

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A. NO.2402/2004
M.A. NO. 2004/2004

New Delhi, this the 10th day of February, 2006

HON'BLE MR. V.K. MAJOTRA, VICE CHAIRMAN (A)
HON'BLE MR. MUKESH KUMAR GUPTA, MEMBER (J)

1. Subhash Chander S/o Sh. Tek Chand,
R/o H.No.774/B-2, Pardhavan Mohall,
Rothak

2. Sunil Kumar S/o Sh. Sadi Lal,
R/o H.No.8/16, Jank Pura,
Gohana Distt. Sonipat

(By Advocate : Shri Yogesh Sharma)

... APPLICANTS

Versus

1. Union of India through
The General Manager,
Northern Railway, Baroda House,
New Delhi

2. The Divisional Railway Manager,
Northern Railway, Delhi Division,
Near New Delhi Railway Station
New Delhi

... RESPONDENTS

(By Advocate : Shri R.L. Dhawan)

O R D E R

BY MUKESH KUMAR GUPTA, MEMBER (J)

MA No.2004/2004 :

MA No.2004/2004 seeking joining together is allowed, as the nature of relief prayed for and the cause of action is common.

OA No.2402/2004:

2. By the present OA, two applicants challenge the validity of an order dated 29.10.2003 vide which they were retrospectively promoted as Sr. Clerk w.e.f. 01.05.2001 and 01.08.2001 respectively, to the extent, on "proforma basis". In other words, the challenge made is to denial of arrears of pay and allowances from the aforesaid dates till issuance of the said order. The applicants also seek a direction to Respondents to grant them the difference of pay and allowances during the aforesaid period with interest.

2. Admitted facts of the case are that the applicants were initially appointed as Khalasi in the years 1973 and 1974 respectively. On being screened, they were regularized and later promoted as Material Checking Clerk (MMC)/Store Issuer/Clerk in the year 1985 on ad hoc basis. Their grievance had been that since juniors were screened and regularized as MMC/Clerk ignoring their just claim and therefore, they filed OA No.932/1989 seeking regularization. During the pendency of the said OA, they were regularized on 20.08.1993. The said OA was disposed of vide Order dated 8.3.1994 with direction to Respondents to consider their cases for regularization from the date their juniors were regularized in the said grade with the "benefit of seniority". As the applicants' seniority had not been correctly determined despite repeated representations made in 1995, 1997 etc., they preferred another OA No.2206/2001. In reply filed to the said OA, the Respondents, *inter alia*, stated that their request was under their active consideration and, therefore, the said OA was disposed of vide order dated 23.9.2002 with a direction to Respondents to take a final decision within the time limit prescribed therein and intimate the same to them. Since the required action had not been taken within the stipulated period, they preferred CP No.189/2003, which was disposed of vide order dated 24.7.2003 holding that though the Respondents had issued revised seniority list on 14.1.2003, but the consequential benefits, available in accordance with law, ought to have flown.

3. The contention of the applicants is that in terms of the aforesaid revised seniority list dated 14.1.2003, they were subjected to suitability test and on being declared qualified were promoted as Sr. Clerk in the pay scale of Rs.4,500-7,000 w.e.f. 1.5.2001 and 1.8.2001 respectively, but only on "proforma basis" which is illegal and arbitrary. Once the applicants were promoted with retrospective effect, in compliance of the directions issued by the Tribunal, they were entitled to all the benefits flowing therefrom including monetary benefits. The Respondents denied the same by promoting them on "proforma basis", which action is illegal, arbitrary and unjustified.

4. A reference was made to *State of Andhra Pradesh vs. K.V.L. Narsimha Rao & Ors.*, JT 1999 (3) SC 205, wherein it has been held that "in normal circumstances when

retrospective promotions are effected, all benefit flowing therefrom, including monetary benefits must be extended to an officer who has been denied promotion earlier." Reliance was also placed on **UOI vs. K.V. Jankiraman** (AIR 1991 SC 2010) wherein it has been held that the normal rule of "no work no pay" is not applicable to such cases where the employee although was willing to work was kept away from work by the authorities by no fault of his. Our attention was also drawn to a co-ordinate Bench Judgment reported at 2004 (3) ATJ 36, **Shri D. Thomas v. Union of India & Ors**, particularly to paras 5 to 7 holding that denial of arrears of difference of pay and allowances to an official promoted retrospectively was not justified. Further reliance was also placed on JT 1993 (2) S.C. 451 **Vasant Rao Roman v. The Union of India through the Central Railway Bombay & Ors.** dealing with the question of payment of arrears of emoluments in similar situation. Reliance was also placed on 2004 (3) SLJ 323, **J.P.S. Bhandari vs B.B. Mishra, Director General, CISF**, wherein the Hon'ble Delhi High Court had taken a view that once the Court directed the Respondents to accord seniority with consequential benefits, the Respondents cannot deny back-wages on the specious plea, particularly when a similarly placed person was allowed such a benefit. Lastly, reliance was also placed on the Full Bench Judgment of the Tribunal in **B.S. Tyagi vs. Shri S.P. Mehta, G.M. Northern Railway & Ors**, 2002-2003 Administrative Tribunal Full Bench Judgments page 143 wherein, after noticing the provisions of Railway Board's Circular dated 15/17.9.1964, Para 228 of IREM Vol. I, and FR-17 as well as numerous Judgments, it was held that since the provisions contained in Paragraph 228 of IREM Vol-I have been declared invalid by various Courts, the Respondents can rely upon the provisions of FR 17(1) being the basic rule to deny grant of arrears of difference of promotional posts in cases where wrong action of the Respondents involved in not promoting the employee. Shri Yogesh Sharma, learned counsel by drawing our attention from Para 13(3) of aforesaid Full Bench Judgment, however, suggested that once a promotion was made by the Respondents following the direction issued by a Court/Tribunal, the Railway Authorities cannot deny an employee the salary of the promotional post.

