Nagar, Galli No.1,)
 New Sangvi, Pune 411 027) **....Applicant**

Versus

- 1) Udyog Saha-Sanchalak,)
 Pune Division, Shivaji Nagar,)
 Agriculture College Compound,)
 Pune 411 005.)
- 2) The Principle Secretary,)
 Ministry of Industry, Mantralaya,)
 Mumbai 400 032)
- 3) Development Commissioner,)
 Udyog Sanchalanalaya,)
 New Administrative Building,)
 Opp. Mantralaya, Mumbai 400 032.)
- 4) General Manager,)
 Udyog Bhavan, 1st floor,)
 District Industrial Centre,)
 Assembly Road, New Collector Office,)
 Kolhapur.) **....Respondents**

Shri H.G. Adake, the learned Advocate for the Applicant.

Ms. S. Suryawanshi, the learned Presenting Officer for the Respondents.

CORAM : JUSTICE SHRI A.H. JOSHI, CHAIRMAN
SHRI RAJIV AGARWAL, VICE-CHAIRMAN

RESERVED ON : 07.06.2017.

PRONOUNCED ON : 20.07.2017.

PER : JUSTICE SHRI A.H. JOSHI, CHAIRMAN

J U D G M E N T

1. Heard Shri H.G. Adake, the learned Advocate for the Applicant and Ms. S. Suryawanshi, the learned Presenting Officer for the Respondents.
2. Heard both sides and perused the record annexed to O.A., the affidavit-in-reply and rejoinder etc.
3. The paper book is voluminous and the O.A. runs into 16 pages, however, facts of the case are extremely brief.
4. Facts of Applicant's case are summarized as follows :-

Sr. No.	Date	Particulars
1	15.11.1985	The Applicant was appointed as Technical Assistant, Grade-I in the pay scale of 290-10-390-15-465-640, in Small Scale Industries Development Institute, Pune.
2	28.09.1988	The Respondents had issued to the Applicant, a notice of one month of termination of his service. (Copy is on record at Exhibit R-2, page 86 of O.A. paper book).
3	1988	The Applicant filed Complaint ULP No.204/1988 before Labour Court, Pune and prayed for quashing of termination notice / orders issued by the Respondents. During pendency of complaint, interim relief was granted and the Applicant was continued on roll and was paid Salary.
4.	21.02.1994	The Labour Court, Pune allowed the complaint ULP No.204/88 and declared that the termination of applicant's service was by way of unfair labour practice and declared that the Applicant shall be deemed to continue in the employment.

5	06.06.1995	Incharge Deputy Director, Industries issued memo to the Applicant, (copy whereof is at Exhibit R-3, page 101 of the O.A. paper book) informing that the post of Technical Assistant (Grade-I), held by the Applicant had ceased to exist and it would be possible to absorb the Applicant as Clerk by protecting his pay, and if he is willing, he should furnish his willingness for absorption within seven days.
6	13.06.1995	Applicant furnished his willingness for absorption as Clerk (copy whereof is at Exhibit R-4, page 102 of the O.A. paper book).
7	08.08.1996	By office order dated 08.08.1996 (copy whereof is at Annexure A-6, page 53 of the O.A. paper book), Applicant was absorbed as Junior Clerk in the Pay scale of 950-1500, by giving retrospective effect thereto from 08.03.1996.
8	04.11.1996	Applicant's pay was protected and his pay was fixed in the pay scale 950-1500, at Basic pay of Rs.1500/-.
9	20.05.1999	The Applicant filed application with the Respondents and prayed that the benefits under Assured Career Progression (A.C.P.) Scheme be granted to him as he had completed 12 years of service without functional promotion.
10	17.12.2013	By communication dated 17.12.2013 (copy whereof is at Annexure A-1, page 17 to 19 of the O.A. paper book) Applicant's request for grant of A.C.P. as per the dates sought by him was rejected.
11	17.12.2013	This communication dated 17.12.2013 is challenged in present O.A. with consequent directions.

