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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR

Original Application No. 174/2006

Dated this the 13th day of April, 2011

CORAM

**HON'BLE MR. JUSTICE S.M.M. ALAM, JUDICIAL MEMBER
HON'BLE MR. SUDHIR KUMAR, ADMINISTRATIVE MEMBER**

Rajeev Prakash Vasu by caste Brahmin
Aged about 42 years resident of Jaisalmer at present
Residing at Old Loco Colony, working a Depot Material Superintendent
Grade II under Assistant Material Manager (Diesel) NW Railway,
Bhugat Ki Kothi, Jodhpur.Applicant

(By Advocate Mr. Girish Joshi)

Vs.

1. Union of India, through General Manager
North Western Railway, Zonal Headquarter,
Opposite Railway Hospital, Hasanpur Road
Jaipur.

2. Deputy Chief Material Manager,
North Western Railway, Near Railway
Workshop, Jodhpur.

.....Respondents

(By Advocate Mr. Kamal Dave)

ORDER

Hon'ble Mr. Justice S.M.M. Alam, Judicial Member

Applicant Rajeev Prakash Vasu presently working as Depot
Material Superintendent Grade-II under Assistant Material Manager(Diesel)
in the North Western Railway, Jodhpur has preferred this OA for grant of
following reliefs:

“(i) That the record of the case may be called for
and the respondents be directed to bestow the seniority

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and pay fixation benefits of my client from the date of occurrence of the vacancy.

(ii) To conduct examination for the post which were lying vacant from year 1999 to 2002 as prescribed for promotions from DMS-III, DMS-II.

(iii) To determine year-2ise vacancies and then follow prescribed procedure.

(iv) To apply modifying selection procedure only to vacancies, which came into existence on account of restructuring.

(v) Each and every prayer made hereinabove is alternative and without prejudice to each other.

(vi) Any other order or direction may be passed in favour of the petitioner, which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.

(vii) Circular dated 9.10.2003 (Annexure.A1) and 6.1.2004 (Annexure.A2) may kindly be quashed and set aside.

2. The facts of the case are as follows.

The applicant entered into the service of the respondents in the year 1991 as DMS-III on being selected against direct recruitment quota of DMS-III. On 23.5.1998 the Railway Administration conducted an examination for the post of DMS-II of which the DMS-III is feeder category. The post of DMS-II is 100% from promotional category. The result of the examination was declared on 29.8.1998 as per Anenxure.A3. As per the advertisement for conducting the examination for the post of DMS-II three posts were advertised out of which two posts were of general category and the remaining third post belonged to Scheduled Tribe category. As per the

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result the petitioner stood at Sl.No.4 and as only two posts were available for general category, the petitioner could not be promoted. It is stated that the post of DMS-II is a selection post and only after selection an incumbent can be promoted to the said post. The further case of the applicant is that after 1998 the Railway administration has not conducted any examination in order to fill up the post of DMS-II as per yearwise vacancy and although yearwise vacancies were available but the respondents failed to notify the same for more than five years period. It is stated that as per Circular of Railway Board bearing No.RB No.279/98 dated 9.12.1998 (Annexure.A4) the respondents were under obligation to hold the examination to fill up the post of DMS-II yearly. Further case of the applicant is that by the Railway Board's Circular No. RBE No.177/2003 all the General Manager's of Railways were directed to restructure Group 'C' and D' staff with a view to rationalizing the staffing pattern of Railways. As per restructuring of category of Deputy Material Superintendent, the distribution of the enhanced percentage of CDMS, DMS-I, II and III were set as 10:30:30:30 respectively. The said circular of the Railway Board has been annexed as Annexure.A.1 of the OA. It is further stated that Railway Board further modified selection procedure vide Circular No. RBE /2004 dated 6.1.2004 (Annexure.A2). It is stated that due to restructuring of the cadre and the modification in the selection process the same has resulted in discrimination to the meritorious candidates. It is stated that although in the year 1998 the applicant was eligible for promotion to the post of DMS-II from DMS-III but by implementation of restructuring after 9.10.2003 the applicant could

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not be promoted. However, the applicant was promoted to DMS-II vide order dated 9.12.2004 and the benefits of promotion were given with effect from 1.11.2003. Applicant claims promotion from back date and for this he has preferred this OA.

3 On filing of the OA, notices were issued to the respondents and in response to the notice, respondents appeared through lawyer and filed reply.

The respondents in their reply has stated that the applicant has no case for grant of the relief claimed as the applicant had undergone the process of

selection for which written examination was conducted on 23.5.1998 for the post of DMS.II and the applicant also stood qualified in the written examination as per the result declared on 29.8.1998 but as the selection was conducted for three posts out of which two posts were general and the third one was reserved and since the applicant could not succeed within the two general category posts as such he could not be granted promotion. The contention of the applicant that the respondents failed to conduct the selection yearly for the post of DMS-II since 1998 cannot be tenable in view of the fact that till the filing of this OA in the year 2006 the applicant did not raise any grievance for non-conducting of the examination for the post of DMS-II yearly by the respondents and so this relief is not available to the applicant at this belated juncture as the grievance had accrued to the applicant in the year 1999 itself. It is stated that the selection can only be held when vacancies are available and the applicant has only the right to consideration for promotion and not that of being promoted on the basis of appearing in the selection procedure. With regard to restructuring of the

