

CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH
JODHPUR

Original Application No. 137 of 2011

Monday, this the 4th day of June, 2015
2 July - 2016

Hon'ble Mr. U. Sarathchandran, Judicial Member

Hon'ble Mr. Praveen Mahajan, Administrative Member

Rajeev Pathak, S/o. Shri Shiv Nandan Prasad Pathak,
 aged about 52 years, resident of B-III-285, 286 Sudarshan Nagar,
 ahead Nagnechi Temple, Bikaner, at present employed on the post of
 Senior Section Engineer (Ele.) construction on deputation under
 DEE (Cons.), Bikaner, N/W Railway.

Applicant

(By Advocate : Mr. J.K. Mishra)

V e r s u s

1. Union of India, through General Manager (P),
 North Western Railway, Head Quarter, Jaipur.
2. Senior Divisional Personnel Officer,
 Bikaner Division, North Western Railway, Bikaner.
3. Divisional Electrical Engineer (Construction),
 North Western Railway, Bikaner.

Respondents

[By Advocate : Mr. Vinay Jain (R1-3)]

This Original Application having been heard on 26.05.2016, the Tribunal
 on 4/7/2016 delivered the following:

ORDER

By Hon'ble Mr. U. Sarathchandran, Judicial Member –

Miscellaneous Application No. 84 of 2011 for condonation of delay is
 allowed for the reasons stated therein.


2. The short question which crops up in this Original Application is whether
 the ad hoc promotion granted to the applicant to the post of Sr. E.F.O. [re-



designated as Section Engineer (hereinafter referred to as SE)] in 1994 can be counted as the length of service the applicant had put in as SE or not ?

3. Applicant started his service in the Bikaner Division of North Western Railway on 7.9.1985 after he was selected to the post of Chargeman (Electric) through the Railway Recruitment Board, Allahabad in 1983. He joined the service after completion of two years training. He was thereafter promoted to the post of Electrical Foreman (JE-II) in 1989. Due to the transfer of one Shri Prem Singh one post of SE in the grade of Rs. 6500-10500/- became vacant. Applicant was promoted against that vacant post as SE on ad hoc basis for three months vide Annexure A2 order dated 15/22.4.1994. His ad hoc appointment was extended and was allowed to continue as SEF on ad hoc basis till the selected candidate is posted against the vacancy vide Annexure A3 order dated 5.1.1995. No selection for promotion to the post of SE (Ele.) grade Rs. 6500-10500/- was held in Bikaner Division till 2000. The regular selection was made only in 2001. Applicant was selected for the said post and his ad hoc promotion as SE (Ele.) was regularised vide Annexure A4 dated 17.8.2001. Selection to the post of SE in other divisions of the respondent Zonal Railway were conducted in time but only in Bikaner division it was delayed for such a long period without any cogent reason. Thereafter applicant was further promoted to the post of Sr. Section Engineer in the pay scale of Rs. 7450-11500/- with effect from 1.11.2003.

4. The provisional Annexure A5 *inter se* seniority list of Group-C staff of Electrical Department was issued on 10.4.2008. Applicant's name is at serial No. 60 but the persons who are selected and promoted in the scale of Rs. 6500-



10500/- in 1995 have been placed at serial Nos. 35 to 59 above the applicant. A good number of persons in the list are appointees later year than the applicant's appointment in the lower post of Rs. 5000-8000/-. As the applicant came to know that a similarly situated employee Shri A.K. Mathur, CM-I in Ajmer Division was promoted on ad hoc basis from 12.5.1995 while his regular promotion was granted to him on 2.7.2003 and that he was later allowed the seniority from the date of ad hoc promotion, the applicant sent Annexure A6 representation dated 15.5.2010 and requested the authority to grant him the due seniority from the date of ad hoc promotion since his ad hoc promotion was without any interruption till he was posted against a regular post. Though respondent No. 1 vide Annexure A7 dated 12.8.2010 called for remarks on Annexure A6 from the Divisional Manager (Personnel) [respondent No. 2], no action was taken by the respondents on Annexure A6 representation for more than six months. Hence, the applicant submitted a reminder dated 2.2.2011. Respondents thereafter rejected the claim made by the applicant vide Annexure A1 order dated 15.2.2011. Thereafter the respondents published Annexure A10 *inter se* seniority list of Group-C staff of Electrical Department on 28.3.2011 for the purpose of selection to the post of Group-B post (Assistant Electrical Engineer). In Annexure A10 seniority list applicant is placed at serial No. 45 and the persons at serial Nos. 21 to 44 are appointees/promotees of Sr. SE/SE after 1994 and are much juniors to the applicant. Hence, applicant apprehends that on the basis of Annexure A10 it is likely that a Junior SE may be promoted over and above him to the five vacant posts of Group-B gazetted under the 70% quota. Hence, the applicant prays for:

“(i) That impugned order dt. 15.2.2011 (Annexure A-1) may be declared illegal and the same may be quashed. The respondents may be directed to regularise/count the ad hoc period of applicant service on the post of Section Engineer in the scale of Rs. 6500-10500/- with all

consequential benefits and interpolate his name at appropriate place in the seniority and also modify Annexure A4 accordingly.

