

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO.443 OF 2011

Wednesday, this the 8th day of February 2012

CORAM:

**HON'BLE Dr.K.B.S RAJAN, JUDICIAL MEMBER
HON'BLE Ms. K. NOORJEHAN, ADMINISTRATIVE MEMBER**

T Johnson, aged 60 years
S/o.Thankaraj
(Retired Assistant Personnel Officer)
Southern Railway
Trivandrum Division
Residing at :"Mangatuvilai"
Mangalakuntu Post
Kanyakumari District – 629 178

Applicant

(By Advocate Mr.T.C.G Swamy)

Versus

1. The Union of India represented by the
General Manager, Southern Railway
Head Quarters Office
Park Town (P.O)
Chennai – 3
2. The Railway Board
(Ministry of Railways)
Rail Bhavan
New Delhi – 110 001 – Through its Secretary
3. The Divisional Railway Manager
Southern Railway
Trivandrum Division
Trivandrum – 14

Respondents

(By Advocate Mr.Thomas Mathew Nellimootttil)



The application having been heard on 01.02.2012, the Tribunal on the 01.02.2012 delivered the following:

ORDER

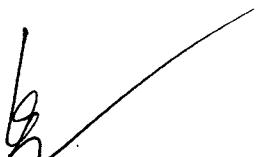
HON'BLE Dr.K.B.S RAJAN, JUDICIAL MEMBER

1. This is the second round of litigation. Earlier, this Tribunal had passed the following order vide order dated 14.09.2009 in O.A 629/08.

" 11. The OA is therefore, allowed. Annexure A-12 and A-14 are hereby quashed and set aside. Respondents are directed to include the name of the applicant in the Annexure A-4 panel at the appropriate place and afford promotion to the applicant from the date his junior has been promoted. The promotion so made shall, however, be only notional actual being from the date the applicant enshoulde higher responsibility. This order shall be complied with, within a period of three months from the date of receipt of a copy of this order. "

2. Review application filed by the respondents was considered but dismissed vide order dated 01.12.2009 in R.A 51/09. Respondents have therefore taken up the matter with the Hon'ble High Court in Writ Petition No.11094 of 2010. However, the Hon'ble High Court did not interfere with the order and did not grant any interim order for stay. As such, on an application by the applicant in M.A No.106/10 the respondents were directed to implement the aforesaid order of this Tribunal forthwith, with a rider that the promotion of the applicant would be subject to the outcome of the aforesaid WPC pending before the Hon'ble High Court of Kerala. Order dated 18.05.2010 refers.

3. However, later on when the Hon'ble High Court considered the Writ Petition No.11094/2010 vide order dated 31.05.2010, enforcement of the order of this Tribunal referred to above had been directed to be suspended.



4. The writ petition came to be considered by the High Court on 25.11.2010 and after considering the case, the High Court had dismissed the Writ Petition. The order of the Hon'ble High Court inter-alia reads as under:-

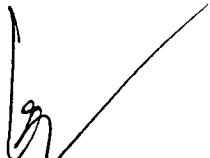
" Heard learned senior counsel for petitioners and learned counsel appearing for respondent.

2. Order under challenge is the one issued by the Central Administrative Tribunal declaring the respondent's eligibility for appointment to the post of Assistant Personnel Officer in the quota reserved for promotees. Admittedly, respondent is next in the list for selected candidates eligible for appointment to the post on merit basis. Total vacancies available are eight, out of which six vacancies are to be filled up by merit quota and one from Scheduled Caste Community and another from Scheduled Tribe community. The respondent happens to be 7th in the merit list and this position is not disputed by the petitioners. However, according to the petitioners, one Shri P Rajeswaran, who is a member of Scheduled Caste community, had filed an O.A challenging the recruitment made in the year 2001, and the O.A was later allowed by the Tribunal declaring his eligibility to be posted based on earlier selection. Since Shri P Rajeswaran is a member of Scheduled Caste community, the post that has fallen vacant in the merit quota has to be filled up by another member of Scheduled Caste community from the select list is the case of the petitioners. However, finding of the CAT is that the said person, Shri P Rajeswaran, though is a member of Scheduled Caste community got selection in merit quota, and he is not a person selected under the quota reserved for Scheduled Caste Community. So much so, the vacancy arising on account of his getting posted based on earlier selection under orders of the CAT in the O.A filed is a vacancy available to candidates in the merit list.

In our view, the CAT rightly held that the respondent being next in the merit list is eligible to be appointed in the merit quota as the last candidate from out of the six posts available for appointment in merit quota.

Consequently, this writ petition lacks merit and is dismissed."