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cadre, the respondents have stated that the impugned order dated 9.10.2003 is the order by which the restructuring in Group 'C' and 'D' cadre was made effective and as per Annexure.A2 which is also under challenge certain Group 'C' and 'D' posts were re-arranged on restructuring and on the basis of the restructuring the applicant was promoted to the post of DMS-II vide order dated 9.12.2004 which was made effective from 1.11.2003 and so the applicant cannot be allowed to derive advantage of the restructuring and at the same time to assail the same. It is stated that the applicant has accepted the promotion as DMS-II vide order dated 9.12.2004 without any protest and so he is estopped from challenging the restructuring scheme. It is stated that the claim of the applicant is for grant of retrospective promotion with regard to his grievance of the year 1998-99 but he failed to raise the same deliberately till he got the benefit of modified selection on application of restructuring.

4. Shri Girish Joshi , Advocate appeared for the applicant whereas on behalf of the respondents Shri Kamal Dave appeared and argued the case.

5. During the course of arguments Shri Kamal Dave, learned counsel for the respondents submitted that the relief claimed by the applicant for grant of seniority and pay fixation benefit and for conducting examination for the post of DMS-II since the year 1999 cannot be allowed to the applicant in view of the fact that by virtue of order dated 9.10.2003 restructuring of Group 'C' and 'D' cadre was done and made effective and on the basis of restructuring the applicant was promoted to the post of DMS-

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II vide order dated 9.12.2004 and the applicant has also joined the said post on promotion. So at present the applicant is working on the post of DMS-II and therefore no question of promoting him from back date from the post of DMS-III to DMS-II arises. He submitted that as per the pleadings of the parties it is admitted case that the post of DMS-II is selection grade post and without appearing in the examination/test and without being successful in the examination/test no one can be promoted to the post of DMS-II. Since the applicant has already joined the post of DMS-II on promotion vide order dated 9.12.2004 without any protest as such no question of conducting examination/test for the period from 1999 for promoting the applicant to the post of DMS-II from back date arises.

6. In support of his argument that after promotion of the applicant as DMS-II vide order dated 9.12.2004 and his acceptance of the said promotion without any protest the principle of estoppel will apply in the case of and the applicant will be estopped from claiming relief that he may be promoted from back date, the learned advocate of the respondents has placed reliance upon the following decisions of Hon'ble Apex Court:

1998 SCC (L&S) 1235 –Dr.A.K. Mitra, D.G. CSIR and another Vs. D.Appa Rao and another.

1990 SCC (L&S) 916 – Union of India and another Vs. N..Chandrasekharan and other.

(2000) SCC (L&S) 977 – Suraj Parkash Gupta and others Vs. State of J&K and others.

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7. —7— We have perused the above mentioned decisions and we are of the view that the decision of the Apex Court reported in 1998 SCC (L&S) 1235 is relevant in this case. The relevant lines from para-9 of the decision are being incorporated below:-

“It must be noted that after the appointment of the third respondent as Office Assistant (General) in the year 1972, the first respondent was regularly promoted to the post of Office Assistant only on 6.4.1983 and that being the position and he having accepted the promotion without challenge, it was not open to him to contend that he must be deemed to have been promoted as Assistant (General) w.e.f. 11.4.1972 when the third respondent was appointed by direct recruitment to that post.”

Here in this case also the applicant has accepted his promotion as DMS-II in the year 2004 without any protest and, therefore, we are of the view that now it is not open to him to contend that he should be promoted from back date.

8. As regards the decision in the case of Union of India and another Vs. N.Chandrasekaran and in the case of Suraj Prakash Gutpa Vs. State of J&K (supra) we are of the view that these two decisions are based on different facts and so the same are not very much relevant in connection with this case. However, we are satisfied that once the applicant accepted his promotion in DMS-II vide order dated 9.12.2004 without any protest, at this juncture the applicant is estopped to claim his promotion as DMS-II from back date which require holding of test/examination and passing of the said test/examination. It is true that the applicant has succeeded in

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test/examination in the year 1992 but due to lack of vacancy he could not be promoted to the said post. But this will not support the claim of the applicant for giving him promotion from an earlier date as there is nothing on record to show that during the period from 1999 upto 2004 the applicant made any representation to the authorities concerned to hold examination for the post of DMS-II. It is to be noted that the restructuring scheme in the cadre of Group 'C' and Group 'D' was implemented vide circular of the Government of India, Ministry of Railways (Railway Board) dated 9.10.2003 and after restructuring of the cadre the applicant was promoted to DMS-II vide order dated 9.12.2004 but before his promotion as DMS-II he never challenged this restructuring of Group 'C' and Group 'D' cadres. So at present the applicant will be estopped from challenging the said restructuring of the cadre after taking advantage of the restructuring.

9. Thus we are of the view that the applicant is not entitled for grant of the reliefs claimed. In the result, we find no merit in this application and as such the same is hereby dismissed. In the circumstances of the case, there will be no order as to costs.

Dated this the 13th day of April, 2011



SUDHIR KUMAR
ADMINISTRATIVE MEMBER



JUSTICE S.M.M. ALAM
JUDICIAL MEMBER

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