

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

THIS THE 24th DAY OF MAY, 1999

Original Application No.1628 of 1993

HON.MR.JUSTICE NEELAM SANJIVA REDDY,V.C.

HON.MR.G.RAMAKRISHNAN, MEMBER(A)

Arjun Idnani, Son of late Godhumal
R/o 405-C, krishnapuri, beharipur Mathiya
Bareilly-243 003

.. .. Applicant

(By Adv: shri G.D.Mukherjee)

Versus

1. The Union of India through the Chairman
Railway Board, Rail Bhawan, New Delhi.
2. The General Manager, North Eastern
Railway, Gorakhpur.
3. The Financial Adviser and Chief Accounts
Officer, North Eastern Railway
Gorakhpur.

.. .. Respondents

(By Adv:Shri A.K.Gaur)

O R D E R(Reserved)

BY HON.MR.G.RAMAKRISHNAN, MEMBER(A)

This is an application under section 19 of the Administrative Tribunals Act filed by the applicant seeking to quash the Railway board' letter No.E(NG)I/91/PM/9/7 dated 13.11.1992 and FA&CAO/NE Railway/Gorakhpur's letter No.AD/90/4/4/Loose/992/90 dated 30.11.92.

2. Facts which are not in dispute are that the applicant was posted in Coaching Accounts office, North eastern Railway, Izat Nagar as Clerk Grade-I in the year 1960. Applicant appeared in Appendix III(IREM) Examination in 1961 with Travelling Inspector of Accounts(TIA for short) group as his option, and on passing the same, was empanelled for promotion to the post of TIA. The applicant was promoted as TIA on availability of vacancy in term of Office Order No.169 dated 10.7.1976. Applicant refused the

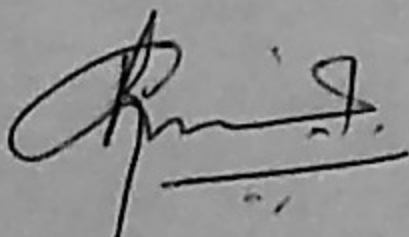
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same and was debarred for promotion for one year w.e.f 11.10.76. After one year he was again promoted as TIA in terms of Office Order No.81 dated 9.5.1978 for the second time. But the applicant again refused and therefore was debarred for promotion for one year in terms of Office Order No.85 dated 17/18.5.1978. Again the applicant was promoted for the third time in terms of Office Order No. 85 dated 20.4.81 with effect from 1.4.81. Applicant was an office bearer of North Eastern railway men's union and his case was taken up by the Union in 1980 and 81 and again 1990 and 91 when the issue of non promotion of the applicant was raised as an agenda item in the PNM meeting at G.M's level and for informal meeting with FA&CAO/NE Railway, the union was replied by respondent no.2 vide letter No.AD/90/4/4/7G dated 7.2.91(Annexure 1 of OA)

3. Applicant states that his case of non-promotion as TIA was taken up by the Union for discussion at the Zonal level and during the discussions held on 18/19.4.1991 the respondents took the stand^{that} in accordance with the Railway Board's letter dated 21.1.1965 (Annexure 2) the applicant after two refusals may be removed from the panel for further promotion. The Union leaders pointed out that in accordance with Railway Board's letter No. E(NG)XI-66 dated 10.1.1966 a TIA may be debarred from promotion for a period of one year at a time on each occasion, on refusal to carry out promotion order, without disturbing the panel position. According to the applicant, the respondent no.2 took up the matter with Railway board vide letter dated 4.7.91(Annexure 3). After exchange of correspondence and on the basis of the D.O letter dated 6.3.92 of Joint Director(Establishment) Railway Board, Shri K.B.Lall wherein the Railway was advised that they could decide the matter as per the orders prevalent at the relevant time and if some relaxation in the existing rules were required then the matter should be referred to the ^{Railway} Board, respondent no.2

