

## IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

N E W D E L H I

A H M E D A B A D

B E N C H

O.A. No. 259 of 1987.  
T A X X N o .

DATE OF DECISION 27.2.1991

Shri Prabhakar G. Dhakate Petitioner

Shri D.R. Chaudhary Advocate for the Petitioner(s)

Versus

Union of India &amp; Anr. Respondent

Shri B.R. Kyada Advocate for the Respondent(s)

## CORAM :

The Hon'ble Mr. P.H. Trivedi .. .. Vice Chairman

The Hon'ble Mr. R.C. Bhatt .. .. Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *Y*
2. To be referred to the Reporter or not? *Y*
3. Whether their Lordships wish to see the fair copy of the Judgement? *N*
4. Whether it needs to be circulated to other Benches of the Tribunal? *Y*

Shri Prabhakar G. Dhakate,  
Quarter No. M-54A,  
Rukhadiya Railway Colony,  
RAJKOT.  
(Advocate-Mr. D.R. Chaudhary)

.. Petitioner

Versus

1. Union of India,  
Through : General Manager,  
Western Railway,  
Churchgate,  
Bombay.
2. Divisional Railway Manager,  
Western Railway,  
Kothi Compound,  
Rajkot.  
(Advocate-Mr. B.R. Kyada)

.. Respondents

CORAM : Hon'ble Mr. P.H. Trivedi .. Vice Chairman  
Hon'ble Mr. R.C. Bhatt .. Judicial Member

O.A. No. 259 of 1987

JUDGMENTS CITED : (1) S.L.R. 1987(2)54 Brij Mohan Singh Chopra v. State of Punjab  
(2) 1988(5) SLR Vijay Kumar v. State of Maharashtra (S.C.) 101  
(3) 1985(2)K.L. Gadhvi v. Chief Conservator of Forest (Spl.C.A.) Qureshi J. 1107  
(4) 1973(2) SLR N.G. Prabhu v. Chief Justice (Kerala) 251  
(5) 1990(3) CAT AISLJ Shri Jhon Chacko Padical v. Union of India & Others (Ahmedabad) 178  
(6) 1988(5) SLR Raji Nanji v. Union of India (CAT:Ahmedabad) 121  
(7) Judgment of Gujarat High Court in S.C.A. 1965 & 3166 of 1985-Ajitsinh Raisinh Rathod v. The Chief Conservator of Forest and others.  
(8) Judgment of Gujarat High Court in Second Appeal No. 179/78 - Union of India v. Tejumal Kishanchand Billanchand.  
(9) Judgment of Hon. Supreme Court in Civil Appeal No. 5903/83 - Munshilal Verma v. Union of India.

J U D G M E N T

Dated : 27.2.1991

Per : Hon'ble Mr. P.H. Trivedi .. Vice Chairman

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In this petition, under section 19 of the

Administrative Tribunals Act, 1985, the petitioner was admittedly promoted to the post in the grade of Rs. 700-900 on officiating ad hoc basis and was placed on the panel for the same post, according to him after selection on 8.8.1984 with retrospective effect of 11.7.1981. The post of Rs. 700-900 was upgraded to the scale of Rs. 840-1040 from 1.1.1984. Respondent No. 1 by an order dt. 2.11.1984 did not consider the petitioner suitable for such upgradation. The petitioner's representations dt. 17.11.1984 and 23.6.1986 according to him were not replied to. Again respondent No. 2 by an order dt. 6.2.1987 giving the reason of adverse service record superseded the petitioner. The petitioner's case, therefore, is based upon his claim of being entitled to the post of Rs. 840-1040 because it was merely upgraded and no fresh selection was required for him when the petitioner was empanelled for the post of Rs. 700-900 after selection and that post was upgraded to the scale of Rs. 840-1040. So far as the adverse remarks are concerned, the petitioner has stated that no adverse remark was communicated to him for the period ending 31.3.1983 which was alone to be considered for upgradation. The adverse C.R. ending 31.3.1985 was communicated to him by letter dt. 13.8.1985 in which it is stated that he is "not yet fit for promotion". His representation against it dt. 10.10.1985 was rejected by letter dt. 20/25-2-1986 although according to him the circular dt. 4.4.1985 requires that the said adverse remarks for the period ending 31.3.1985 is not to be considered, the petitioner apprehends to be the reason for it. The petitioner bases his claim to the upgraded scale of Rs. 840-1040 from 1.1.1984 from the date from which his juniors were granted the same and for declaring the decisions by order dt. 2.11.1984 and 6.2.1987 to be illegal.