5. The Respondents contested the prayer made in this OA and stated that in terms of the direction issued by this Tribunal vide Order dated 23.9.2002, in OA No.2296/2001, the applicants were assigned revised seniority in accordance with the rules vide seniority list dated 14.1.2003 and thereafter, they were subjected to suitability test for Sr. Clerk. On being declared successful, they were promoted as Sr. Clerk on "proforma basis", strictly in accordance with the provisions of Para-228 of the IREM Volume-I. The applicants were paid pay and allowances of the higher post from the day they assumed duty and responsibility of the higher post. They were not eligible and entitled to pay and allowances of the higher post from the dates of their proforma promotion in accordance with the provision of the aforesaid paragraph of IREM. It was further contended that the Order and Judgment of the Ernakulam Bench of this Tribunal in OA No.649/1990 dated 30.9.1991 in the case of **P.O. Abraham & Ors. v. UOI & Ors**, quashing and setting aside part of para 228 of IREM Volume-I has been reversed by the Hon'ble Supreme Court vide order dated 13.8.1997 in Civil Appeal No.8904/1994 **Union of India & Others v. P.O. Abraham & Others**. Similarly, a Full Bench Judgment of the Jodhpur Bench of this Tribunal in **Devi Lal vs. Union of India**, dated 11.2.2002, reported in 2002 (1) ATJ 485 has not been approved by the Rajasthan High Court at Jodhpur vide Judgment dated 10.9.2003 in Civil Writ Petition No.4227/2002 and others cases.

6. We have heard the learned counsel for the parties and perused the pleadings on record.

7. The main thrust of the applicants has been that they are entitled to retrospective promotion with all consequential benefits. On the other hand, the Respondents' basic thrust was that in terms of Para 228 of IREM Vol.-I they are not entitled to arrears of pay and allowances on promotion to higher grade from retrospective date. The further thrust laid had been on the fact that Para 228 has been held to be legal, justified as well as operative in terms of Hon'ble Supreme Court order dated 13.08.1997.

8. Before proceeding further, it would be relevant to notice Railway Board's letter dated 15/17.9.1964, Para-228 (I) of IREM Vol.-1 and Rule 17 of Fundamental Rules which read as follows:-

(Signature)

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"Board's letter No.E(NG)63 : PM1/92 dated 15.7.64 addressed to GMs and others on sub. : "Hardships to non-gazetted staff due to administrative errors, loss in seniority and pay,"

It has been represented to the board that some time due to administrative errors staff are over-looked for promotion to higher grades. This could either be on account of wrong assignment of relative seniority of the eligible staff or full facts not being placed before the competent authority at the time of ordering promotions or some other persons. Broadly loss of seniority due to administrative errors can be of two types:-

- (a) *Where a person has not been promoted at all because of administrative error; and*
- (b) *Where a person has been promoted but not on the date from which he should have been promoted but for the administrative error.*

2. *That matter has been considered and the Board desire that each such case should be dealt with on its merits. The staff who have lost promotion on account of administrative errors should on promotion be assigned correct seniority vis-à-vis their juniors already promoted, irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed proforma at the stage which the employee would have reached if he was promoted at the proper time. The enhanced pay may be allowed from the date of actual promotion. No arrears on this account shall be payable, as he did not actually shoulder the duties and responsibilities of the higher grade posts."*

ii) *Para 228(I) of IREM*

"Erroneous Promotions :- (I) Sometime due to administrative errors staff are overlooked for promotion to higher grades could either be on account of wrong assignment of relative seniority of the eligible staff or full facts not being placed before the competent authority at the time of ordering promotions or some other reasons. Broadly, loss of seniority due to administrative errors can be of two types:-

- (a) *where as a person has not been promoted at all because of administrative error; and*
- (b) *where a person has been promoted but not on the date from which he should have been promoted but for the administrative error.*

Each such case should be dealt with on its merits. The staff who have lost promotion on account of administrative errors should on promotion be assigned correct seniority vis-a-vis their juniors already promoted, irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed at the proper time. The enhanced pay may be allowed from the date of actual promotion. No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts."

iii) *F.R. 17*

"(1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

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Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.

(2) The date from which a person recruited overseas shall commence to draw pay on first appointment shall be determined by the general or special orders of the authority by whom he is appointed."