reviewed the case and decided to promote the applicant as TIA and Senior TIA with retrospective effect 28.5.92 and 1.4.87 respectively on proforma basis. The promotion as TIA from 28.5.82 was based on the premise that orders of promotion of the applicant for the third time was issued on 20.4.81 and he could be deemed to be eligible for promotion with effect from 28.5.82 when the first man was promoted after expiry of the period of debarment of the applicant from promotion. According to the applicant respondent no.2 referred the matter to the Railway Board vide letter dated 24.7.92 wherein he had further gone ^{on} to state that since the applicant had retired with effect from 31.3.92 he was entitled to get the benefit of proforma fixation of pay in higher grades for pensionary benefits only and Railway Board was requested to confirm the decision. (Annexure 8). Railway Board vide their letter dated 13.11.92 (Annexure 11) informed the respondent no.2 that Rules regarding qualifying emoluments for the purpose of settlement dues could not be relaxed. Respondent no.3 intimated the applicant vide his letter dated 30.11.92 that the applicant's case was referred to Railway Board and Railway Board did not agree. Applicant sought for the following reliefs in the OA.

- (a) Issue a writ, order or direction in the nature of certiorari quashing the order of Railway board vide letter dated 13.11.92 and communication letter dated 30.11.92 of the respondent no.3.
- (b) Issue a writ, order or direction in the nature of mandamus directing the respondents to promote the applicant as TIA with effect from 28.5.1982 and as Senior TIA with effect from 1.4.1987 and on subsequent higher



promotion to which the applicant is entitled to
in accordance with the promotion rules;

- (c) Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the arrears of pay and allowances of T.I.A w.e.f. 28.5.1982 to 31.3.1987 and also arrears of pay and allowances of senior T.I.A with effect from 1.4.1987 to the date of next higher promotion and also arrears of pay and allowances of the post of subsequent promotion according to law as per entitlement of the applicant.
- (d) To issue any other writ or order or direction which the Hon'ble court may deem fit and proper in favour of the applicant in the circumstances of the case and;
- (e) award costs of this application to the applicant.

4. Respondents filed counter affidavit and resisted the claim of the applicant. According to the respondents the case of the promotion of the applicant as T.I.A came up for discussion in the PNM meeting at the level of Dy.Chief Accounts officer sponsored by North Eastern Railway Employees Union vide agenda item No.19 and was discussed at length in the meeting held on 15/16.12.1980 when the applicant was also present in the meeting as a union representative. Respondents reproduced the noting of the said item as follows.

"Posting of Shri Arjun Idnani as T.I.A-IZN
creation of post.

Deputy Chief Accounts Officer/Traffic agreed to re-examine the issue."

Respondents further stated that on availability of vacancy in the T.I.A Cadre, 6 C.G.I.S were promoted to officiate as T.I.A along with the applicant in terms of Office Order No.85 dated 20.4.1981 with effect from 1.4.1981 against upgraded post. All other staff carried out the promotions except the applicant. Case of the applicant was taken up by the Union in

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view of the decision taken on 15/16.12.1980. After examination of the case, the decision taken was communicated to Divisional Railway Manager, Izat Nagar and copy to Divisional Accounts officer, Izat Nagar under D.O. letter No.SP/RU/71 dated 25/26.6.1981 (Annexure A-2). Respondents stated that raising the issue after an unusual gap of silence of almost 10 years by North Eastern Railway Employees Union as per agenda item for informal discussion with FA&CAO in december 1990 was significant and felt that the same may be because of the fear of the applicant that if he had agitated the matter earlier, he would get shifted out of Izatnagar and the applicant would have had to refuse promotion as he did earlier on a couple of occasions. Respondents stated that under letter dated 24.7.1992 Railway Board's approval for relaxation of existing rules regarding qualifying emoluments for the purpose of settlement dues was requested for and the Railway board replied that rules regarding qualifying emoluments for the purpose of settlement dues could not be relaxed. According to the respondents the application dated 16.6.1992 received from the applicant (after his retirement on 31.3.1992) for promotion as T.I.A had been disposed of in terms of the letter dated 30.11.92 and the same was almost after a lapse of 11 years after 20.4.1981. Respondents stated that on this distant date it was difficult to produce all the connected reference received in this regard. They pleaded that the OA is devoid of merits and force and was liable to be dismissed.