2. In their reply, the respondents have taken the stand that the panel referred to by the petitioner vide memo dt. 18.8.1983 was for vacancies upto 31.12.1983 and they have disputed that the applicant was not placed on any panel in Rs. 700-900 on 8.8.1984 with retrospective effect from 11.7.1981. The respondents also state that adverse remarks for 1980-81, 1981-82 and 1982-83 were communicated to him by letters dt. 12.10.1982 and 21.11.1987. The petitioner was only considered fit for promotion until the year ending 1983-84. The respondents also state that restructuring of the cadre was done by giving certain per-centages to various grades, 80 posts were restructured. In their letter, the Railway Board had clarified that the existing classification of the posts covered by this restructuring orders as selection and non-selection may remain unchanged and that posts of Rs. 840-1040 was non-selection and it was so even prior to restructuring were non-selection posts as seen from the reply, especially para 3. Reason for refusing the petitioner scale of Rs. 840-1040 is drawn from the adverse remarks for the period ending 31.3.1984, 31.3.1982 and 31.3.1983. The respondents have also resisted the contention that the scale Rs. 840-1040 does not carry any higher responsibility in that CTXR in 700-900 continue to work under CTXR Rs. 840-1040. Respondents have also stated that in terms of Railway Board letter dt. 13.5.1982 no relaxation in safety post is permissible.

3. In his rejoinder, the petitioner has stated that the adverse remarks for the year 1980-81 had not been communicated to him, it was communicated only on 12.10.1982 after the expiry of time prescribed for communication. The petitioner has cited several judgments

to show that the adverse remarks referred to by the respondents should not be allowed to stand in the way of upgradation of his post.

4. It is not disputed that by memo dt. 8.7.1981 the petitioner was promoted on ad hoc basis for 6 months and that by order dt. 9.12.1983, the petitioner is shown to be on a provisional panel in the scale of Rs. 700-900. It is stated in terms that this will have effect from 1.9.1981 but no arrears or fixation of pay will be admissible till the decision of the Supreme Court in one of the petitions is available. On 8.8.1984, in Annexure C-15 against the name of the petitioner under heading "Date of promotion regularised" and "Remarks", it is stated that the date is "11.7.1981" and in the remarks it is stated that "since officiating on ad hoc basis w.e.f. 11.7.1981". Annexure D-18 which is a circular dt. 4.4.1985, the petitioner re-inforces the liberal treatment to be given to the candidates for upgradation as seen from the following:

"In continuation of this office circular No. EP/246/0 dt. 11.3.1985 (P.S. No. 69/85) it is possible that on some of the Divisional/Units, the upgradation may have already been effected taking into account the Confidential Report for the P.E. 31.3.1984 on the premise that even if any of the employee has got an adverse confidential report for the year ending 31.3.1983, the remaining 9 months for the year 1983 he might have improved his performance thereby earning a good report for the year ending 31.3.1984. In these circumstances, these persons should not be deprived of promotion against the upgraded posts.

*(Signature)*  
In other words, if by considering the three C.Rs. for the period ending 31.3.1983, if a person is not considered suitable for promotion, his case can be considered for suitability by such a consideration is advantageous to the employees."

In circular dt. 6.2.1986, the cadre position and

post upgradation are analysed. In letter dt. 6.2.1987 Appendix L-30 and L-31, it is stated that the petitioner is not suitable for promotion in the scale Rs. 840-1040.

5. From the above facts which have not been disputed beyond a bare denial any further substantiation by the respondents it seems clear that the petitioner was placed on the panel for the post Rs. 700-900 to which he was promoted on ad hoc basis, that that post was upgraded to the post of Rs. 840-1040, that the post Rs. 840-1040 was a non-selection post before and after upgradation and therefore, the petitioner's plea that he should have been given that post without any element of higher responsibility or selection being brought in it has force.

6. It is difficult to uphold the respondents' contention that the promotion on the officiation post should not have effect from 11.7.1981 on the basis of the above circular although the effect is limited by the stipulation that arrears of fixation of pay for earlier period would not be allowed.