(ii) That any other direction, or orders may be passed in favour of the applicant which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.

(iii) That the cost of this application may be awarded.”

5. Applicant contends that had the selection been conducted in time along with the selection for SE in other divisions he would have got regular promotion in 1995 itself as SE and would have been on the top in the seniority list than persons at serial Nos. 21 to 44 and hence he has been given a differently treatment in the matter of employment. He relies on the five Judges Bench decision dated 2.5.1990 of the Apex Court in *The Direct Recruit Class-II Engineering Officers' Association & Ors. v. State of Maharashtra & Ors.* - AIR 1990 SC 1607, wherein the Apex Court held that if the initial appointment is not made by following the procedure laid down in the rules but the appointee continues in the post undoubtedly till regularisation of his service in accordance with the rules the period of officiating service will be counted. He states that he had worked in the ad hoc post without any interruption for about seven years followed by regularisation and therefore not reckoning his ad hoc service for the purpose of seniority is ex-facie illegal, discriminatory and is violative of Articles 14 & 16 of the Constitution of India and against the law laid down by the Apex Court in the above case.

6. Respondents resist the O.A contending that Annexures A2 and A3 ad hoc appointments given to the applicant are purely ad hoc in nature. The selection to the post of SEFO/SE(Elec.) grade Rs. 2000-3200/-/Rs. 6500-10500/- was not held

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in Bikaner Division from 1995 to 2000 due to some disputes on reservation issue. When the applicant was given regular appointment with immediate effect by Annexure A4 order dated 17.8.200, he joined on 18.8.2001 and thereafter he was promoted as Sr. SE(Elec.) in the scale of Rs. 7450-11500/- from 1.11.2003. Referring to Annexure R1 Railway Board's circular dated 4.12.1961 respondents state that for selection post seniority is given from the date of empanelment or from the date of announcement of the panel. As the applicant joined on 18.8.2001 he is entitled to get seniority only from that date. The respondents contend that the Apex Court's decision in *Direct Recruit*'s case (supra) is applicable only to initial appointment and not to ad hoc promotion. For selection to Group-B post of AEE in 70% quota, *inter se* seniority of Group-C staff has been prepared from the date of entering into the grade of Rs. 6500-10500/- on regular basis and accordingly the employees placed at serial Nos. 21 to 44 were promoted prior to the applicant on regular basis in the grade of Rs. 6500-10500/- and thus they became senior to the applicant in Annexure A10 seniority list. The *inter se* seniority is prepared on the basis of the length of non-fortuitous service. The Railway Board letter dated 29.3.2010 [(RBE No. 46/2010) Annexure R2] reads:

“In the integrated seniority of group-C employee eligible for group-B selection (70% quota) employees in pay band PB-2 (Rs. 9300-34800) with grade pay Rs. 4600/- will be placed above those in pay band PB-2 (Rs. 9300-34800/-) with grade pay Rs. 4200/-. In either category relative seniority of employee coming from different streams will be determined with reference to the length of non-fortuitous service in the scale of PB-2 + Rs. 4600/- or PB-2 + Rs. 4200/- as the case may be.”

7. It is further stated by the respondents that the applicant has not raised any grievance relating to the delayed conducting of selection to the post of SE in Bikaner Division. It is also contended by the respondents that he has not joined




the other employees who are placed above him in the seniority list as parties in this OA. Respondents pray for rejecting the OA.

8. Applicant filed rejoinder contending that the delay in conducting the selection to the post of SE was not applicable to the applicant who was very well within the zone of consideration and was willing to undergo the selection process. The applicant refers to yet another decision of the Apex Court in *T. Vijayan & Ors. v. Divisional Railway Manager & Ors. - 2000 SCC (L&S) 444*, wherein it was held that employees who have been granted ad hoc appointment are entitled to reckon the period of ad hoc service towards their seniority. According to the applicant Annexure R1 RBE was issued subsequent to the selection of the applicant and hence it does not apply to his case as he was promoted in 1995.

9. We have heard Shri J.K. Mishra learned counsel for the applicant and Shri Vinay Jain learned counsel appearing for the respondents *in extenso*. Perused the record.

