

O.A.NO. 555/2004

CORAM:

E.K.S. Nair,
(Retired Assistant Engineer,
South Eastern Railway,
Khurda Road Division,
Jatni P.O., Khurda District,
Orissa-752 030),
Enjakkattu House,
Thrikkariyur.P.O.
Ernakulam District.. - Applicant

VS

1. Union of India represented by
Secretary to Government of India,
Ministry of Railways,
New Delhi.
2. The General Manager,
South Eastern Railway,
Garden Reach, Calcutta-43.
3. The Chief Personnel Officer,
South Eastern Railway,
Garden Reach, Calcutta-43.
4. The Chief Engineer,
South Eastern Railway,
Garden Reach, Calcutta-43.
5. The Senior Divisional Personnel Officer,
South Eastern Railway,
Khurda Road Division, Jatni.P.O.
Khurda District,
Orissa-752 030.
6. The Divisional Engineer(North),
South Eastern Railway,
Khurda Road Division, Jatni.P.O.
Khurda District,
Orissa-752 030.

By Advocate Mr P. Haridas

The application having been heard on 18.5.2005, the Tribunal on 2.6.2004 delivered the following:

O _ R _ D _ E _ R

HON'BLE MR N.RAMAKRISHNAN, ADMINISTRATIVE MEMBER

This O.A. deals with the grievance of the applicant Shri E.K.S. Nair, Retired Assistant Engineer, South Eastern Railway, presently residing at Ernakulam arising out of denial for consideration for ad hoc promotion to the Senior Scale of Assistant Engineer.

2. According to the applicant, he retired as Senior Section Engineer (Permanent Way) on 31.7.2000. He became eligible to be considered for promotion to Group 'B' service as Assistant Engineer and was placed in the select panel for vacancies of the year 1990. His position was Sl.No.155 followed by his next junior Shri U.M.Vijayan, Sl.No.156. Though his name figured in the panel, he was not given the benefit of promotion. Upon his taking up of this matter before this Tribunal in O.A.No.521/2001, the respondents pleaded their inability of promoting him on account of certain disciplinary proceedings taken against him including suspension at various points of time, which ultimately ended with no serious consequences. This Tribunal found:

"..We find that the applicant was denied his due promotion against 1990 vacancies, though no penalty proceedings were actually pending at the material time. Further, the disciplinary proceedings initiated on 16.10.1995 were closed exonerating the applicant from the charges levelled against him vide Annexure A3 communication dated



4.9.1999. Another disciplinary proceedings initiated on 24.6.1994 were also dropped, though his failure to attend in connection with the enquiries on certain days fixed by the Inquiry Officer caused a minor penalty of 'Censure' to be imposed on him vide Annexure A4 dated 3.9.1999. The respondents' contention that there were three major penalty proceedings pending against the applicant is not borne out by facts. Thus, we notice that there was no circumstance that justified continued denial of promotion to the applicant as Assistant Engineer inspite of his right having been upheld and a finding of victimization was also recorded by the Tribunal..”

In pursuance of the order by this Tribunal in O.A.No.521/2001 delivered on 17.4.2003, the Chief Personnel Officer, South Eastern Railway, Garden Reach, Calcutta, the 3rd respondent in this O.A. issued a memorandum No.P/G/14 B/2/J/S/CI.II/PT6 dated 7.7.2003, granting promotion to the applicant in Group.B. service as Assistant Engineer with effect from 23.1.96, the date of promotion as Assistant Engineer of his immediate junior Shri U.M.Vijayan (A-2). According to the said memorandum, the applicant was to be considered for promotion to Senior Scale (Ad hoc) with reference to his junior Shri U.M.Vijayan, subject to his being found suitable by the DPC. On a representation being made regarding further promotion, he was sent with blank ACRs for the years 1.4.97 to 31.3.2001 for appropriate action vide letter dated 13.11.2003 (A-3). Vide his reply A-4, he stated that he had already submitted similar forms while in service, he was unable to recall the necessary facts to be incorporated in the blank forms(A-4), he was returning the blank forms, and that he was entitled for promotion for the year 1997, a year in which his immediate junior Shri



Vijayan was promoted and the ACRs to be considered actually related to previous years. Ultimately, a DPC was held to consider ad hoc promotion to senior scale in favour of the applicant and in the proceedings dated 23.3.2004, the DPC observed:

"(1) Sri E.K.S. Nair does not fulfil the minimum eligibility criteria as laid down by Railway Board as he did not work in Gazetted capacity even for a single day. His notional promotion to Group B was possible as he was empanelled for promotion to Group B and his performance assessment was to be done based on his non-Gaz. ACFs. Accordingly, he has been granted notional promotion to the extent of his junior revising his pensionary dues accordingly in compliance of the direction of the Hon'ble Tribunal.

