



**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A. No.4563 of 2018

Orders reserved on : 24.08.2021

Orders pronounced on : 16.09.2021

(Through Video Conferencing)

**Hon'ble Mr. A. K. Bishnoi, Member (A)
Hon'ble Mr. R.N. Singh, Member (J)**

Kunal Kumar, aged 34 years, Group 'B',
S/o Sh. S.B. Mishra
Working as Traffic Inspector (Planning)
in Northern Railway, Ferozepur,
R/o H.No.407A, Double Storey Railway Colony,
Ferozepur Cantt.

... Applicant

(through Advocate Shri Yogesh Sharma)

Versus

1. Union of India through the General Manager,
Northern Railway, Baroda House, New Delhi.
2. The General Manager(P)
Northern Railway, Baroda House, New Delhi.
3. Sh. Irshad Ahmed,
Through the General Manager(P)
Northern Railway, Baroda House, New Delhi.

... Respondents

(through Advocate Shri Satpal Singh)

ORDER**Hon'ble Mr. R. N. Singh, Member (J):**

In the present Original Application filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has challenged the provisional panel dated 22.12.2017 (Annexure A/2) for the post of Assistant Operating Manager/N.R. (hereinafter referred to 'AOM') to the extent that the name of the applicant has not been included therein and the orders dated 16.2.2018 (Annexure A/3) and dated 12.11.2018 vide which the respondents have rejected the representation of the applicant.

2. Brief facts leading to the present OA are that the applicant was initially appointed under the respondents to the post of Traffic Apprentice on 25.11.2008 and after completion of requisite training, he was posted w.e.f. 17.3.2011 and since then he has been working on the post of Traffic Inspector – Group 'C' post. The respondent Nos.1 and 2 vide order dated 6.1.2016 decided to conduct selection for promotion from Group 'C' post to Group 'B' post, i.e., to the post of AOM in the Northern Railway under 30% quota against vacancies through Limited Departmental Competitive Examination (LDCE) to fill up 5 vacancies (4 unreserved and 1 SC) under 30% quota



through LDCE. The applicant was fulfilling the eligibility criteria for participating into the said selection and he accordingly applied for the same. He participated in the written examination, which was conducted on 16.10.2016 and he qualified the same. As per the Recruitment Rules, the mode of selection is as under:-

	Prescribed papers	Max Marks	Qualifying Marks
a)	Professional Paper-I	150	90
b)	Professional Paper-II	150	90
c)	Viva Voce	25	30 (including at least 15)
d)	Record of service	25	Marks in the record of service

2.1 The marks of each grading of ACRs/APAR are as under:-

1. Average - 2 marks
2. Good- - 3 marks
3. Very Good - 4 marks
4. Outstanding - 5 marks

2.2 The result of the written test was declared vide order dated 18.9.2017 (Annexure A/5) and order dated 9.10.2017. The applicant also participated in the relevant viva voce on 23.10.2017 and he qualified the same. However, the applicant's name did not figure in the final panel of selected candidates prepared by the respondents



vide order dated 22.12.2017 (Annexure A/2). The applicant was confident of his selection keeping in view of the fact that he has secured second highest marks in the written test and have done very good in the viva voce and he was having outstanding service record, i.e., 1GM and 3 DRM awards. Accordingly, the applicant submitted his representation dated 25.12.2017 requesting the respondent Nos.1 and 3 to include his name in the panel. However, the said representation of the applicant was rejected vide order dated 16.2.2018 (Annexure A/3) whereby the applicant was informed that he has secured 238 marks whereas the last selected candidate secured 240.5 marks out of 350 marks and, therefore, his name did not figure in the list of final selected candidate. The applicant sought information under Right to Information ACT regarding his marks in the aforesaid selection process and vide letter dated 5.1.2018, the applicant was informed the breakup of the marks, which is as under:-

Paper-I	:	110
Paper-II	:	98
Record of Service	:	20
Viva voce	:	10

2.3 After perusing the information provided to him under RTI, the applicant found that he has been awarded marks in respect of his service record wrongly in as much as he



is having four ACRs with outstanding grading and no marks have been awarded to him for the fifth year in spite of he being reported as outstanding by the officer concerned. Accordingly, he should have been given 25 marks in respect to his record of service. Had this been done, the applicant could have secured 25 marks for record of service and his total marks would have been 243 marks, i.e., over and above 240.5 marks secured by the last selected candidate.

2.4 Aggrieved of the aforesaid, the applicant approached this Tribunal earlier vide OA 1308/2018, as the applicant has approached this Tribunal against the aforesaid order dated 22.12.2017 and during the pendency of the OA, the respondents have issued the order dated 14.8.2018 (Annexure A/11) on the subject : Problem being faced in finalizing selection – non availability of APARs. The same reads as under:-

“It has been noticed that sometimes while conducting selections some APARs are not available for the period under consideration. This results in delay in finalization of Selections and divergent views/methodology is adopted by the members of the Selection Committees. Number of Court cases/staff representations are received after issue of panel due to lack of uniform procedure being adopted in selections.