5. Applicant filed rejoinder affidavit and reiterated what was stated in the OA.

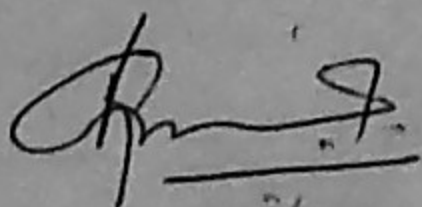
6. Heard the learned counsel for the parties. On the plea of the respondents that the delay in pursuing the case by the applicant was deliberate as he did not want to leave his place of posting due to union activities, Shri G.D.Mukherjee,

learned counsel for the applicant submitted that there was no provision which empowers this Tribunal to examine the delay which took place when the applicant was pursuing his case for promotion with the department. He submitted that this Tribunal can only examine the delay in filing the application in this Tribunal in accordance with the provisions of Section 21 read in conjunction with Section 20 of the Administrative Tribunal Act, 1985. Shri Mukherjee further submitted that promotion was a fundamental right as enshrined in Article 16 of the Constitution which came under Part III of the Constitution and that fundamental rights could not either be waived by an individual nor he was estopped as provided for Section 115 of the Evidence Act and therefore there was no time limit for invoking the fundamental rights which always subsisted. He relied on AIR 1986 SC page 180 (Constitution Bench) (Olga Tellis Vs. Bombay Municipal Corporation and Others) paras 28 and 29 wherein the Hon'ble Supreme Court held:

"....The preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a

concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well founded is another matter. But, the argument has to be examined despite the concession."

"The plea of estoppel is closely connected with the plea of waiver the object of both being to ensure bonafides in day to-day transactions. In *Basheshwar Nath v. Commissioner of Income tax, Delhi*, (1959) Supp(1) SCR 528: (AIR 1959SC149), a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J and Kapoor J) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ) held that not only could there be no waiver of the right conferred by Article 14, but there would be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the

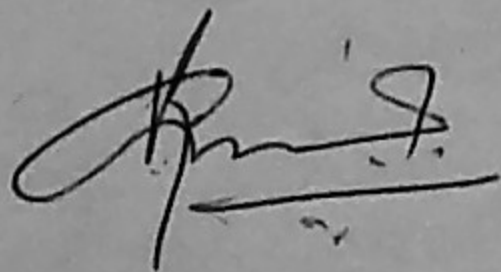


benefit of the individual and those enacted in public interest or on grounds of public policy."

7. Learned counsel for the applicant submitted that the General Manager had recommended promotion of the applicant with retrospective effect and fixation of pay on notional basis, but the Railway Board declined to relax the rules and the applicant was again put back on square one. He referred to para 10 of the counter affidavit and submitted that instead of accepting their own mistake the respondents took up the stand that because the applicant raked up the issue after 10 years, as such he was depanelled after his second refusal, so it was the mistake of the respondents that the applicant could not be promoted in time even though he was very much entitled to and did not refuse it either. He relied on the rulings of the Hon'ble Supreme Court and this Tribunal in the following cases and submitted that the relief sought for need to be allowed.

- (i) Union of India and Others Vs.K.V.Janaki Raman, AIR 1991 SC 2010.
- (ii) R.K.Singh Vs. State of U.P. and Others, 1991 SCC(L&S) 1178
- (iii) U.P.S.E.B and another Vs.Kharak Singh and another (1991) 15 ATC 833
- (iv) P.Velliachamy Vs.Union of India, 1996(1) ATJ page 443- Madras Bench of the CAT.
- (V) S.Paranthaman Vs.Union of India, 1996(1)ATJ 457 Madras Bench of the C.A.T.

8. Shri A.K.Gaur learned counsel for the respondents submitted that it was a settled principle of law that Courts and Tribunals should grant the relief only on the basis of the pleadings of the parties and in the present OA the applicant claimed for promotion w.e.f. 28.5.1982 and that this relief was wholly time barred. He relied on the rulings of the Hon'ble Supreme Court in the following cases.