5. With the above decision of the Hon'ble High Court, the respondents had implemented the order of the Tribunal by promoting the applicant with effect from 08.05.2008 on notional basis and on actual basis from the date on which he shouldered the responsibilities of the higher post of Assistant Personnel Officer vide impugned order dated 20.01.2011 at Annexure A-1. Subsequently, pay fixation etc had taken place vide Annexure A-2 order dated 31.01.2011.



6. The applicant has challenged the date of retrospective promotion granted to him and also the date from which the arrears of pay and allowances were drawn and he has sought following reliefs in this O.A:-

" (i) Call for the records leading to Annexure A-1 and quash the same to the extent it grants the applicant the benefit of retrospective promotion only with effect from 08.05.2008 as against the requirement of 6.3.2007;

(ii) Direct the respondents to grant the applicant the benefit of retrospective promotion as Assistant Personnel Officer with effect from 06.03.2007 and direct further to grant the consequential benefits thereof;

(iii) Call for the records leading to the issuance of Annexure A-2 and quash the same to the extent it grants the applicant the benefit of arrears of pay and allowances in the post of Assistant Personnel Officer only for the period from 20.01.2011 as against the requirement of 16.12.2009;

(iv) Direct the respondents to grant the applicant arrears of pay and allowances consequent upon his promotion as Assistant Personnel Officer for the period from 16.12.2009 with interest calculated at the rate of 9% per annum with effect from 1.2.2011;

(v) Direct the respondents to recalculate and revise the applicant's pension and other retirement benefits in the light of the declaration and directions above mentioned and to grant the consequential benefits thereof; "

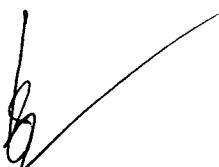
7. The respondents have contested the O.A. According to them, the applicant was promoted on notional basis from the date his junior was promoted and actual promotion should be from the date he shouldered the higher responsibilities. As per the seniority position he was to be placed below all the employees in the panel. There is no other junior to the applicant in that particular panel and as such, on par with his immediate junior Shri. A Immanuel who was promoted as APO in the subsequent selection on 08.05.2008, the applicant was given proforma promotion from that date and his pay was also fixed accordingly giving the actual benefit of promotion from 20.01.2011, the date on which he shouldered the higher responsibilities. The respondents have further stated that the applicant was not eligible for promotion as APO against the post vacated by Shri Rajeswaran. However as there is a failure on the part of the respondents to



present the correct facts before the Tribunal, the applicant could get a favourable order. It has also been stated that the immediate junior to the applicant in the APO cadre (of unreserved candidates) Shri M Srinivasalu was promoted on 08.5.2008 and as such, the applicant was also accordingly given notional promotion from that date.

8. Counsel for the applicant submitted that the order of the Tribunal as well as of the Hon'ble the High Court have, in unambiguous terms, held that the vacancy being available in the merit list caused by Shri Rajeswaran and the applicant being the next in the merit list is eligible to be appointed in the merit quota as a last candidate from out of the 6 posts available for appointment in merit quota. In view of this clear finding, the respondents cannot construe the order in a different fashion to contend that due to failure on the part of respondents, correct facts could not be brought before the Tribunal. Thus the applicant is entitled to, notional promotion as APO from the same date when all other unreserved candidates were promoted vide Annexure A-4 order dated 06.03.2007. The last unreserved candidate was Shri M Srinivasalu whose promotion was ordered on 6.3.2007 along with others. The contention of the respondents that the said M.Srinivasalu was promoted on 08.05.08 is, therefore, erroneous. According to the counsel for the applicant the respondents had indicated the date as 08.5.08 as, according to them, the applicant was to be promoted from the date Mr.Immanuel who was selected in the next selection was promoted as APO. This contention of the respondents cannot be held valid. Thus, according to the counsel for the applicant, the date of notional promotion should be 6.3.07.

9. As regards the date of actual promotion, the counsel argued that it is from the date the applicant shouldered the higher responsibilities. True, there was

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an initial stay of the order of this Tribunal, but later on, the very writ petition itself came to be dismissed as per the judgment extracted above. Thus the initial stay order granted loses its entire effects by getting merged with the final order. It has been held by this Tribunal vide order dated 24.11.2011 in O.A 444/11 as under:-