(2) However, for promotion to Senior Scale one has to earn minimum 3 ACRs in Gazetted capacity. The DPC has to adjudge the fitness/suitability based on his performance as a Gazetted Officer. In the present case Shri Nair never actually worked as Gazetted officer and therefore, did not earn any CR as a Gazetted Officer."

Hence, the DPC found it not possible to adjudge the suitability/fitness of Shri E.K.S.Nair for promotion to Senior Scale with reference to his junior even on notional basis as he did not fulfil the minimum eligibility criteria (A-5).

3. The applicant contends that his immediate junior Shri Vijayan was promoted as Assistant Engineer with effect from 23.1.96 (A-2) and to Senior Scale ad hoc vide office order issued by the Chief Personnel Officer, Southern Eastern Railway, Calcutta on 26.12.1997 (A-7). These facts would show that his junior had only less than 3 years



service (between 23.1.96 & 26.12.97) on the date of promotion to the ad hoc Senior Scale contrary to the insistence of 3 years' service in applicant's case by the DPC vide A-7.. To sustain his own claim, the applicant has produced A-8 which is a copy of the letter No.DCPO(G)/Con/Cl.II-1/DPC(Ad hoc) dated 14.2.1992 issued by the Chief Personnel Officer, South Eastern Railway. Circulating copy of Railway Board's letter No.E(GPO91/1/40 dated 2.1.92 addressed to all General Managers, All Indian Railways and others on the subject of officiating promotions of Group B Officer to Senior Scale on Ad hoc basis. Para 3 of the *ibid* letter states:

"..the Board have decided that in the cases of the types enumerated in para 3 of their letter dated 27.4.1983, the senior Group 'B' officer should be deemed to have rendered the service put in by his immediate junior and if that happens to be 3 years or more he should be considered for ad hoc promotion to Sr.Scale against the existing and future vacancies i.e. without reverting any officers already promoted."

He has also produced a clarification issued by the Railway Board by a D.O. letter No.E(GP)89/2/21 dated 2.11.1989 from Shri R.R. Kohli, Joint Director addressed to Shri P.C.Das. Deputy C.P.O.(G) (A-9). In the light of A-8 and A-9, the applicant contends that the proceedings of the DPC (A-5) finding him not fulfilling the minimum eligibility criteria of 3 years minimum work experience are illegal.

4. As grounds for relief, the applicant urges *inter-alia* the following:

- (A) The DPC proceedings (A-5) are arbitrary and violative of Articles 14 and 16 of the Constitution



- (B) The fact of his junior having been promoted while he himself having been denied the promotion again makes A-5 illegal.
- (C) The insistence of 3 years actual service as a condition precedente for promotion to the senior scale is against the Board's order contained in A-8 and in any case, his junior does not satisfy this condition.
- (D) The applicant cannot be faulted for lack of necessary duration of service which was attributable to the respondents.

5. In their reply statement the respondents have stated that the DPC considered the facts and circumstances of his case and found it not possible to adjudge the suitability/fitness of the applicant due to non-fulfilment of eligibility criteria. According to the respondents, the reliance of the applicant on A-8 and A-9 is unsustainable because these cover Group'B' officers who are in service and therefore the zone of consideration but who for administrative reasons could not complete the required minimum length of service of 3 years. In the case of applicant, he never worked in the Gazetted capacity and was granted benefit of promotion to Group'B' only on notional basis after his retirement. The respondents also rebut all the grounds as untenable. On the question of Shri Vijayan, the immediate junior of the applicant, the respondents submitted that though the former was actually promoted with effect from 23.1.96, he got the benefit of seniority with reference to 1990 panel as per Hon'ble C.A.T./Cuttack order.

6. We have heard Shri T.C. Govindaswamy, learned counsel for the applicant and Shri P. Haridas, learned counsel for the respondents.



