

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 530/2010

Monday, this the 19th day of March, 2012.

CORAM

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

A.Bhoomi, S/o Ayyachami Pillai,
Chief Commercial Clerk II,
Ernakulam South Railway Station Booking Office,
Residing at Railway Quarters, 136 C,
South Railway Station, Ernakulam South. - Applicant

(By Advocate Mr Shafik M Abdulkadir)

v.

1. Union of India represented by the
General Manager, Southern Railway,
Chennai.
2. The Senior Divisional Personnel Officer,
Southern Railway, Division Personnel office,
Trivandrum.Respondents

(By Advocate Mr Thomas Mathew Nellimoottil)

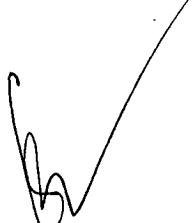
This application having been finally heard on 14.03.2012, the Tribunal on 19.03.2012
delivered the following:

ORDER

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

The applicant has filed this OA seeking the following reliefs:-

(i) To call for the records relating to Annexure A-1 to A-7 and to declare
that the refusal of the respondents to consider the applicant for
promotion as Chief Commercial Clerk I is highly illegal, arbitrary, unjust,
unreasonable, irrational and the same violates Articles 14 and 16 of the



Constitution of India;

- (ii) To direct the respondents to consider the applicant for promotion as Chief Commercial Clerk I notwithstanding Annexure A-4 to A-6 series of orders of punishment and to promote him if found suitable as Chief Commercial Clerk I with effect from the due date with all consequential benefits;
- (iii) To issue such other appropriate orders or directions this Hon'ble Tribunal may deem fit, just and proper in the circumstances of the case; and
- (iv) To grant the costs of this Original Application.

2. Capsulated facts of the case with terse sufficiency are in the succeeding paragraphs.

3. The applicant joined the services of the Respondents in 1979 as Commercial Clerk and gradually reached the position as Chief Commercial Clerk Grade III in 1989 and Grade II at present with ten years of service in that post. The next promotional post is Chief Commercial Clerk Grade I which the applicant had been awaiting. On finding that a number of his juniors had been promoted to the said grade vide Order dated 23-02-2010, (to the exclusion of the applicant) vide Annexure A-1, wherein it was reflected that the applicant was not promoted as he was undergoing certain punishment for certain alleged misconduct. As the applicant was not at all aware of any such penalty imposed, since no communication was ever received, he had preferred an application under the Right to Information Act and called for various details and documents. One such detail called for was acknowledgment of the applicant in token of having received penalty order alleged to have been issued to the applicant. Annexure A-2 refers. The respondents, vide Annexure A-3, in response to the application under the RTI Act, furnished the details of orders dated 08-04-2005

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and 07-03-2006, and as to the details of acknowledgment, the respondents have informed the applicant that the same is not available. Annexure A-4 and A-5 refer. As the punishment order was not at all served upon the applicant, yet as the applicant's case for promotion was not considered, he has moved this OA seeking the reliefs as stated in para 1 above.

4. Respondents have contested the O.A. According to them, the applicant's increment was stopped in July, 2009 about which he had never raised any issue. This would go to prove that the applicant was aware of his penalty order. Thus, the respondents contended that the applicant was rightly not granted promotion during the currency of penalty and the OA is thus, devoid of merits.

5. The applicant has filed the rejoinder in which he had reiterated the fact that the respondents have never communicated the order of penalty. Relying upon the decision of the Apex Court in **Abhijith Ghosh Dastidar vs Union of India and Others** (CA No. 6227 of 2008), the applicant contended that when even un-communicated adverse remarks, or grading lower than the bench mark should not be considered, the currency of that penalty, the order in respect of which had not been communicated cannot stand in the way of consideration of promotion of the applicant. The fact that no acknowledgment has been held by the respondents, proves that the copy of penalty order has not been served upon the applicant. He has also submitted that he could and he needs to challenge the penalties imposed consequent to issue of Annexure A-4 and A-5.

6. Counsel for the applicant argued on the very same lines as above while Senior Standing Counsel for the Railways submitted that the very fact that the applicant remained silent when the increment due for the months of July 2009 had not been released, would mean that the applicant is well aware of the

penalty of withholding of increment.

7. In his oral rejoinder, the counsel for the applicant argued that there no presumption can be made on the basis of the above contention.