10. The focus of the arguments of Shri Vinay Jain was that since the applicant has not challenged Annexures A5 and A6 seniority lists the present OA is not maintainable. Besides, he argued that the employees who are likely to be affected and are placed in the aforesaid seniority list above the applicant ought to have been impleaded as respondents and that without impleading them effective adjudication of this case cannot be done. The arguments of learned counsel for the respondents appear to be quite plausible but the question involved in this case is something beyond the issue of mere *inter se* seniority. We feel that since the



question arising for consideration ie. whether the ad hoc service rendered by the applicant uninterruptedly till he was regularised in the post has to be counted being a question of law which has been answered in affirmative by the Apex Court in *Direct Recruit's* case (*supra*), it has a greater bearing ~~on~~ⁱⁿ the grievance raised by the applicant rather than the issue of assigning him appropriate seniority. Since it is purely an issue of law in the light of the law laid down by the Apex Court in the aforesaid case, assigning appropriate seniority is only consequential in effect which has to be tackled by the respondent Railway after issuing notices to the other employees. Since the question of law involved in this case is more important than the issue of upsetting the seniority, in our view, a decision thereon has to be made first which will have the effect of declaration of law. Once the law is declared, it is for the respondents to concomitantly apply the law after giving notice to the other employees, given their seniority is affected. Therefore, we are not inclined to accept the arguments of Shri Vinay Jain on non-joinder of necessary parties.

11. It was argued by learned counsel for respondents that the OA is time barred. It has to be noted that within two years after the applicant realizing that he is placed in a disadvantageous position in Annexure A5 seniority list he had approached the respondents with Annexure A6 representation dated 15.5.2010. No action was taken by the respondents. He sent a reminder on 2.2.2011 also. It appears that only after receiving the reminder the respondents issued Annexure A1 dated 15.2.2011 communication rejecting his representation. The applicant has approached the Tribunal on 9.5.2011. Therefore, we feel that he has approached the Tribunal within time.

12. The Railway seems to take the view that the applicant's ad hoc appointment was purely ad hoc in nature and is only a fortuitous promotion which cannot be reckoned for the purpose of seniority. The respondents rely on Annexure R2 Railway Board instruction in this connection. Nevertheless, the five Judges Bench of the Apex Court in *Direct Recruits'* case (*supra*) held:

“(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.”

This decision has been followed by another five Judges Bench decision of the Apex Court in *Rudra Kumar Jain & Ors. v. Union of India & Ors.* - 2000 (8) SCC 25 also. As pointed out by Shri Mishra, learned counsel for the applicant, the Apex Court has again reiterated this position of law in *Vijayan's* case (*supra*) also.

13. In the instant case the respondents have no case that the applicant's ad hoc promotion was not in accordance with rules. Initially the ad hoc appointment vide Annexure A2 order was given to the applicant for three months. After the expiry of one year Annexure A3 order was issued specifically stating that the applicant is *allowed to continue* as SEFO on ad hoc basis till the selected candidates are posted against the vacancies. This arrangement continued till 17.8.2001 when by Annexure A4 the applicant was regularised in the post with immediate effect. Shri Vinay Jain agreed that the administrative arrangement of granting ad hoc promotion exceeding six months was contrary to Annexure A8 Railway Board letter which clearly states that in any case no second ad hoc promotion should be allowed under any circumstances. Thus, we see the applicant's case is in all fours



with the paragraph (B) of the dictum laid down by the Apex Court in *Direct Recruits'* case (*supra*). It is all the more in tune with the decision of the apex court in *Vijayan's* case (*supra*) also.

14. For the forgoing reasons, we declare that the period of ad hoc promotion rendered by the applicant with effect from 22.4.1994 (the date of issue of Annexure A2 order) till he was selected in the regular post on 18.8.2001 is lawfully liable to be reckoned for all purposes relating to his service in the respondent railway, including seniority. This being the legal position as laid down by the Hon'ble Apex Court, respondents are bound to follow the same. Therefore, we are of the view that Annexure R2 communication issued by the Railway Board (RBE No. 46/2010, dated 29.3.2010) is contrary to the law to the extent it is in conflict with the laid down by the Apex Court in *Direct Recruits'* case(*supra*).

15. In the result while declaring that the ad hoc service of the applicant rendered from 22.4.1994 to 18.8.2001 is to be reckoned for all purposes connected with his service in the respondent railway, this Tribunal directs the respondents to recast the Annexures A5 & A10 seniority lists of SEs after giving opportunity of being heard^{to} the officials enlisted in the aforementioned seniority lists. This exercise shall be completed by the respondents within four months from the date of receipt of copy of this order. Ordered accordingly.

16. Parties shall suffer their own costs.


(PRAVEEN MAHAJAN)
ADMINISTRATIVE MEMBER
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(U. SARATHCHANDRAN)
JUDICIAL MEMBER