Shri Govindaswamy reiterated the points mentioned in the Original Application supported by the Annexures thereto. He contended that the respondents ought to have considered the case of the applicant particularly in the light of directions of the Railway Board as contained in A-8. The non-acquisition of relevant duration of qualifying service was entirely to be attributable to the respondents and the applicant should not be deprived of the benefits of promotion on account of such departmental action.

7. Shri P Haridas representing the respondents countered by saying that the proceedings of the DPC were in order as the applicant did not put in the required length of service. He could not confirm whether or not the DPC factored A-8 and A-9 documents before they issued the proceedings vide A-5.

8. The case rests essentially on two issues:

- (a) Whether non-acquisition of the required length of service was attributable to the departmental action and in consequence whether the applicant should be given the benefit of lost time, and
- (b) Whether the applicant is entitled to the benefit of the circular of the Board in A-8

9. On the first issue, it is seen that the applicant refers under para 4 (e) of the details of application, to C.P.(C) No.2/2004 in O.A. No.521/2001 alleging disobedience of the orders of this Tribunal, apparently relating to promotion to ad hoc Senior Scale. Reference is also made to the affidavit of the Chief Personnel Officer, South Eastern



Railway in which the DPC proceedings relating to such promotion were referred to (A-5). As mentioned earlier, the DPC found it not possible to adjudge the suitability of the applicant on account of lack of minimum eligibility criteria of length of service. On this aspect, this Tribunal inter-alia made the following observation while disposing of the Contempt case

"..the applicant did not have the service as a Gazetted Officer even for a day to consider him for ad hoc promotion to Senior Scale does not apparently appears to be a reason for making such a recommendation because the reason why the applicant did not have even a day's experience as Assistant Engineer is attributable only to the department and not to the applicant..."

Besides, the observations made by this Tribunal in O.A. 521/2001 (A-1) in para 7 also are also relevant. This makes it evident that the reason for non-acquisition of the necessary length of service is attributable to the department. Hence, it appears that the non acquisition of required length of service was attributable to the Department.

10. As regards the second issue, reliance is placed by the applicant on A-8 and A-9. As already referred to in para 3 above, the Senior Group 'B' officer should be deemed to have rendered the service put in by his immediate junior and if that happens to be 3 years or more, he should be considered for ad hoc promotion. In the present case, his immediate junior is Shri Vijayan. He should have a service equal to or more than 3 years before his immediate senior is given the benefit of



deemed seniority. As admitted by the applicant himself in Ground(c), the length of service prima facie appears to be less than 3 years- because he was promoted on 23.1.96 as Assistant Engineer and on 26.12.97 as ad hoc Senior Scale Assistant Engineer. The respondents in their reply statement vide para 10 have observed that Shri U.M. Vijayan even though was actually promoted with effect from 23.1.96 got benefit of seniority with reference to 1990 panel as per Hon'ble C.A.T./Cuttack judgment. The contention of the respondents is that the benefit of the deeming provision is available only to service officers. The plain reading of A-8 document does not make any distinction between serving and retired officers. If as already found in the preceding paragraph, the non-acquisition of required length of service as Assistant Engineer is attributable to the department, it is only fair to argue that the latter should not be allowed to argue that the benefit is available only to the serving officers. In any case, the applicant was interested only in getting certain consequential benefits of ad hoc promotion.

11. In view of the above findings, the O.A. is disposed of with the following orders/directions:

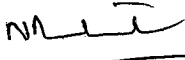
- i) The applicant is entitled to be promoted as ad hoc Senior Scale Assistant Engineer with effect from the date of promotion of his immediate junior Shri U.M. Vijayan with all consequential due benefits arising from such promotion.



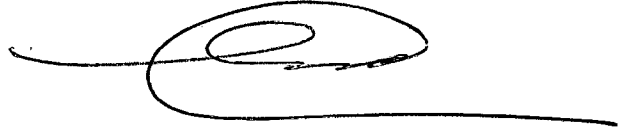
- ii) The respondents are directed to comply with the above directions and pass appropriate orders within a period of two months from the date of receipt of copy of this order.

12. There is no order as to costs.

Dated, the 2nd June, 2005.



N.RAMAKRISHNAN
ADMINISTRATIVE MEMBER



K.V.SACHIDANANDAN
JUDICIAL MEMBER

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