8. Arguments were heard and documents perused. The applicant is governed by the provisions of the Railway Servants (Discipline and Appeal) Rules, 1968. The said Rules clearly provide vide Rule 12 that orders made by the disciplinary authority shall be communicated to the Government servant. In addition, Railway Board letter No. E(D&A) 69 RG 6-29 dated 17-10-1970 and 19-11-1971 provide for the method of such service of notice imposing penalty. The same reads as under:-

"(8) Service of the notice imposing the penalty: :- As far as possible actual service of an order or notice which seeks to impose a punishment on the employee concerned is desirable and, therefore, with a view to ensure actual service of the Order/Notice on the employee concerned, the authority should explore all possibilities of serving the Order/Notice as indicated below:

(a) Where the railway servant is present in the office, the Order/Notice should be served on him in person. If he refuses to accept the same or evades its service on him on one plea or the other, the fact of his refusal etc., should be recorded in writing and signatures of the witnesses in whose presence the order/Notice is attempted to be served on him, taken in sport of such attempt. The Order/Notice should be deemed to have come into effect from the date it was so attempted to be served on the employee concerned, irrespective of whether he accepts it or not.

(b) If delinquent employee is not present in office, the Order/Notice should be communicated to him at his last known address by registered post acknowledgment due. In case the employee accepts the notice sent by post, it should be deemed to have come into effect from the date of such acceptance thereof, unless it specifies any subsequent dates from which it has to take effect.

(c) In case the railway servant concerned does not accept the Order/Notice and the same is returned undelivered by the Postal Authorities with the remarks such as "Addressee not found" or "Refused to accept" etc, it shall be pasted on the Notice Board of the railway premises in which the employee concerned was working last, as well as in a place in the last noted address of the railway servant:

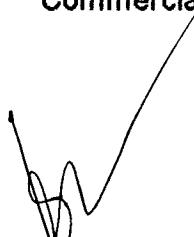


"Last noted address" as used in this para means the local address of the employee i.e. the premises which the employee had been occupying before he proceeded on leave etc. In case, where the last noted address of the employee is at a distant town/village⁴, the proper mode of serving would be to send the Order/Notice on the address of his home town/village by registered post and the question of pasting it in that place does not arise.

(d) The Order/Notice of imposition of penalty should be deemed to have come into effect from the date of issuing thereof unless it specifies any subsequent date from which it has to take effect.
[R.B's No.E(D&A) 69 RG 6-29 of 17.10.70 and 19.11.71]

9. This mandatory requirement as contained in Rule 12, read with the above order of the Railway Board, attains significance, as the same would afford the government servant ^{opportunity} to file appeal, if he so chooses, to the appellate authority within the time stipulated. Rule 20 of the Rules specifies that no appeal preferred shall be entertained unless such appeal is preferred within a period of forty-five days from the date on which a copy of the order appealed against is delivered to the appellant. This would go to prove that mere issue of the penalty order is not sufficient, but the same should be duly delivered. For ascertaining as to whether the appeal has been filed on time or not, preserving of the acknowledgment in token of having delivered the order of penalty is a must. In the instant case, the acknowledgment was not available. Thus, the conspicuous absence of acknowledgment with the authorities would go to show that the applicant has not been delivered a copy of the penalty order.

10. In view of the above we are of the concrete view that the respondents have failed to deliver the notice imposing penalty upon the applicant. This has, apart from the applicant being deprived of his right to appeal, has been the cause for the applicant not being considered for promotion to the post of Chief Commercial Clerk Grade I. Thus the applicant has made out a cast iron case.



11. Now, what should be the further course of action. The penalty of withholding of increment for a specified period without cumulative effect is only a minor penalty. During the currency of penalty, the railway servant may not be promoted but his case ought to have been considered. Railway Board letter E (D&A) 71 RG-6-23 of 01-06-1971 and 22-11-1971 stipulates that if a railway servant becomes due for promotion after penalty of withholding of increment, he should be promoted only after the expiry of the period of penalty. This would not mean that the applicant cannot be considered for promotion at all. He would be considered for promotion and if found suitable, his name should figure in the panel but with a rider that the promotion shall take effect after the currency of penalty. In this case, Annexure A-2 order clearly states that the applicant was not considered for promotion at all due to currency of penalty of withholding of increment.

12. Thus, the respondents shall hold a review DPC for promotion to the post of Chief Commercial Clerk Grade I and assess the suitability of the applicant for promotion without taking into account the aspect of currency of penalty and if so found suitable, include his name in the panel. However, the promotion shall take effect after the currency of penalty. At the same time, the applicant shall have the opportunity of challenging the penalty order before the appellate authority and for this purpose, if the applicant files the appeal within forty five days from the date of this order, the same shall be treated having been filed within time and the appellate authority shall duly consider the same in accordance with the provisions contained in Rule 22 of the Railway Servants (DAR) Rules, 1968 and communicate the decision within a period of two months from the date of filing of the appeal. If the applicant is exonerated, his promotion would be effective from the date on which the immediate junior had been promoted, as if there has been



no penalty that was imposed upon the applicant.

13. To the above extent, the OA is allowed. Under the circumstances, there shall be no orders as to costs.



K. NOORJEHAN
ADMINISTRATIVE MEMBER



Dr K.B.S.RAJAN
JUDICIAL MEMBER

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