In order to have uniform procedure over Northern Railway the undernoted methodology as a guiding factor, be adopted by the Selection



Committees to avoid complaints and litigations at a later stage:

S. No.	Problem Faced	Guiding Principle for Selection Committee
(1)	Employees though fulfil requisite length of service for eligibility but APARs for the entire period under consideration is not available as he has not earned due to training, study leave etc.	In such a situation, the average of available APARs should be taken for the entire period.
(ii)	APAR missing for a particular year in the zone of consideration.	APAR of previous years are to be taken into account to complete 5/3 years APARs as the case is. Railway Board letter no. E(GP)89/ 230 dated 29.09.89.
(iii)	APARS of some of the candidates are not accepted/countersigned by the Reviewing/accepting Authorities.	Since accepting authority may not be available on the post, the grading given by the reporting officer may be considered by the selection committee.
(iv)	APARs of some of the candidates filled in old format in which attributes columns are not available.	In such cases, overall grading may be considered by the selection committee.

Similar methodology will be adopted for MACP too. Instructions contained in PS No.14600/12 (RBE-155/2016) to be followed.

Illustration example for S.NO.(i) is attached for information:

In situation not covered by above instruction, the selection committee may devise its own methodology. The above guidelines will be applicable with immediate effect.

This has the approval of competent authority.”

3. It was contended on behalf of the applicant that in view of the provisions of guiding principles for Selection



Committee at serial No.(1) by the aforesaid clarification dated 14.8.2018, the respondents were duty bound to award average marks for non-available APARs as out of the fifth APARs, first year APAR was not available to him as he was under training. The said OA was disposed of by this Tribunal vide Order/Judgement dated 28.9.2018. Para 2 of the said Order/Judgment (Annexure A/12) reads as under:-

2. In the circumstances, the OA is disposed of without going into the merits of the case by directing the respondents to consider the claim of the applicant in terms of the proceedings dated 14.08.2018 and if the said proceedings are applicable to the applicant, they may take a final view and pass appropriate orders within sixty days from the date of receipt of a certified copy of this order. Accordingly, the OA and MA stand disposed of. No costs.”

In purported compliance of the aforesaid direction of this Tribunal dated 28.9.2018, the respondents have passed the aforesaid impugned order dated 12.11.2018 (Annexure A/1). In the said impugned, the respondents have admitted that the applicant had completed five years service to participate in the aforesaid selection process by counting the training period immediately before his appointment as per the relevant instructions, i.e., PS No.8208 and, therefore, on being qualified was called for interview. However, he could not earn total 05 APARs as on 01.07.2015 since no APAR was due during his training



period and working reports are not considered in the selection process for promotion to Group 'B' post. In the impugned order, the respondents have also contended that instruction/clarification dated 14.8.2018 under reference is effective only w.e.f. 14.8.2018 and not applicable in the case of the applicant, as his case cannot be considered in terms of the guidelines issued vide the letter dated 14.8.2018. In this back ground, the applicant has approached this Tribunal wherein the applicant has prayed for the following reliefs:-

- “(i) That the Hon’ble Tribunal may graciously be pleased to pass an order of quashing the impugned provisional panel dated 22.12.2017 (Annex.A/2) to the post of AOM/N.R. to the extent by which the name of the applicant has not been included and also quashing the impugned order dated 12.11.2018 and dated 16.2.2018 (Annex.A/1 & A/2), declaring to the effect that the same are illegal, arbitrary and against the law of the land and consequently, pass an order directing the respondents to award correct marks in respect of service record of the applicant, by awarding the marks in respect of service record of the applicant, by awarding the marks of 5th year ACR by applying averaging of other years of ACRs and consequently, consider the applicant for his promotion to the post of AOM from the date of promotion of similarly situated persons with all the consequential benefits including the arrears of difference of pay and allowances.
- (ii) Any other relief which the Hon’ble Tribunal deem fit and proper may also be granted to the applicants along with the costs of litigation.”



4. Pursuant to notice from this Tribunal, the respondents have filed the reply. The factual matrix as contended by the applicant and recorded hereinabove has not been disputed by the respondents in the said counter reply. They have asserted that the applicant has earned 4 APARs for the period ending 31.03.2012 to 31.03.2015, i.e., as on crucial date of reckoning eligibility for assessment period from 01.07.2015 to 30.06.2017. It is reiterated by the respondents in their counter reply, particularly, in paras 4.14 to 4.17 that the order dated 12.11.2018 has been passed in compliance of the aforesaid direction of this Tribunal dated 28.9.2018 in the previous OA and the instructions/guidelines dated 14.8.2018 are applicable with immediate effect.