“ 6. Thus the Tribunal noticed the various dates on which notional promotion was effected as Revetter Gr.III and also as Gr.II but did not find eligible for any arrears of pay except in the case of the applicant for whom arrears of pay was also ordered to be paid from the date on which he shoulders higher responsibilities as HS Gr.I. Therefore, the present contention that he is entitled for arrears of pay in the every post, namely, Revetter Gr.II and Gr.III with retrospective effect having been specifically not granted, it must be presumed that the same has been rejected. It is well settled law that when a prayer is specifically raised and not granted it implies that the Court has not granted the relief. Even otherwise, the Court has specifically directed the arrears to be paid only in Gr.I from the date on which he shoulders higher responsibilities. Thus, what has not been granted by the previous order in Annexure A-1, cannot be re-agitated in the present O.A and is estopped from contending so as it is barred by the principle of res-judicata. However, the Tribunal has directed the payment of pay attached to Gr.I from the date on which he shoulders higher responsibilities and six months time was granted for complying with the order. Even though the Tribunal was considerate in reserving the right on the part of the respondents to move an application in case further time is required, the respondents obviously did not come for any such extension possibly because the order was stayed by the High Court. It is a cardinal principle that no order of the Court shall prejudice the right of either parties. It is respondents who invited the Court for an interim stay which was eventually dismissed. Therefore, merely because the WP(C) was pending by itself is no reason to deny the legitimate claim of the applicant for difference in the arrears of pay in Gr.I with effect from the expiry of six months from the date of receipt of a copy of the order, namely, with effect from 4.11.2007 (six months time being calculated from the date on which the order was obtained.). Therefore, the only relief the applicant is entitled to is for difference in the pay in Gr.I less that is paid with effect from 4.11.2007 till 19.2.2009. The O.A is allowed partly as above. The order shall be complied with, within a period of three months from the date of receipt of a copy of this order. The parties shall bear the respective costs. ”

10. In addition, the Apex Court in the case of Shri Amarjith Singh Vs Devi Ratan 2010 L&S SCC 1108 has held as under.

“ 17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges



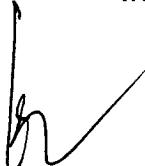
in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. "

11. In view of the above, according to the counsel for the applicant the date of actual promotion of the applicant should be taken from 3 months from the receipt of copy of the order dated 14.09.2009.
12. Counsel for the respondents had taken us through the reply filed by the respondents and submitted that the applicant's promotion, both notional and actual had been made strictly in accordance with the direction of this Tribunal vide order dated 14.09.2009 in O.A 629/08.
13. Arguments were heard and documents perused.
14. There were in all 8 posts of APO which were filled up by this unreserved candidates and 1 SC candidate and 1 ST candidate. Serial no.1 of Annexure A-3 is an ST point and consequently 1 ST candidate was appointed. Similarly Serial No.8 was an SC point and accordingly Shri M Subramaniam an SC candidate was appointed. In between of all the 6 unreserved candidates, the merit list contains the names of 4 unreserved candidates and 2 SC candidates, one of whom was Shri P Rajeswaran. In view of the fact that Shri Rajeswaran was included to the previous panel, the vacancy caused by his move was to be filled up by the next

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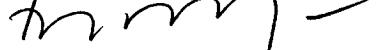
available candidate. This resulted in 2 of the unreserved candidates after Shri Rajeswaran to improve their respective position in the merit list and the last of the unreserved candidate on merit basis was the applicant. Annexure A-4 referred to is the order dated 14.09.2009 is nothing but Annexure A-3 of this O.A and the applicant was to be accommodated in the very same panel. Thus the question of the name of the applicant falling out of Annexure A-3 panel and being associated with the subsequent years panel as contended by the respondents does not arise. The applicant is therefore, right when he states the claim that his notional promotion shall be along with the actual promotion of others i.e, 06.03.2007. We declare accordingly.

15. As regards actual date of promotion, had the respondents complied with the order without resorting to filing of R.A and filing of writ petition and getting a temporary stay, the promotion of the applicant would have been within the time calendered by the Tribunal in its order dated 14.09.2009. However, in view of their filing the R.A first and writ petition next and getting an interim stay, the applicant was not in a position to take up the higher responsibilities. Once the writ petition came to be dismissed, the effect of earlier stay order would mean that there was no stay order at all. From that point of view the applicants actual date of promotion should be deemed to be immediately after the expiry of the time calendered in the Tribunal's order dated 14.09.2009. Reckoning the period of three months after the issue of order dated 14.09.2009, the applicant's entitlement to actual promotion comes to 01.01.2010. As such, it is declared that the applicant is entitled to pay w.e.f 01.01.2010.



16. In view of the above, the Original Application is allowed. The impugned order Annexure A-1 and Annexure A-2 are quashed and set aside with a direction to the respondents to issue a fresh order of promotion of the applicant promoting him to the post of APO from 06.03.2007 on notional basis and 01.01.2010 on actual basis. Arrears arising out of refixation of his pay and allowances in the wake of the above order shall also be paid to the applicant. The entire drill in passing necessary orders and fixation of pay as well as payment of arrears of pay and allowances shall be completed within a period of three months from the date of communication of this order.

(Dated, this the 8th day of February, 2012)


K. NOORJEHAN
ADMINISTRATIVE MEMBER


DR.K.B.S RAJAN
JUDICIAL MEMBER

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