5. According to the Applicant :-

- (a) Rejection of grant of 1st and 2nd A.C.P. after completion of 12 and 24 years respectively, despite actual service, is based on the wrong point of view of employer / respondent, that applicant was "Promoted as a Clerk it was not necessary to give promotion to the Applicant".
- (b) Respondents have wrongly & illegally rejected applicant's claim for 1st and 2nd A.C.P. on the dates on which, from the point of view of Applicant those benefits were due.

6. After hearing rival submissions, we thought it proper to focus upon the text contained in the impugned communication, instead of being carried away by oral submissions.

7. It is seen on perusal of impugned communication that the narration contained in the impugned letter from paragraphs 1 to 5 is in the nature of recitals or narration of background. The narration contained in paragraph nos.6 and 7 of the impugned letter consists of the reasons and grounds due to which applicant's request for 1st as well as 2nd A.C.P. is denied.

8. For quick reference, paragraphs 6 and 7 of impugned order appearing at page 18 of O.A. are quoted below :-

“६. श्री. वारके यांची दि.२३/९/२०१३ ची नोटीस पडताळली असता त्यांनी मूळ पदाची प्रथम नियुक्ती दि.१५/११/१९८५ विचारात घेऊन सदर पदावरील १२ वर्षांच्या कालावधीनंतर दि. १५/११/१९९७ (पहिला लाभ) व दि.१५/११/२००९ (दुसरा लाभ) मंजूर करावा अशी विनंती केली आहे. श्री. वारके यांची प्रथम नियुक्ती दि.१५/११/१९८५ रोजी झाली असून शुन्याधारित अर्थसंकल्पाखाली त्यांना अतिरिक्त घोषित केल्याने त्यांना सेवा समाप्तीकामी एक महिन्याची आगाऊ नोटीस दि.३/१०/१९८८ रोजी बजावण्यात आली होती. त्यानुसार त्यांनी मा. कामगार न्यायालय, पुणे येथे याचिका दाखल केल्यानंतर सदर याचिकेचा निकाल दि. २१/२/१९९४ रोजी देऊन, त्यांना मूळ पदावर मागील सेवेसह नियमित सेवा धरावी असे आदेशित केले होते. तथापी ते मूळ पदावर दि.२८/२/१९९६ अखेर कार्यरत होते. तांत्रिक सहाय्यक श्रेणी -१ या पदावरील मागील सेवा विचारात घेता त्यांची एकूण सेवा १० वर्षे ३ महिने १३ दिवस इतकी झाली आहे. श्री. वारके यांनी लिपिक पदावर सामावून घेणेकामी दिलेला विकल्पानुसार, त्यांना त्यांच्या वेतनास संरक्षण देऊन लिपिक पदी सामावून घेतल्याने त्यांना तांत्रिक सहाय्यक श्रेणी-१ पदाचा दि.१५/११/१९९७ (पहिला लाभ) अनुज्ञेय नाही.

७. श्री. वारके यांच्या लिपिक पदावरील नियुक्ती पासून (दि.१/३/१९९६) त्यांची लिपिक पदावरील १२ वर्षे सेवा दि.२९/२/२००८ रोजी पूर्ण झालेली होती. परंतु श्री. वारके यांची सदर दिनांकास सेवाप्रवेशोत्तर परिक्षा व संगणक अर्हता धारण करित नसल्यामुळे आश्वसित प्रगती योजनेखाली वरिष्ठ वेतनश्रेणीचा लाभ अनुज्ञेय केला नाही.”

(The underlining is done for identification of relevant text and for emphasis.)