7. Much of the dispute between the parties centres on the fact or otherwise communication of adverse remarks and the effect thereof on the promotion of the petitioner. From the reply it seems that the petitioner has been given penalties which are minor but nevertheless penalties in terms of the Discipline & Appeal Rules. For adverse remarks not communicated it is trite law that the decision adverse to the petitioner based on such

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uncommunicated adverse remarks are bad in law and cannot be upheld. For adverse remarks which are communicated and against which representation is pending, the respondents are duty bound to dispose them of. In this case, the representations have been rejected but the communicated adverse remarks is merely "not yet fit". Such a remark does not point out any flaw of character or performance and is merely a judgment and by itself cannot stand in the way of deciding upon the petitioner's promotion. They cannot be regarded as non-existing but any fair minded person would regard such a remark as requiring specific conclusion about a particular fault or any adequacy to be substantiated before the aggrieved Government servant is deprived of his promotion especially when his juniors are promoted over his head.

8. The respondents themselves have stated in their reply that the adverse remarks for the year 1980-81, 1981-82 and 1982-83 have been communicated to the applicant vide letter dt. 12.10.1982 and 21.11.1987 which contention the petitioner in his reply has contested stating that the adverse C.Rs. for 1980-81 has not been communicated to him and that the adverse remarks for the year 1981-82 were communicated to him only on 12.10.1982. His stand is that these C.Rs. as of period of one month, have no validity in law. The C.R. for 1986 which was communicated to the petitioner on 28.8.1987 and when his representation dt. 1.9.1987 was pending it influenced the decision against him. The respondents have not strictly proved the communication of the adverse C.R. in the prescribed time but from the date from communication given by them it is fair to conclude that the communications

were made much after the prescribed period.

9. The respondents have made heavy weather of non entitlement of relaxation for safety categories. The relevant instruction cited in this regard states "accordingly, no relaxation be allowed in the prescribed qualifications, period of service and other criteria while filling up these posts". It is not shown how this case relaxation was required to be allowed and the petitioner was not eligible for it as a reason for taking this ground because neither prescribed qualification nor period of service or any other criterian is shown to be requiring relaxation.

10. One ground that the respondents have taken is that even if the promotion post is non-selection post a declaration of unfitness could stand in the way of promotion and if so made a senior employee can be passed over. There has been considerable unhappiness about the description "not yet fit" as it is not categorical enough for "unfit" while it does not add yet to be "fit". The retention of this category has been found inequitable and there is good reason to consider it unjust that a person should be refused promotion without any specific flaw pointed out, without even forming a final judgment that he is unfit in the case of non-selection post. Therefore, we have to read the instruction strictly, "not yet fit" cannot be regarded as synonimus with "unfit" and unless a person is definitely judged to be unfit and so declared, the relevant instruction has to be very strictly construed. In Para 212 states "Non-selection Posts : (a) Non-selection posts will be filled by promotion of the senior most suitable railway servant

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suitability, whether of an individual or a group of railway servants, being determined by the authority competent to fill the post on the basis of the record of service and/or departmental tests, if necessary.

A senior employee may be passed over only if he/she has been declared unfit for holding the post in question. A declaration of unfitness should ordinarily have been made sometime previous to the time when the promotion of the Railway servant is being considered.

(b) When, in filling a . . . non-selection post, a senior railway servant is passed over, the authority making the promotion shall record briefly the reason for such supersession. (c) In respect of non-selection posts, filled from different categories of staff, the following principles should be followed :- (i) The number of eligible candidates to be considered at a suitability test should be twice the number of vacancies. (ii) No hard and fast limits need be prescribed as to the number of candidates to be admitted from each eligible category. In cases where posts are to be filled on a quota basis it should be ensured that each category is adequately represented within the overall number of candidates called up. The employees passing the suitability test shown only be placed on the panel. Employees not qualifying in the test should not be taken merely to make up quota fixed." These instructions which were relied upon by the respondents will not help them.

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11. In this case, declaration of unfitness is not satisfactorily shown to have been made prior to the decision to reject the petitioner. Even according to the contention of the respondents, the impugned orders

dt. 1.1.1984 not granting the petitioner the upgraded scale is before the communication dt. 5.8.1985 Annexure E-19 declaring the petitioner to be "not yet fit for promotion". The petitioner, therefore, has established satisfactorily that the impugned orders dt. 1.1.1984 by which promotion was withheld from him cannot be protected by the instruction on the subject reproduced above.

12. In the result, we find that the petition has merit and the petitioner is entitled to the relief he has claimed to the extent of allowing him promotion to the upgraded scale of Rs. 840-1040 from the date his juniors were granted such a scale with all benefits of seniority, salary etc. The petitioner is also entitled to the declaration that the orders dt. 1.1.1984 and 6.2.1987 are held to be illegal.

No order as to costs.

*R C Bhatt*  
( R C Bhatt )  
Judicial Member

*P H Trivedi*  
( P H Trivedi )  
Vice Chairman