- (i) Ex.Captain Harish Uppal Vs.Union of India
and Others, J.T.1994(3)SC 136
- (ii) R.C.Samanta and others Vs.Union of India
and Others,(1994) ATC 228
- (iii) S.S.Rathore Vs. State of Madhya Pradesh
A.I.R 1990 Supreme Court 10
- (iv) T.R.Kapoor Vs.State of Haryana
AIR 1989 Supreme Court 2082

9. Further Shri Gaur submitted that since the applicant failed to discharge and shoulder higher responsibility on the post he was not entitled to get any consequential benefits. He submitted that the decision communicated by Railway Board vide letter dated 13.11.92 was a sort of policy decision taken by the Railway Board and as the same was not malafide, arbitrary and without jurisdiction the Tribunal may not have the jurisdiction to interfere with the same. He argued that the power exercised by the General Manager was wholly vitiated in law and the power vested with the Railway Board and not with the General Manager to relax the rules. According to him the first and second reliefs were wholly different and not at all one and same and were plural in nature which was not maintainable in view of Rule 10 of the CAT(Procedure) Rules 1987. Further according to him reliefs (b),(c) and(d) could not be granted as they were highly time barred and submitted for dismissal of the OA.

10. We have given careful consideration to the submissions made by the learned counsel for the parties,rival pleadings and have perused the whole record.

11. Learned counsel for the applicant had submitted that promotion was a fundamental right under Article 16 no time limit was there for invoking the same. However, a seven Judge bench of the Hon'ble Supreme Court in S.S.Rathore Vs State of Madhya Pradesh has held that in case of a service dispute the cause of action must be taken to arise not from the original adverse order but on the date when the order of the higher

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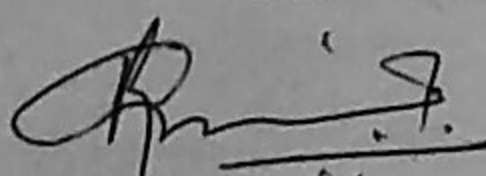
authority where a statutory remedy is provided entertaining the appeal or representation is made ^{and} where no such order is made, though the remedy has been availed of, a six months period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen. This principle has no application when the remedy availed of has not been provided by the law. Repeated unsuccessful representations not provided by law are not governed by this principle. (Para 20) Submission of just a memorial or representation

to the Head of the Establishment shall not be taken

into consideration in the matter of fixing limitation."

(Para 22) In the present OA the orders of promotion of the applicant as T.I.A for the third time was issued on 20.4.1981. The Union of which the applicant was an office bearer made efforts to retain him at Izatnagar by getting a post of T.I.A at Izatnagar; but the same was not agreed to by the respondent no.3 and the decision was advised to the Divisional Railway Manager and the Divisional Accounts Officer by a letter dated 25/26.6.1981. The applicant could have requested for release for carrying out the promotion order then. But the applicant did not make this request. If it is taken that the applicant had refused his promotion, then he becomes due for promotion in 1982. Therefore the cause of action for relief(b) arose in 1981/82. Keeping in view the law laid down by Hon'ble Supreme Court quoted above, read with Section 20 of the Administrative Tribunals Act, 1985 we are of the view that there is weight in the arguments advanced by the learned counsel for the respondents and the relief claimed under ^{Para 8(b)} ~~(a)~~ ~~above~~ is inordinately delayed and is barred by limitation. Further, we find that the Union took up the issue of the applicant in 1980

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and in 1981. Thereafter nothing was brought out by the applicant that he or the Union of which he was an office bearer pursued the matter of his promotion as TIA, till 1991. No explanation was also given by the applicant for this long silence. Further this OA had been filed in August, 1994. In the case of Ex.Captain Harish Uppal Vs. union of India and others Hon'ble Supreme court held:

Parties should pursue their rights and remedies promptly and not sleep over their rights-If they choose to sleep over their rights and remedies for an inordinately long time, the court may well choose to decline to interfere in its discretionary jurisdiction under Article 226 of the Constitution of India".

In the case of R.C.Sharma and others Vs.Union of India and Others, Apex court held:

"Delay itself deprive a person of his remedy available in law"

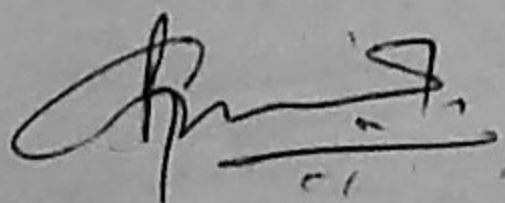
In view of the law laid down by Hon'ble Supreme Court we are of the view that it will not be appropriate for this Tribunal to interfere in the matter of promotion of the applicant as TIA with retrospective effect from 1981. Hence the reliefs under para 8(b) and (c) of this OA are rejected.