9. A bare perusal of Para 228 would show that much stress has been laid upon the observations made therein that "each case should be dealt with on its merits". The heading of Para 228 is "**Erroneous Promotions due to administrative error and not otherwise**". Shri Yogesh Sharma, learned counsel appearing for the applicants forcefully contended that the facts and circumstances of the present case would lead to inescapable conclusion that the applicants' wrong placement in the seniority list despite direction issued by this Tribunal, which led to their being denied the rightful promotion is not a mere error, but a deliberate and intentional act and, therefore, the applicants cannot be made to suffer. The learned counsel expanded his contention by stating that vide Order and Judgment dated 8.3.1994 disposing of OA No. 932/1989, this Tribunal had specifically observed that the applicants "shall also be given the benefit of seniority", and despite repeated representations made, and order issued, the respondents had "not fixed the seniority of the applicants" in terms of the direction issued by this Tribunal. Our attention was drawn to Para 4.9 of the OA where such a contention has been raised and it was stated specifically that in the seniority list dated 27.4.1995, their names did not appear at appropriate place. However, Respondents in their reply stated that on implementation of the direction issued on 23.9.2002 in OA No.2206/2001, the applicants' claim for assigning their seniority was examined and they were assigned "revised position in the seniority list vide notice dated 14.1.2003". In other words, it is inescapable conclusion that the seniority list determined by the Respondents on 27.4.1995 had not been drawn in terms of the direction issued by this Tribunal vide order dated 8.3.1994.

10. Not only this, the learned counsel for the applicants further explained that there had been unjustified delay at every stage, namely, assigning them rightful seniority as well as conducting suitability test and passing the promotion order. It was also pointed out that the selection was initially held on 22.1.2001 against which they submitted their

representation on 24.1.2001 and when no reply was forthcoming, they preferred OA No.2206/2001 which was disposed on 23.9.2002. Though the revised seniority list was issued on 14.1.2003, but consequential action had not been taken, and they were promoted only after a lapse of at least 10 months on 25.10.2003.

11. On bestowing our careful consideration to the entire matter, pleadings, rivals contentions raised as well as the Judgments relied upon, we are of the view that it is, no doubt, true that the Full Bench Judgment of the Tribunal in **Devi Lal** (supra) was not approved by the Hon'ble High Court of Rajasthan at Jodhpur. Similarly, it remains an undisputable fact that Para 228 of IREM Vo.-I, a portion of which has been quashed and set aside by the Ernakulam Bench of this Tribunal, has been restored by the Hon'ble Supreme Court, but as noticed hereinabove, the said para in itself lays emphasis that "**each case should be dealt with on its merits**". We find force and justification in the contention raised by the applicants that as held by the Hon'ble Supreme Court in the Judgment noticed hereinabove, in normal circumstances when retrospective promotions are ordered/made, all benefits flowing therefrom including monetary benefits must be extended to an employee, who has been denied such promotion on an earlier occasion. However, while considering the question of arrears etc., each case has to be dealt on its merits. The only reason and justification offered by the Respondents for denial of the said benefit of arrears to the applicants had been invocation of the aforesaid Para 228. On examining the case minutely in the light of the facts and law noticed hereinabove, we are of the considered view that a co-ordinate Bench of this Tribunal in **D. Thomas** (supra), almost on similar facts, had taken a view that Respondents should accord financial benefits of pay and allowances from the date of retrospective promotion. In the said Judgment, the Bench had noticed all aspects, including the Judgment of Hon'ble Delhi High Court in Civil Writ Petition No.5952 of 2002 **Union of India & Anr Vs. C.N. Shahi & Others** decided on 20th September, 2002. The applicants' seniority had not been fixed despite directions issued by this Tribunal vide order dated 8th March, 1994 and they were forced to institute OA No.2206 of 2001. Even directions issued thereunder were not followed in letter and spirit and despite revised seniority list dated 14th January, 2003, the consequential benefits flowing therefrom had not been extended

to them without any justification. The Applicants were willing not only to appear in the test, but were ready to discharge functions of the higher post. They were prevented from appearing in the test along with juniors in the year 2001 because of non-fixation of their appropriate seniority. As such, the Respondents were not justified in restricting retrospective promotion on "proforma basis" only. Despite repeated direction issued by this Tribunal, it appears that the Respondents were adamant in denying them the benefit of promotion etc.

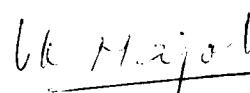
12. In the facts and circumstance of the present case, we do not find justification in Respondents' action. Accordingly, the impugned order dated 29.10.2003 vide which the Applicants were promoted on "proforma basis" and accordingly denied the pay and allowances is quashed and set aside to that extent. The OA is thus allowed. The respondents are directed to grant them the difference of pay and allowances during the period from 01.03.2001/01.08.2001 to 29.10.2003. This exercise shall be completed within a period of three months from the date of receipt of a copy of this order.

13. In the facts and circumstances of the present case, there shall be no order as to costs.


(MUKESH KUMAR GUPTA)

MEMBER (J)

/PKR/


(V.K. MAJOTRA)

VICE CHAIRMAN(A)

10-2-06