

CENTRAL ADMINISTRATIVE TRIBUNAL,
ERNAKULAM BENCH

Original Application No. 166 of 2009

Wednesday, this the 12th day of January, 2011

CORAM:

Hon'ble Mr. Justice P.R Raman, Judicial Member
Hon'ble Mr. K. George Joseph, Administrative Member

Fasuludeen Kunju, aged 54 years, S/o. K. Idrose Kunju,
 Goods Guard, Southern Railway, Quilon, Residing at :
 Thadathil Veedu, Ottakkal P.O., Thenmalai, Quilon
 District, Kerala State.

Applicant

(By Advocate – Mr. T.C.G. Swamy)

V e r s u s

1. Union of India, represented by the General Manager,
 Southern Railway, Head Quarters Office, Park Town
 P.O., Chennai-3.
2. The Sr. Divisional Commercial Manager, Southern
 Railway, Palghat Division, Palghat.
3. The Sr. Divisional Personnel Officer, Southern Railway,
 Palghat Division, Palghat.
4. The Divisional Personnel Officer, Southern Railway,
 Trivandrum Division, Trivandrum-14.
5. The Additional Divisional Railway Manager,
 Southern Railway, Palghat Division,
 Palghat.

Respondents

(By Advocate – Mr. P. Haridas)

This application having been heard on 12.1.2011, the Tribunal on the
 same day delivered the following:

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ORDER

By Hon'ble Mr. George Joseph, Administrative Member -

This OA has been filed for the following reliefs:-

“(a) Call for the records leading to the issue of A10 and quash the same;

(b) Declare that the applicant is entitled to be considered and promoted as a Head Commercial Clerk with effect from the date of promotion of the applicant's next junior in para 1 of Annexure A2 and direct the respondents to consider and promote the applicant accordingly with all consequential benefits arising there from, including arrears of pay and allowances;

(c) Direct the respondents to fix the initial pay of the applicant in the post of Goods Guard with effect from 1.3.96, taking into consideration, the pay of the applicant which he would have drawn as on 29.2.1996 had he been promoted as Head Commercial Clerk on par with his juniors in Annexure A2 and direct further to grant and pay all consequential arrears emanating there from;

(d) Award costs of and incidental to this Application;

(e) Pas such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case.”

2. While the applicant was working as Senior Commercial Clerk in the Southern Railways he was served with a major penalty charge memo. When the applicant's juniors were promoted to the post of Head Commercial Clerk he was denied promotion on account of the pending disciplinary proceedings against him. The applicant was selected for the post of Goods Guard and after undergoing training he was appointed as Goods Guard with effect from 1.3.1996 and is continuing as such. He made several representations for promotion as Head Commercial Clerk along with his juniors which were of no avail. Hence, he filed OA No. 823 of 2003. The Tribunal held that non-consideration of the applicant for promotion as Head Commercial Clerk on par with his juniors was unsustainable and



unjustified. The operative paragraph of the order in OA No. 823 of 2003 is extracted as under:-

“7. In the result, the application is allowed in part. The respondents are directed to have the case of the applicant for promotion as Head Commercial Clerk considered with effect from the date on which his junior was considered and promoted by a review DPC. If he is recommended by the DPC for promotion and if there is no legal impediment in promoting the applicant to issue orders of his promotion with effect from the date of promotion of his junior with all consequential benefits including arrears of pay and allowances. Orders in this regard shall be issued within a period of three months. The prayer for fixation of pay in the post of Goods Guard is not granted. No costs.”

3. The respondents in OA No. 823 of 2003 filed a Review Application No. 15 of 2004 seeking a review of the order passed by this Tribunal which was dismissed as under:-

“3. That the posts of Head Commercial Clerks are not enlisted for selection as Goods Guard a is evidenced by MA-2 is not at all a relevant fact. If no DPC is required for promotion as Head Commercial Clerk the Review Applicants may consider promotion without constituting a review DPC. The effective direction is to consider and promote the applicant, if recommended or eligible. Hence the RA has only to be rejected. The direction to constitute a review DPC is explained to mean that the Original Applicant's case be considered in accordance with law with effect from the date of promotion of his junior.

4. In the result, the MA 600/04 is allowed and the Review Application is dismissed.”

4. Thereafter this order was challenged in WP (C) No. 33448 of 2004 filed by the applicant and WP (C) No. 1712 of 2005 filed by the Railways which were disposed of by the Hon'ble High Court as under:-

“2.
The Tribunal has given a finding that petitioner has lien in his parent department. However, Tribunal has not relied on any rule pertaining to conditions of service to take this view. Since rules of appointment and promotion in both the cadres are not considered we leave this issue to be considered by the review DPC. If petitioner in WPC 33448 of 2004

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is not entitled to retain lien in his parent department and if he opted on permanent basis as Guard of goods train, then there is no scope for promotion to the post of Head Commercial Clerk in his parent department and his promotion will be from Goods Guard to higher cadres in that department.