12. Applicant has pleaded that his non promotion as TIA was due to the ignorance of the respondents no. 2 and 3 about the Railway Board's letter No.E(NG) xi-66 dated 10.1.1966 and his depanelment. But the applicant has not shown any document to prove that after 1981 he was depanelled, except the reference to the respondent's letter written to the General Secretary, NERMU dated 7.2.1991 and the letter dated 5/6.2.1992 from Divisional Accounts Officer, Izat Nagar addressed to Dy.CAO(G). We have considered the contention of the applicant and have perused these two letters. Nowhere in these two letters it had been stated that the applicant had been

depanelled from 1981. In fact in the letter dated 7.2.1991 in the last sentence of the second para it had been stated that the applicant had not carried out his promotion order till then. In any case respondent no.2 reviewed the position in the light of instruction conveyed under the Railway Board's letter dated 13.2.1992, 6.3.1992 and 17.6.1992 and decided to promote the applicant as TIA and Sr.TIA with retrospective effect from 28.5.1992 and 1.4.1987 respectively on proforma basis. However, respondent no.2 referred the matter to Secretary(E), Railway Board for confirming the decision taken, since the applicant stood retired w.e.f. 31.3.1992 without having shouldered the responsibilities of the higher post/s, the benefit of proforma fixation of pay for higher grade could only accrue to him in the form of pensionary settlement dues and the same would be an unprecedented case, of giving the benefit of proforma fixation of pay in higher grade/s retrospectively, after superannuation, without the incumbent having actually performed the duties of higher post/s, while in service, not covered by normal rules. Applicant submitted that non promotion of the applicant was as a result of the mistake of the respondents and the applicant should not be allowed to suffer loss for the same. We have given careful consideration to the submission made by the learned counsel for the respondents. Janakiraman's case relied upon by Sri G.D.Mukherjee is in the context of Government servants not getting promotions due to pendency of disciplinary proceedings and the action to be taken when they are exonerated. Even in these type of cases, Apex court had not ordered payment of salary and allowances of the higher grade post to which the employee was due for promotion from a retrospective date automatically. Hon'ble Supreme Court had

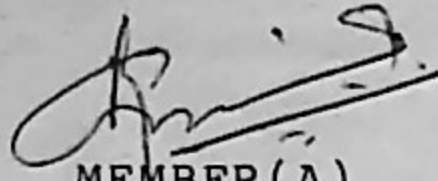
held that whether the officer concerned would be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion would be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceedings/criminal prosecution and where the authority denies arrears of salary or part of it, it will record its reasons for doing so. The OA before us is not one involving disciplinary proceedings. According to the applicant it is a case of mistake of the respondents-i.e. administrative error. We find that Rule 228 of the Indian Railway Establishment Manual Vol-I provides as to how the pay of a Railway employee is to be fixed and to what extent arrears will be payable in a case where he is overlooked for promotion at the appropriate time and his junior is promoted. As in the instant case the decision to give proforma promotion as TIA and Sr.TIA was taken after the retirement of the employee, the applicant is not entitled for any arrears as per the above rule. As the emolument and average emoluments are decided on the basis of actual pay received by the employee at the time of retirement and the last ten months provided for in the Pension rules. If the Railway Board has decided not to relax the rules in favour of the applicant, the same cannot be adjudicated by the Tribunal unless the Tribunal finds that the applicant is entitled for the promotion from a retrospective date. As we have not made such a finding for the reasons given in para 11 above, it will not be appropriate for us to interfere in the decision of the Railway Board. Therefore, we reject the relief sought under para 8(a) of the OA.

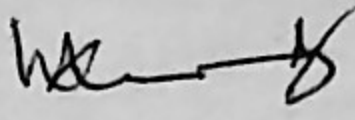
13. In the light of the detailed analysis and reasons^{as} given above the applicant is not entitled for any of the reliefs



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sought for. Accordingly the OA is dismissed with no order as to costs.


MEMBER (A)


VICE CHAIRMAN

Dated: May²⁴, 1999

UV/