

(RESERVED)

**CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD**

ALLAHABAD this the 19th day of December, 2007.

**HON'BLE MR. G. GEORGE PARACKEN, MEMBER- J.
HON'BLE MR. K.S. MENON, MEMBER- A.**

ORIGINAL APPLICATION NO. 1130 OF 2001

Awadh Bihari Dhar Dubey, A/ a 50 years,
S/o Sri Hari Naryan Dhar Dubey,
R/o Vill. Gopalpur, Padariya, P.O. Kakrachor,
Distt. Gorakhpur. Presently working as Motor Electrician Gr. II,
Mechanical Workshop, North Eastern Railway, Gorakhpur.

.....Applicant.

VE R S U S

1. Union of India through the General Manager,
North Eastern Railway, Gorakhpur.
2. Chief Works Manager,
Mechanical Workshop, Gorakhpur,
3. Assistant Personnel Officer, Mechanical Workshop,
North Eastern Railway, Gorakhpur.

.....Respondents

Present for the Applicants: Sri Bashishtha Tiwari
Present for the Respondents : Sri D. Awasthi

ORDER

BY HON'BLE MR. G. GEORGE PARACKEN, J.M.

The grievance of the applicant in this O.A is against the order dated 12.04.2001 (Annexure -3) by which the respondents found the applicant illegible in suitability test for promotion to the post of Motor

Electrician Grade-I in pay scale of Rs. 4500-7000 held on 28.03.2001. The applicant is also aggrieved by the letter dated 30.05.2001 issued by the Chief Workshop Manager, Gorakhpur (respondent No. 2) by which the adverse remarks in the confidential report for the year ending 30.01.2000 had been communicated to him by order dated 05.09.2001 (Annexure- 1).

2. The applicant is presently working as Motor Electrician Gr. II in pay scale Rs. 4000-6000 w.e.f. 31.03.1995. On completion of two years in the said grade, he became eligible for consideration for promotion to the next higher grade of Motor Electrician Gr. I in pay scale Rs. 4500-7000/-. According to the applicant, one post of Motor Electrician Gr. I has fallen vacant on promotion of the incumbent Sri Vijay Bahadur in the year 1995. Since the respondents did not consider the applicant for promotion to the aforesaid post even after he became eligible for the same, he made a representation dated 14.03.2000 (Annexure- 4) and in reply to the said representation, the respondent No. 2 informed the applicant Vide letter dated 07.04.2000 (Annexure- 5) that they would take necessary steps in the matter. Since the respondents have not taken any action even after the above assurance, the applicant made further representations dated 11.10.2000 and 17.03.2001 (Annexure- 6 and 7 respectively). The respondents firstly issued impugned letter dated 12.04.2001 (Annexure- 3) to the applicant stating that a suitability test for the post of Motor Electrician Gr. I was held but he was found "not suitable". The applicant made the representation dated 25.04.2001 and 30.04.2001 (Annexure- 8 and 9 respectively) against the aforesaid impugned order to the Chief Works Shop Manager (respondent

no. 2) but vide order dated 05.09.2001, he was informed by the said respondent that the earlier decision taken by the Selection Committee was correct.

3. As no reasons were given by the respondents for declaring him "not suitable" for promotion as Motor Electrician Gr. I in the suitability test held on 12.04.2001, his presumption was that it was due to the adverse report communicated to him vide the Annexure A- 2 letter dated 30.05.2001. The specific contention of the applicant in the O.A is that, no adverse remarks were ever communicated to him before the Annexure A- 2 letter dated 30.05.2001 and it was totally against the provisions contained in para 1609 to 1619 of Railway Establishment Code Vol. 1 as well as Railway Board's Confidential Letter dated 10.11.1978 (Annexure-12). According to the said letter, annual report should be recorded within one month after expiry of the reporting period and delay, if any, in that regard on the part of the reporting officer should be adversely be commented upon. Further, all adverse remarks in the confidential report of Railway servants, both on performance as well as on basic qualifications and potential, were also required to be communicated within one month. In support of his contention, the learned counsel for the applicant has placed reliance on the judgment of Hon'ble Supreme Court in D.K. Yadav Vs. J.M.A Industries Ltd. (1993) 3 SCC 259, in which it has been held as under: -

"7. The principal question is whether the impugned action is violative of principles of natural justice. In A.K. Kraipak V. Union of India, a Constitution Bench of this court held that the distinction between quasi-judicial and administrative order has gradually become thin. Now it is totally eclipsed and obliterated. The aim of the rule of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules operate in the area not covered by law

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validly made or expressly excluded as held in Col. J.N. Sinha Vs. Union of India. It is settled law that certified standing orders have statutory force which do not expressly exclude the application of the principles of natural justice. Conversely the Act made exceptions for the application of principles of natural justice by necessary implication from specific provisions in the Act like Sections 25-F; 25-FF; 25-FFF etc. The need for temporary hands to cope with sudden and temporary spurt of work demands appointment temporarily to a service of such temporary workmen to meet such exigencies and as soon as the work or service is completed, the need to dispense with the services may arise. In that situation, on compliance with the provisions of Section 25-F resort could be had to retrench the employees in conformity therewith. Particular statute or statutory rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies.

8. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

9. It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill Vs. Chief Election Commissioner, the Constitution Bench held that 'civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th edn., page 1487 defined civil rights are such as belong to every citizen of the state or country they include rights capable of being enforced or redressed in a civil action In State of Orissa Vs. (Miss) Binapani Dei, this court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was

given it was held that superannuation was in violation of principles of natural justice.

10. In State of W.B Vs. Anwar Ali Sarkar per majority , a seven judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. In Maneka Gandhi Vs. Union of India, another Bench of seven judge held that the substantive and procedural laws and action taken under them will have to pass the test under Article 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority, which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way, which is free from even the appearance of arbitrariness, unreasonableness and unfairness. They have to act in a manner, which is patently impartial and meets the requirements of natural justice.

11. The law must therefore be now taken to be well settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right , just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both."

4. Learned counsel for the applicant has further placed reliance on the judgment passed by the Hon'ble Supreme Court in Sukhdeo Vs.

Commissioner, Amravati Division, Amravati and another (1996)5 SCC 103, in which the Hon'ble Supreme Court has held as under : -

"6. It is settled law that when the Government resorts to compulsorily retire a government servant, the entire record of service, particularly , in the last period of service is required to be closely scrutinized and the power would be reasonably exercised. In State Bank of India Vs. Kashinath Kher (JT at p. 578 para 15), this court has held that the controlling officer while writing confidential and character report, should be a superior officer higher above the cadres of the officer whose confidential reports are written. Such officer should show objectivity , impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer, lest the officers get demoralized which would be deleterious to the efficacy and efficiency of public service. In that case, it was pointed out that confidential reports written and submitted by the officer of the same cadre and adopted without any independent scrutiny and assessment by the committee was held to be illegal. In this case, the power exercised is illegal and it is not expected of from that high responsible officer who made the remarks. When an officer makes the remarks he must eschew making vague remarks causing jeopardy to the service of the subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy. In this case, the controlling officer has not used due diligence in making remarks. It would be salutary that the controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him the deficiency he notices for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in writing for improvement and yet was not availed of so that it would form part of the record. The power exercised by the controlling officer is per se illegal. The Tribunal has not considered this aspect of the matter in dismissing the petition. The appellant is entitled to reinstatement with all consequential benefits. The appeal is accordingly allowed with exemplary costs quantified at Rs. 10,000/- recoverable by the State from the officer who made the remarks.



5. Learned counsel for the applicant has also relied on another judgment passed by the Full Bench of Central Administrative Tribunal, Ernakulam in I. Raju Vs. Chairman and Managing Director, B.S.N.L., New Delhi and Ors, reported in Administrative Tribunal Full bench Judgment 1997-2001 page 411. In the said judgment, the Full Bench has held as under :-

"10. As far as the applicant is concerned, indisputably there was no communicated adverse remarks in his ACRs nor was any disciplinary proceedings pending against him at the relevant point of time.

11. When the Tribunal comes to a conclusion that a person was not considered for promotion or the consideration was illegal, then the only direction that can be given is to reconsider his case in accordance with law (See State of Madhya Pradesh Vs. Srikant Chaphekar (1993) 23 ATC 377).

12. Learned counsel appearing for the respondents drew our attention to the ruling in Union of India and another Vs. Samar Singh and others [(1996) 10 SCC 555] and sought to justify the stand of the respondents. The said ruling has no application to the facts of the case at hand for the reasons that it relates not to non-selection post.

13. Accordingly, the question is answered thus:

When promotion is based on seniority-cum-fitness, the incumbent is entitled to be re-considered for promotion when adverse entries in the ACRs have not been communicated to him for the relevant period ignoring the findings of the DPC that incumbent is "Not yet fit" on the basis of ACRs."

6. The respondents in their reply have submitted that the post of Motor Electrician Gr. I became available only in October, 2000 and not in 1997, as submitted by the applicant. They have further submitted that applicant was called for suitability test held on 28.03.2001 and the result was declared on 12.04.2001. The respondents have also submitted that they have taken in to account the comprehensive CRs of the applicant for the last three years but he was found unsuitable " as the

CRs for the year 1999-2000 were adverse". Therefore, his junior Sri Rama Kant was called for the aforesaid test but he was also not found suitable. The respondents however, did not deny the submission of the applicant that the adverse remarks for the aforesaid period was communicated to the applicant only on 30.05.2001.