(Quoted from page 18 of O.A. paper book)

9. Since the text which is quoted in foregoing paragraph is in Marathi, as well it is worded in complex language, we consider that it shall be useful to describe the reasons of rejection contained in impugned letter in English, which is as follows :-

- (a) Since the Applicant was appointed and was serving as a Technical Assistant (Grade-I) and had he continued on the post and served as a Technical Assistant (Grade-I), the Applicant could have become eligible for 1st A.C.P. in the said post of Technical Assistance (Grade-I) on 11.05.1997, had the post continued to exist. The post of Technical Assistant (Grade-I) which was held by the Applicant had ceased to exist and since the Applicant had exercised option of absorption as a Clerk and was according absorbed, he would not be entitled to benefit of 1st A.C.P. in the post of Technical Assistant (Grade-I) which could have eventually accrued to him, had he actually remained in service on the said post of Technical Assistant (Grade-I) on 11.05.1997.
- (b) Applicant could be eligible for 1st A.C.P. on the post of Clerk after 12 years from his date of absorption on the post of Clerk (i.e. after 12 years from 01.03.1996), however, Applicant is not eligible to receive the benefit of 1st A.C.P. (as on 29.02.2008) on the post of Clerk, because the entry level eligibility for appointment as Clerk of passing Typewriting examination was not passed by the Applicant till that date.

10. We have carefully gone through the pleadings contained in the O.A. and have also kept in mind his oral submissions, in order to examine the challenge the impugned communication.

11. It is seen that the Applicant has pleaded as a challenge to impugned communication in extenso, however exact but brief pleading as to illegality averred in O.A. reads as follows :-

“5

(x)

So the Respondent's ground for rejection of Applicant's claim is invalid, illegal & causing unjust discrimination.”

(Quoted paragraph 5(x), page 13 of O.A. paper book.)

12. It is an admitted fact that applicant who was serving as Technical Assistant (Grade-I) when he become surplus. At relevant time the Applicant was drawing pay in the scale of 290-640, which was revised, and when he was absorbed as a Clerk the pay scale of the posts of Technical Assistant (Grade-I) was 1200-1800. Applicant was absorbed as Clerk, having become surplus in the technical post, pursuant to option given by Applicant, in the pay scale which is 950-1500 which was a lower scale of pay, by protecting his pay.

13. Respondent's plea that the date when 1st A.C.P. was eventually to accrue in favour of the Applicant, he was not actually serving on the post of Technical Assistant (Grade-I), as he was already absorbed as Clerk, the A.C.P. in non-existing post cannot be granted, seems to be perfectly legal. Therefore point(a) narrated in paragraph 9 cannot be challenged as illegal.

14. Now we have to examine the legality of second reason leading to rejection of A.C.P. in the post of Clerk.

15. Admittedly the absorption order contains following clause :-

“हया कार्यालयीन आदेशाच्या दिनांकापासून श्री. वारके यांनी ११ महिन्यांच्या आत त्यांनी टंकलेखनाची परीक्षा किमान ४० श.प्र.मि. इंग्रजी किंवा ३० श.प्र.मि. मराठी परीक्षा उत्तीर्ण होणे आवश्यक आहे.”

(Quoted from page 53 of the O.A. paper book.)

16. It is evident clear from the facts and evidence on record that the posting of applicant as Clerk was neither appointment by fresh recruitment nor transfer / drafting on request, or as a product of applicant's sheer volition, but it was due to Government's act of abolition of the post of Technical Assistant (Grade-I), followed by the Government's decision to absorb the Applicant on an available post which was that of a Clerk.

17. Applicant was offered absorption as Clerk, unconditionally. The condition of passing examination relating to typewriting was not a part of offer contained in the letter asking willingness so also it was not a part of the order of appointment as a condition precedent. The applicant was absorbed rather than appointed. In fact induction of condition of passing typewriting examination in the order of absorption passed with retrospective effect amount to super imposition and hence that condition was not and cannot be a condition precedent nor was ever insisted.