5. The applicant has filed his rejoinder. In the rejoinder, the applicant has reiterated his submissions as made in the OA. The applicant has also reiterated that in para 219(n) of the IREM Vol.I, there is a provision of granting average marks of other years in case of non availability of ACR of one year. Counsel for the applicant has submitted that it is not that average marks for non-availability of APAR(s) is provided in para 219(n) of the IREM Vol.I but also this practice was followed earlier as would be evident from Circular dated 3.8.2013 (Annexure A/9) and the guidelines vide letter dated 14.8.2018 has



been issued only to remove the doubts of the concerned authorities and to set out the problems being faced in finalizing the selection and, therefore, the guidelines dated 14.8.2018 is a mere clarification and will not be applicable prospectively. Rather the same would be applicable retrospectively, i.e., from the date of the original rule/instructions. To substantiate this argument, learned counsel for the applicant referred to and relied upon the Judgment of the Hon'ble Apex Court dated 15.5.2007 in Appeal (Civil) No.2527 of 2007, titled **S.B. Bhattacharjee vs. S.D. Majumdar and others**, and Order/Judgment of the Hon'ble High Court of Allahabad in Service Single No.3597 of 2020, titled **Mohit Kumar and others vs. State of U.P. and others**,

6. *Per contra*, learned counsel for the respondents Shri Satpal Singh with the assistance of the reply filed on behalf of the respondents has argued that though the applicant has completed eligibility for participating into relevant selection process. However, before having fifth year of service, he was having only four years of APARs in as much as for the initial one year, he was under training and the reports/assessment for the training period could not be construed as APAR and the same will not entitle the applicant for marks against the service record. He has further added that clarification dated 14.8.2018 (Annexure



A/11) will be applicable only prospectively, i.e., 14.8.2018 and not retrospectively. He has also argued that as the result of the applicant has been prepared prior to issuance of the aforesaid clarification/guidelines vide letter dated 14.8.2018, the same is of no help to the applicant.

7. We have heard the learned counsels for the parties and we have perused the pleadings on record and have also considered the submissions made by the learned counsels for the parties.

8. It is not in dispute that the applicant was found eligible to participate in the selection process for the post under reference and he participated in the same. In paper No.1, he has secured 110 marks and he has secured 98 marks in paper No.II. He has secured 10 marks in viva voce. The only dispute is that on the basis of his APARs for four years, i.e., from the date of his joining, he has been awarded 20 marks and the marks have not been awarded to him against the record of service for the initial year in which he was under training. It is also not in dispute that provision of para 219(n) of IREM Vol. I provides that 'where minimum residency period for promotion to the next higher grade is two years and the ACR for the third year is not available, average marks of the last two ACRs be taken into account for the purpose of ACR for the third year, so that all eligible candidates having rendered



minimum two years of service are considered for selection to the next higher grade'. It is also not in dispute that vide circular dated 30.08.2013 (Annexure A/9) the Railway Board has clarified that in order to avoid any ambiguity on the issue, average marks of the last two ACRs be taken into account for the purpose of ACR for the third year, wherein minimum residency period for promotion to the next higher grade is two years and the ACR for the third year is not available so that all eligible candidates having rendered minimum two years of service are not deprived of being considered for selection to the next higher grade on the ground of non-availability of ACR for the third year. The annexure to the said guidelines dated 14.8.2018 reflects that for Group 'B' Selections (Railway Board letter No.E(GP) 2000/2/95 dated 16.01.2001) provides that where ACR for 2011, 2012, 2013, 2014 and 2015, i.e., five years to be considered, however, APAR/ACR is not available for the year 2011, average marks are to be given for the year, i.e., 2011.

9. Now the issue arises from the pleadings on record and arguments of the learned counsels for the parties, is that as to whether the guidelines vide circular dated 14.8.2018 (Annexure A/11) will be applicable prospectively or retrospectively.



10. The aforesaid issue is no more *res integra* in view of the Judgment of the Hon'ble Supreme Court in the case of **S.B. Bhattacharjee** (supra). In this regard, we may refer to paras 26 to 29 of the said Judgment, which read as under:-

26. The clarification issued by the State is not in the teeth of the illustration given in clause (g) of paragraph 3.4 of the Office Memorandum. The clarification having been issued, the same should be taken into consideration by this Court irrespective of the fact as to whether it was available to the Public Service Commission on 16.03.2004 when the DPC held its meeting which, in our opinion, was not of much significance. The clarification being explanatory and/or clarificatory, in our opinion, will have a retrospective effect.