7. We have heard learned counsel for the parties and perused the entire pleadings available on record.

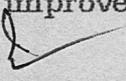
8. Going by the submissions of the respondents, the post of Motor Electrician Gr. I fallen vacant on promotion of incumbent Sri Vijay Bahadur in October, 2000. The suitability test of the applicant was held on 28.03.2001 and the result of the same was declared on 12.04.2001. He was not appointed because he was found unsuitable for that post by the competent authority. The reasons for declaring him as unsuitable admittedly was adverse remarks contained in the ACR for the years 1999-2000. The respondents have also admitted the fact that the adverse remarks for the aforesaid years were communicated to the applicant only on 30.05.2001 i.e. after the suitability test was held on 28.03.2001 and the result was declared on 12.04.2001.

9. It is well settled principle and fundamental rules of law that no decision should be taken against a person, which will affect his right, without informing him the reasons thereof and affording him an opportunity to explain his case. An order involving civil consequences must be made consistently with the rules of natural justice. Admittedly the adverse remarks contained in C.R of the applicant for the year 1999-2000 were the reason for declaring him as illegible and unsuitable for the

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post of Motor Electrician Gr. I. Again it is admitted position by the respondents that before those adverse remarks were considered and held against the applicant, he was never informed about the adverse remarks made in the CR for the year 1999-2000. If the applicant had been informed about it, he would have got an opportunity to explain the reasons why such remarks should not have been there and if his contentions were accepted , those adverse remarks would have been expunged by the higher authority.

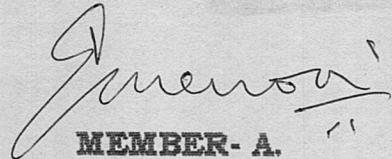
10. It is also seen from the impugned Annexure - 2 letter dated 30.05.2001 that adverse remarks as communicated to the applicant are very vague . The controlling officer has not used due diligence in making these remarks. The controlling officer of the applicant have recorded adverse remarks in the CR of the applicant for the year 1999-2000 without giving him any prior opportunity for improvement. On this ground alone, adverse remarks recorded in the CR of the applicant for the year 1999-2000 is to be treated as non existent. Secondly, the respondents have clearly violated the fundamental rules of law by denying the applicant an opportunity to make representation against the adverse remarks recorded in his ACR for the aforesaid year, which was taken in to consideration by the selection committee for determining his suitability for the post of Motor Electrician Gr. I. Such communication of adverse remarks also has to be declared as illegal and contrary to law. As held by the Apex Court, it is salutary that the controlling officer before writing adverse remarks should give prior sufficient opportunity in writing by informing him the deficiency, he noticed, for improvement. In spite of the opportunity given to the employee, if he has not shown any improvement, then the controlling authority would be justified in



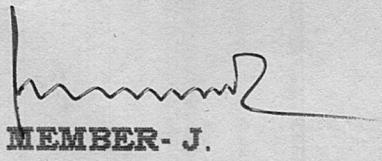
recording the adverse remarks. It is not the case of the respondents that the controlling authority has taken any such action. Undisputedly, the adverse remarks were communicated to the applicant only after the suitability test was conducted and declared unsuitable for the higher post. As held by the Apex Court in the aforementioned case, the action of the respondents in not communicating the adverse remarks to the applicant in time and taking those un-communicated adverse remarks into consideration for considering him suitability and declaring him unsuitable, are absolutely arbitrary and against the principles of natural justice. As held by the Full Bench (Supra), "when promotion is based on seniority-cum-fitness, the incumbent is entitled to be re-considered for promotion when adverse entries in the ACRs have not been communicated to him for the relevant period ignoring the findings of the DPC that incumbent is "Not yet fit" on the basis of ACRs. In normal circumstances, we also would have directed the respondents to hold a suitability test again for consideration of the applicant for promotion to the post of Motor Electrician Gr. I ignoring the adverse entries in the CRs for the year 1999-2000 and if found suitable, to promote him to the said post. In our considered opinion such a course of action would be a futile exercise because the only reason, even according to the respondents to declare him as unsuitable for the aforesaid post is the un-communicated adverse remarks in his ACRs for "year 1999-2000", which are unjustifiable in the eyes of law. Once these un-communicated adverse remarks are ignored, there are no other reasons for the respondents to deny promotion to the applicant, as it is an admitted fact that the entrance of the adverse remarks in the ACR for the year 1999-2000 was the only reason for declaring him as unsuitable for promotion.

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11. In the above facts and circumstances of case, the O.A is allowed. The impugned orders dated 12.04.2001 (Annexure- 3) and order dated 05.09.2001 (Annexure- 1) are quashed and set aside. Since the only reason for declaring the applicant unsuitable for promotion to the post of Motor Electrician Gr. I is the adverse remarks contained in his ACR for the year 1999-2000 and the same has been set aside, the respondents shall promote the applicant on the post of Motor Electrician Gr. I w.e.f. 12.04.2001 in the pay scale Rs. 4500-7000/- with all consequential benefits including the arrears of pay and seniority in the grade. The respondents shall comply with the aforesaid orders within a period of three months from the date of receipt of copy of this order. No costs.



MEMBER - A



MEMBER - J.

/ Anand/