Both the Writ Petitions are disposed of directing the review DPC to take up the above issues and decide within three months from today."

5. In compliance of the orders of the Hon'ble High Court the respondents held a review DPC to consider the claim of the applicant for promotion as Head Commercial Clerk. The review DPC recommended that the applicant cannot be promoted as Head Commercial Clerk with effect from the date of promotion of his juniors. Hence, this OA.

6. The applicant submitted that the impugned order is without jurisdiction, arbitrary, discriminatory and not based on relevant considerations. Taking note that there is no provision for constitution of DPC for considering eligible candidates for promotion to the post of Head Commercial Clerks, this Tribunal had clarified in Annexure A-8 that the direction to constitute review DPC is to mean that the eligible applicant's case be considered in accordance with law with effect from the date of promotion of his junior has to be read into Annexure A-9 of the Hon'ble High Court also. In the absence of any provision for constitution of a DPC the review DPC must be found to be without jurisdiction. A DPC was not constituted even while considering and promoting the applicant's juniors. The consideration of the applicant's eligibility for promotion has to be made by the competent authority namely the Additional Divisional Railway Manger. The Annexure A-10 order shows that the Additional Divisional



Railway Manager has not considered the applicant's case for promotion as Head Commercial Clerk and relevant issues involved in the case. The applicant though empaneled after training was posted as Goods Guard only with effect from 1.3.1996. While undergoing training the applicant's substantive post was that of a Senior Commercial Clerk and only salary attached to that post was drawn. Mere empanelment for promotion as Goods Guard will not deprive the substantive status of a Railway servant in his original cadre. In case the applicant was unable to complete the training successfully he would have been reverted as a Commercial Clerk. Merely because the applicant opted to be sent for training and because he expressed his willingness to be promoted as Goods Guard are not reasons to say that he was not entitled to be considered for promotion as Head Commercial Clerk on par with his juniors. The impugned order is not based on any relevant rules or instructions. The DPC which was constituted without any authority or law should not have bypassed the statutory provisions regarding maintenance of lien and the applicant's right to be considered for promotion in his parent line. The applicant was entitled to protection of pay drawn by him as Head Commercial Clerk (upon his promotion) by virtue of Rule 1313 of Indian Railway Establishment Code read with Rule 227. Hence, the OA should be allowed.

7. In the reply statement the respondents submitted that the review DPC was constituted by the ADRM as per directions of the Hon'ble High Court in WP(C) No. 1712 of 2005. The said committee considered the applicant's case and arrived at a decision that he having expressed in his willingness for



posting as Goods Guard cannot be considered for promotion as Head Commercial Clerk with effect from the date of his juniors, which is not arbitrary or discriminatory and contrary to law as contended by the applicant. The respondents in their reply statement submitted that there is no provision to constitute the review DPC in the case of non-selection post such as Commercial Clerk. However, the review DPC constituted consisted of Divisional Personnel Officer and Divisional Commercial Manager and they are senior scale officers empowered to make appointment to the post of Head Commercial Clerk in the scale of Rs. 5000-8000/-. Even though the applicant was empaneled on 31.8.1994 because of his non-reporting for training in time and not reporting at Zonal Training Centre, Thiruvhirapalli, his posting as Goods Guard was delayed. Had he completed the training in time he would have been posted as Goods Guard prior to 28.8.1995 the date on which the promotion process was proposed. Even if the applicant happened to be promoted as Head Commercial Clerk on par with his juniors his pay on posting as Goods Guard cannot be fixed reckoning the pay fixed in Head Commercial Clerk since as per avenue of promotion only up to Senior Commercial Clerks can be considered for posting as Goods Guard.

8. In the rejoinder the applicant submitted that his lien continued to be maintained in the Commercial Cadre for two years after the date of order posting him as Goods Guard on 1.3.1996. The only reason for non-consideration of the applicant for promotion as Head Commercial Clerk in the year 1995 was that major penalty charge memo dated 21.12.1993 was pending finalization. The applicant's juniors were promoted by order dated



27.9.1995. The applicant submitted that effective direction of this Tribunal has not been implemented by the respondents as per the clarification that the case of the applicant should be considered by the competent authority. The respondents while issuing the impugned order never considered the directions of the Hon'ble High Court such as whether the applicant is entitled to retain lien and whether there is any rule pertaining to lien. Even though the applicant expressed his willingness by letter dated 6.8.1995 to join Good Guard's training his lien on the cadre of Commercial Clerk was not relinquished. This Tribunal had held in Annexure A-8 order that the posts of Head Commercial Clerks are not enlisted for selection as Goods Guards is not at all a relevant fact.