27. In *S.S. Grewal v. State of Punjab and Others* [(1993) Supp. (3) SCC 234], this Court stated the law thus :

"\005In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Edn., p. 58) It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 insofar as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980\005"

28.. Yet again in *Commissioner of Income-Tax, Bombay and Others v. Podar Cement Pvt. Ltd. and Others* [(1997) 5 SCC 482], this Court referring to a large number of authorities including that of G.P. Singh's *Principles of Statutory Interpretation*, observed :



"\005An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law."

29. This Court in *Allied Motors (P) Ltd. v. Commissioner of Income Tax, Delhi* [(1997) 3 SCC 472], observed :

"13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Jodha Mal Kuthiala v. CIT*, this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

[See also *Zile Singh v. State of Haryana and Others* [(2004) 8 SCC 1]"

The said view is further evident from the Judgment of the Hon'ble Allahabad High Court in the case of ***Mohit Kumar*** (supra). Paras 34 and 35 of the said Judgment read as under:-



34. If a new Government Order/ Office Order/ Memorandum/ Act/ Rule is 'to explain' an earlier Government Order/ Office Order/ Memorandum/ Act/ Rule, it would be without object unless construed retrospective. An explanatory/clarificatory Government Order is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Government Order. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Government Order is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Government Order may be purely clarificatory to clear a meaning of a provision of the principal Government Order which was already implicit. A clarificatory amendment of this nature will have retrospective effect.

35. Hon'ble Apex Court in the case of ***Mukul Kumar Tyagi vs The State of Uttar Pradesh and others; (2020) 4 SCC 86*** has held that the candidates who were covered under the guidelines dated 03.05.2016 were also treated as equivalent to 'CCC' Certificate. In this case, while issuing clarificatory Government Order dated 05.07.2018 in pursuance to the Government Orders dated 3/6.05.2016 and 23.09.2016, the State Government had clarified that the candidates who applied for all the public services/ posts shall be entitled for the benefit of equivalence to 'CCC' certificate. In paras 71 and 72 of *Mukul Kumar Tyagi's case (supra)*, the Apex Court has held as under:

"71. The above direction indicates that select list insofar as the candidates, who had certificates from NIELIT/DOEACC was not quashed, their position in the select list was not disturbed and select list was partly quashed only with regard to those candidates, who did not have CCC or NIELIT certificate. The object or purpose of



the direction was to scrutinise the qualifications of those candidates, who have claimed equivalent certificate. The above direction of the learned Single Judge was only for the purpose to scrutinize the qualification of those candidates, who are found possessing equivalent computer qualification so as to retain their names in the select list. After the judgment of the learned Single Judge dated 7-10-2017 [Prashant Kumar Jaiswal v. State of U.P. Writ A No. 41750 of 2015, order dated 7-10-2017 (All)], the Commission in revising the merit list accepted the guidelines given under the Government Order dated 3-5-2016. The guidelines prescribed under the Government Order dated 3-5-2016 are as follows:

“(a) The qualification of High School or intermediate examination with an independent subject or Computer Science from Madhyamik Shiksha Parishad, Uttar Pradesh or from any Institution/Education Board/Council established by the Central or any State Government.

(b) If any candidate has obtained diploma or degree in Computer Science then he shall also be eligible to be recruited as Junior Assistant/Stenographer.”

72. *Thus, in the revised select list apart from candidates, who had CCC certificates from DOEACC/NIELIT, the candidates who were covered under guidelines dated 3-5-2016 were also treated as equivalent to CCC and were given place in the merit list subject to marks secured by them in the written test and interview.”*



11. In view of the aforesaid, we are of the considered view that OA deserves to be allowed and the same is accordingly allowed with the following orders:-

- (i) The impugned order(s) dated 12.11.2018 (Annexure A/1) and dated 16.02.2018 (Annexure A/3) are quashed;
- (ii) The respondents nos.1 and 2 are directed to revisit the order dated 22.12.2017 (Annexure A/2) as the same has been issued without giving the benefit of the Circular dated 14.8.2018 (Annexure A/11);
- (iii) The respondents are directed to revise the list of successful candidates by awarding the average marks to the applicant for the period/year in which the applicant was under training in view of the provisions of their circular dated 14.8.2018 (Annexure A/11). If on revision of such list of successful candidates, the name of the applicant figures in the selected panel, the applicant shall be entitled for the promotion to the post of AOM from the date of his junior in merit/seniority, as the case may be, on notional basis. The applicant shall be entitled for seniority in view of his such promotion and he will be entitled for the fixation of his pay on notional basis. However, he will not be entitled for difference of arrears; and



- (iv) The respondents shall complete the aforesaid exercise and pass necessary orders in this regard as expeditiously as possible and in any case within 10 weeks of receipt of a copy of this Order.

12. However, in the facts and circumstances, there shall be no orders as to costs.

(R.N. Singh)
Member (J)

(A. K. Bishnoi)
Member (A)

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