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**CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH**

OA No.2230/2002

New Delhi this the 2<sup>nd</sup> day of February, 2005.

**HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (A)  
HON'BLE MR. SHANKER RAJU, MEMBER (J)**

Bansi Dhar s/o Shri Gurudayala,  
R/o H.No. 521, Near Saraswati Nursery School,  
Rampura, Rewari (Har)

-Applicant

(By Advocate Shri Yogesh Sharma)

-Versus-

1. Union of India through  
the General Manager,  
N. Western Railway, Jaipur.
2. The Divisional Railway Manager,  
N. Western Railway, Jaipur.
3. The Divisional Railway Manager,  
N. Western Railway, Bikaner.

-Respondents

(By Advocates Shri R.L. Dhawan and Shri B.S. Mainee)

**O R D E R**

**Mr. Shanker Raju, Hon'ble Member (J):**

Applicant impugns show cause notice dated 21.7.2003 and order dated 28.5.2003, whereby his promotion to the post of Hospital Attendant (HA, for short) in the grade of Rs.775-1025/- has been postponed from 1.2.1990 to 1.3.1993 with consequent recovery.

2. Applicant was working as a khalasi in the Medical Department. On change of category to HA on 19.8.78 he was promoted to the post of HA on 1.2.1990 in the grade of Rs.725-1025 on officiating basis and regularly w.e.f. 15.11.90. A representation made for fixation of pay entailed a show cause notice dated 2.8.94, treating the promotion from 1.3.93. On reply, no action was taken and applicant was further promoted as Senior HA on 19.8.97.
3. Without issuing show cause notice on the basis of the earlier one, the orders passed on 5.4.2002 treated applicant's promotion as HA w.e.f. 1.3.93

(2)

which was assailed in OA-2230/2002. By an order dated 6.9.2002 the impugned order was set aside with liberty to respondents to issue notice and then to take a decision. Till then the recovery was stayed. This was with liberty to revive the OA. Accordingly on being aggrieved by an order dated 28.5.2003 the OA was revived.

4. Learned counsel for applicant stated that the decision of the respondents after 12 years to defer his promotion to a prospective date is not correct as held by the High Court of Orissa in **Banchhandhi Lal v. State of Orissa & Ors.**, 1973 (2) SLR 499.

5. Learned counsel further stated that as applicant was in the seniority list was called in the selection and after qualifying the same was promoted. It is none of his fault or action rested on his misrepresentation, the change of promotion to the seniors is not attributable to him. Accordingly no recovery can be made for excess payment in the light of the decision of the Apex Court in **Shyam Babu Verma v. Union of India**, 1994 SCC (L&S) 683.

6. Learned counsel also stated that applicant has not been promoted erroneously and has qualified the selection process which was in accordance with rules. As such the earlier promotion which was on the order of the DRM, the impugned orders passed by the APO without approval of the DRM is without jurisdiction.

7. Learned counsel lastly stated that what is to be rectified is only an administrative error whereas the promotion as HA was on applicant's own request. As such seniority during the period he had worked as khalasi shall be computed.

8. On the other hand, respondents' counsel vehemently opposed the contentions and stated that in the light of paragraph 228 of IREM Volume-I applicant has been given erroneous promotion, ignoring his seniors, as a result of cadre restructuring from 1.3.98 whereas persons senior to him at serial Nos. 9-21 in the seniority list as on 14.6.89 were promoted as Senior

HA w.e.f. 1.3.93. Accordingly, applicant who was further promoted erroneously has drawn higher pay for the period 1.2.90 to 28.2.90 in comparison to the seniors as his promotion instead of 1.2.90 was due from 1.3.93. The learned counsel further stated that in the light of the decision of the Apex Court in **State of Haryana v. Ram Kumar Mann**, 1997 (3) SCC 311 a wrong decision would not confer any right upon a government servant to enforce the wrong order.

9. We have carefully considered the rival contentions of the parties and perused the material on record.

10. We find that applicant was promoted after following the due process of law and seniors had been ignored, whereas we find that applicant along with, after the test was declared, two other persons was promoted, who were his seniors and rest of his seniors had not been considered.

11. Paragraph 228 of IREM Volume-I provides that if due to administrative error, seniors are overlooked for promotion and in the light of the Rule 1326 (ii) 1987 Edition IREM, order of promotion, where a person has been erroneously promoted ignoring the seniors, suffers from factual errors the promotion be cancelled but not without following the procedure laid down under Railway Board's letter dated 23.7.1954.

12. The Apex Court in the case of **Anand Kumar Vs. Prem Singh**, 2000 (1) SCC 655 held that wrong promotion, erroneous one, which has been continued for several years, cannot be legalized and one has no right to continue not being eligible and erroneous promotion can be interfered even after <sup>1</sup> <sub>several</sub> years.

13. The trite law in view of the **Shyam Babu Verma's** case (supra) is that if an erroneous decision is not attributable to the concerned by way of fraud and misrepresentation, recovery cannot be effected against such promotion. Moreover, the applicant had performed the work on higher post for which he is entitled to be paid accordingly.



14. As regards promotion, admittedly applicant was considered in 1990, his seniors had been ignored with the result applicant who could have been legally promoted as per his seniority on restructuring from 1.3.1993, the benefit of past officiating period from 1.2.1990 to 20.11.1990 and up to 1.3.1993 was not in accordance with law. This is an erroneous promotion given to the applicant ignoring right of his seniors. No doubt, applicant has been further promoted but the respondents had only postponed his promotion as HA from 1.2.1990 to 1.3.1993. This is in accordance with Para 228 IREM-I which provides cancellation of promotion made due to an administrative lapse ignoring the claim of seniors. As such even after lapse of long years, if applicant was not due for promotion as per his seniority on 1.2.1990 has no right to continue on promotion and he has been rightly promoted from 1.3.1993. We do not find any infirmity in the orders passed by the respondents.

15. However, as far as recovery is concerned, the same is not attributed to applicant by way of any fraud or misrepresentation and he has discharged the functions of the higher post as well. As such he cannot be burdened with recovery of excess amount in the light of the decision of the Apex Court in the case of **Shyam Babu Verma** (supra).

16. In the result, for the foregoing reasons, OA is partly allowed upholding postponement of promotion of applicant to a prospective date. We direct the respondents not to recover excess payment from applicant and if it is recovered, the same shall be restored back to him within one month from the date of receipt of a copy of this order. No costs.

S. Raju  
 (SHANKER RAJU)  
 Member(J)  
 'San.' 2/2/05

V.K. Majotra  
 (V.K. MAJOTRA)  
 VICE CHAIRMAN (A)  
 2/2/05