9. In the additional reply statement the respondents reiterated their stand in the reply statement.

10. In the MA filed on 20.5.2010 the applicant had enclosed the order dated 9.4.1999 wherein one Head Commercial Clerk Shri Arulappan Charles was posted as Goods Guard.

11. In the affidavit filed by the respondents it was stated that Mr. Arulappan Charles was only a Head Clerk and not Commercial Clerk and was in the pay scale of Rs. 5750-8000/-. Further it was submitted that the records of disciplinary proceedings initiated against the applicant on 2.12.1993 is not available at Commercial Branch of Palaghat Division and the only record available regarding the applicant is only his service records and it could be seen that a penalty was confirmed and later modified and



finalized as withholding 3 months' increment in 2008. Although it is claimed that a true copy of the service records is produced as Annexure R-10 it is not available on record.

12. We have heard the learned counsel for the applicant and learned counsel for the respondents and perused the records. The effective directions of this Tribunal in OA No. 823 of 2003 and by implication, the order of the Hon'ble High Court in WP(C) No. 1712 of 2005 were that the competent authority should consider the question of lien of the applicant on the post of Senior Commercial Clerk when his juniors were promoted as Head Commercial Clerks and the rules of promotion to the post of Head Commercial Clerk and the rules of appointment to the post of Goods Guard. The question whether he is entitled to retain his lien in his parent department and the question whether the applicant's option for Goods Guard was on a permanent basis were to be dealt with by the competent authority. We find that the respondents technically complied with the direction of the Hon'ble High Court to hold a review DPC but it disregarded the clarification given in RA 15 of 2004 to the effect that the direction to constitute a review DPC is to mean that the applicant's case has to be considered in accordance with law with effect from the date of promotion of his junior. It is seen that the review DPC has not considered whether the option given by the applicant for selection to the post of Goods Guard in response to the notification dated 13.5.1994 was irrevocable and final. The review DPC has taken the willingness for joining as Goods Guard shown by the applicant as option on permanent basis without relying on any rule. It also



failed to consider the rules in regard to appointment as Goods Guard and the rules in regard to promotion as Senior Commercial Clerks as Head Commercial Clerks. It also did not consider the question of lien of the applicant on the post of Senior Commercial Clerk when his juniors were considered and promoted as Head Commercial Clerks. Therefore, the impugned order at Annexure A-10 is vitiated by non-consideration of the relevant issues. Hence, it has to be quashed and set aside.

13. However, in the light of the relief sought and the submissions made in this OA the following issues need to be considered i) whether the applicant is entitled to protection of pay drawn by him by virtue of Rule 1313 of Indian Railway Establishment Code in case he is found fit to be promoted as Head Commercial Clerk and ii) if Shri Arulapan Charles who was only a Head Trains Clerk and not listed in the feeder cadre as per Annexure R-9 could be posted as Goods Guard why the applicant in the cadre of Head Commercial Clerk (in case he is promoted) which also is not in the feeder cadre for the post of Goods Guard as per Annexure R-9 cannot be considered for posting as Goods Guard.

14. We therefore, are of the considered view that in the interest of justice the issues raised in the above paragraphs should be considered by the competent authority i.e. the Additional Divisional Railway Manager, Southern Railway, Palaghat Division, Palaghat.

15. Accordingly, the impugned order at Annexure A-10 in this OA is quashed and set aside. The Additional Divisional Railway Manager,

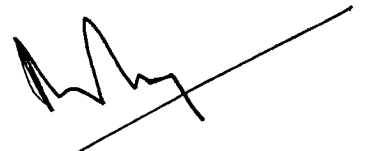


Southern Railway, Palaghat Division, Palaghat is directed to consider the case of the applicant for promotion from the post of Senior Commercial Clerk to the post of Head Commercial Clerk in accordance with rules as directed by this Tribunal in OA No. 823 of 2003 read with the direction given in RA No. 15 of 2004 and the directions of the Hon'ble High Court in WP(C) No. 1712 of 2005 and other issues flagged by this Tribunal within a period of two months from the date of receipt of a copy of this order.

16. The Original Application stands disposed of as above. No order as to costs.



(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER



(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER

"SA"

15.06.2011

PRR & KGJ

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(22)

Ms.Sikky for Mr.P.Haridas

Mr.Shyam for Mr.TCG Swamy

MA 421/11:

This is an application for enlargement of time for complying the order in OA 166/09. The direction in the OA is to consider the applicant for promotion within a period of two months. The date of order is 12.01.2011. Two months period from the date of order expired on 12.03.2011. According to the applicant in the MA (Respondents in the OA) the certified copy was received only on 31.01.2011. As such, two months period expired on 31.03.2011. This MA has been filed seeking further three months time. The application is dated 03.03.2011. Even if the entire period of three months is granted, the time will expire by 30.06.2011. In the circumstances, we grant time till 30.06.2011 as sought for. MA is allowed.


KGJ(AM)

15.06.2011


PRR (JM)

vs