

CASE NO.:
Appeal (civil) 1377 of 2007

PETITIONER:
Director General, I.C.M.R.

RESPONDENT:
Dr. D.K. Jain and Anr.

DATE OF JUDGMENT: 09/03/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
JUDGMENT

S.B. Sinha, J.

1. Learned counsel for both the parties accept that the Union of India is not a necessary party in this case. It is hence directed to be expunged accordingly.

2. Leave granted.

3. Respondent No. 1 herein joined the services of the appellant as a Statistical Officer on 14.5.1971. He completed his period of probation. However, on or about 10.4.1974 his services were terminated. He questioned the order of his termination by filing a writ petition before the High Court of Delhi which was marked as CWP No. 545/1974. Indisputably he joined Bombay Cancer Registry on or about 25.1.1975.

4. The writ petition filed by the respondent herein came up for consideration before the High Court some time in 1983. During pendency of the said writ petition. The appellant herein placed before the said Court an offer so that respondent No. 1 may be reinstated in service on the following terms:

"Having regard to the facts summed up in para 1 above and the issues discussed in para 2. Director General of ICMR is of the considered view that Shri Jain can at best be offered a regular post of Sr. Research Officer, which he had been holding before his service were terminated. He may be given his seniority in the grade of Senior Research Officer, as had been originally assigned to him, and his pay may be fixed as per rules. He cannot be given any back-wages for the reasons that he had not worked in the post since April, 1974, that his services were terminated in terms of the conditions specifically included in the offer of appointment issued to him and that. for some time he was actually employed (no employee can draw pay from two sources). As already explained, there is no question of offering him any appointment for the post higher than Sr. Research Officer because such an appointment can be made only by direct recruitment through open advertisement as per the procedure of the Council. Shri Jain is, however, free to take his chance along with other candidates for the post of Asstt. Director under the Council. as and when such a post is created and advertised."

5. The said offer of the appellant having been accepted by respondent No. 1 the High Court disposed of the writ petition directing:

"The respondent Council has addressed a letter to this Court dated 22.4.1983. Let this letter be placed on record."

The petitioner has been offered a post on the terms and conditions given in the aforesaid letter the petitioner has conveyed his acceptance to the Council of the offer made to him. The disposes of the writ petition.

Mr. Gupta on behalf of petitioner further submits the following two points:

1. That the petitioner should be considered for appointment to the post of Assistant Director. I have no doubt that if the post is available the petitioner will be considered for the same and if found eligible, he will be given his due promotion.
2. The petitioner has been appointed against a regular post. He should be considered for confirmation. This request also seems to me to be reasonable since the petitioner has been reinstated in service.

The petition is disposed of in terms of the above order. No costs."

6. Pursuant to and in furtherance of the said order passed by the High Court. Respondent No. 1 was reinstated in service on the following terms:

- "1. The pay of Sh. Jain will be fixed as admissible under the ICMR Rules.
2. He will be given seniority in the grade of Senior Research officer (Rs. 1100-50-1600) as was originally assigned to him.
3. He will not be given any back-wages.
4. Notwithstanding his seniority in the grade of SRO he will not have any claim for automatic promotion to the post of Assistant Director. He can, however, take his chance along with other candidates for the post of Assistant Director as and when such a post is created and advertised. As regards his posting. I am to State that with his experience in work at the Bombay Cancer Registry. Sh. Jain is considered suited to work as Senior Research Officer at the technical unit of the National Cancer Registry Project under Dr. L.D. Sanghvi at the Tata Memorial Research Centre. Bombay. He is, therefore, required to report to Dr. Sanghvi as early as possible.

I am to add that only after Shri Jain has joined the post of Senior Research Officer (Rs. 1100-50-1600) on the above terms and conditions and without any further pre-conditions on his part, if he makes any specific request for giving him back-wages, the matter may be considered in due course on merits by the Competent authority. However, the Council cannot make any commitment in this regard at this stage."

7. It is not in dispute that even a no objection certificate was issued on his application for acquiring an Indian passport wherein respondent No. 1 was described as a permanent employee of the appellant organisation with effect from 23.1.1978. The period from 10.4.1974 to 11.5.1983. However, was kept out consideration for the purpose of computing pensionary and retiral benefits of Respondent No. 1 inter alia on the premise that he had not been in service of the appellant during the said period.

8. The High Court by reason of the impugned judgment has allowed the writ petition filed by Respondent No. 1 herein opining that he would be deemed to be in the service of the appellant even during the aforesaid period i.e. 10.4.1974 to 11.5.1983.

9. Mr. Raju Ramachandran, learned senior counsel appearing on behalf of the appellant, in support of the appeal, would submit that despite the settled legal position that 'pension' is not a bounty but the same must be earned wherefor the employee must remain in the employment of his employer during the entire period. In view of the fact that respondent No.1 did not earn

any wages during the period in question, the same cannot be considered for the purpose of computing pensionary and retiral benefits.

10. In a case of this nature, in our opinion, the question as to whether respondent No. 1 continued to be in service despite temporary break during the said period, will have to be determined having regard to the fact situation involved herein. The services of Respondent No. 1 although were terminated on 10/4/1974, he immediately questioned the legality and validity thereof by filing a writ petition. The Director of the appellant organisation himself made an offer that respondent No.1 would be reinstated in service subject to the terms and conditions mentioned in his letter dated 29.4.1983, as noticed hereinbefore. It was that offer of the appellant which was unconditionally accepted by the respondent. Not only this, certain other observations had also been made by the High Court while passing the order dated 27.4.1983. The High Court directed that he be reinstated in service.

11. The expression 'reinstatement' has been defined in 'Advanced Law Lexicon' by P. Ramanatha Aiyar, (at page 4030) to mean:

"Reinstatement means that a man is put back in his job. Reinstatement can only arise if a man is dismissed or removed from service or if otherwise his service has been terminated and he is brought back to service. Hemanta Kumar Bhattacharjee v. Union of India, AIR (1958) Cal. 239, 241 [Constitution of India, Art. 311].

Therein it is further stated:

"The word 'reinstatement' in the context of Rule 16.5 of the Punjab Police Rules can refer only to the resumption of service for the purpose of grant of increments. The said rule has no bearing on qualifying service for compulsory premature retirement. Chamba Singh v. State of Punjab, AIR (1997) SC 2455, Service Laws."

12. It is also significant to note that the appellant in terms of its letter dated 21.4.1983, also assured Respondent No.1 to consider his request, if any, for payment of back-wages. As indicated hereinbefore, even he had been considered to be a permanent employee of the appellant with effect from 21.3.1978.

13. Having regard to the conduct of the parties which, in our opinion, is significant, for the purpose of determining the issue involved, we have no doubt in our mind that for all intent and purport. Respondent No.1 has to be treated to be continuing in service despite small disruption during the aforementioned period. The very fact that the offer made in favour of the respondent by the appellant was for reinstatement in service, it is beyond any civil of doubt the same would amount to continuity of his service. Moreover, the respondent has been given his due seniority from the date of his initial appointment. Had it been a case of fresh appointment, as sought to be argued by Mr. Raju Ramachandran learned senior counsel appearing on behalf of the appellant, the question of respondent No. 1's getting his seniority from the date of his original appointment would not have arisen.

14. What was, therefore, denied to him was only the back-wages for the period he was in service in some other organisation, which in our opinion cannot be construed to mean that an employee although being validly appointed and continued in service shall be deprived of the pensionary benefits during the period in question thereby.

15. For the reasons aforementioned, there is no merit in this appeal which is dismissed. Counsel's fee is assessed at Rs. 5,000/-.