18. The order of absorption is dated 01.08.1996, while he was absorbed as Clerk retrospectively w.e.f. 01.03.1996, and by order dated 04.11.1996 he was granted protection of pay w.e.f. 01.03.1996 at Rs.1,500/-. Thus on the date of issue of that order of absorption already five months period was already over. Moreover, it was the case of absorption because of surplusage. It is not a case of recruitment or appointment as a Clerk. The order of appointment did not contain the condition that applicant's service would be terminated if he fails to acquire the conditions imposed therein, since any such termination was not within the contemplation of the Government.

19. Moreover at no point of time, due to applicant's failure to pass the typewriting examination any action such as to stoppage of increment etc. was taken, mostly because the applicant's case stands on totally different foundation to which normal rules of accrued of 1st and 2nd A.C.P. could not apply.

20. From the facts narrated in foregoing paragraphs what is evident is that applicant was not a fresh direct recruit or promote to the post of Clerk. Applicant was already serving in a higher pay scale and because the posts held by him had ceased to exist he was absorbed at posts carry lesser or lower pay band.

21. Had the applicant not been declared surplus and had he not been absorbed in the Clerical post, the 1st A.C.P. would have accrued to him in Technical Assistant (Grade-I), on 11.05.1997.

22. The reason assigned in the impugned order is that applicant did not possess entry level eligibility for the post of Clerk in 2008. In relation to this reason we are of considered view that this reason cannot apply to applicant, because applicant did not enter the cadre of Clerk due to his sheer volition.

23. Though factually, applicant cannot get A.C.P. in the post of Technical Assistant, Grade-I, but he is entitled to the said 1st A.C.P. in Clerk's post, because applicant was absorbed (and not appointed) on a lower post.

24. Apart from foregoing discussion and observation this Tribunal thinks that the scheme of A.C.P. has to be construed for attaining the object of removing stagnation. We are, therefore, of the considered view that the rule of granting 1st and 2nd A.C.P. will have to be construed harmoniously for achieving the object of and purpose of the scheme, as well by leaning the construction towards beneficial construction. Hence we hold that the Applicant shall be entitled to 1st A.C.P. on completion of 12 years service from the date of his entry in service as Technical Assistant (Grade-I), however, while in Clerical cadre. He would therefore get 1st A.C.P. in the post of Clerk of next available scale of pay w.e.f. 15.11.1997. Applicant shall also be entitled to 2nd A.C.P. after completion of 24 years on 15.11.2009. The Respondents shall be free to adjust and alter the date of commencement of 1st and 2nd A.C.P. after considering the actual continuous service, absence, leave without pay etc; but by adhering to the principles discussed in foregoing paragraphs.

25. On seeing applicant's case, from the point of view discussed in foregoing paragraphs we conclude holding and directing as follows :-

- (a) O.A. succeeds on the grounds, discussions and observations contained in foregoing paragraphs.
- (b) As the consequential order we direct that impugned communication (copy whereof is at Annexure A-1, page 17 of O.A. i.e. letter dated 17.12.2013 paper book) is quashed and set aside.
- (c) We hold that Applicant's 1st A.C.P. had to become due on the post of Clerk on 15.11.1997 and 2nd A.C.P. could become due as prayed the Applicant's claim after completing 12 years service i.e. on 15.11.2009.
- (d) We direct that the work of calculation of benefits of 1st as well as 2nd A.C.P. with reference to dates found and held by us or on such dates as may be reckoned after taking into account 12 years and 24 years actual services rendered by the applicant. In case there is any arithmetic correction in the dates found by this Tribunal it may be done on the principles indicated in the discussion contained in foregoing paragraphs no.15 to 23.
- (e) The entire work of calculation be done within six months from the date of this order.

26. Steno copy and Hamdast is allowed to both the parties.
27. In the facts and circumstances, of the case we direct the parties to bear their own costs.

Sd/-
(Rajiv Agarwal)
Vice-Chairman

Sd/-
(A.H. Joshi, J.)
Chairman

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