

**CENTRAL ADMINISTRATIAVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 196/2005

TUESDAY, THIS THE 13th DAY OF JUNE, 2006

C O R A M

**HONLE MRS SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. K. B. S. RAJAN, JUDICIAL MEMBER**

K. Chandran S/o late M. Kutty Raman Nair
Adhoc Senior Stenographer
Office of the Deputy Chief Engineer (Construction)
Southern Railway/Ernakulam
permanent address- Vedhas, H.No. 49/132
Ayyanthole, Trichur District.

Applicant

By Advocate Mr. T.C. Govindaswamy

Vs.

- 1 Union of India represented by
the General Manager, Southern Railways
Headquarters, Park Town P.O
Chennai-3
- 2 The Divisional; Railway Manager
Southern Railway
Trivandrum division
Trivandrum-14
- 3 The Senior Divisional Personnel Officer
Southern Railway,
Trivandrum Division
Trivandrum-14
- 4 The Chief Engineer/Construction
Southern Railway,
Headquarters Office, Egmore
Chennia-8
- 5 The Deputy Chief Engineer/
Construction, Southern Railway,
Ernakulam Junction
Kochi-682 016

Respondents

By Advocate Mr. Thomas Mathew Nellimoottil

ORDERHON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicant is working as a Senior Stenographer under the fifth respondent on adhoc basis since 1.9.1985. His grievance is that he is not regularised despite his long and continuous service, existence of vacancies and his juniors in the open line being regularised from time to time.

2 The applicant has submitted the following facts. He was holding a substantive post of Typist in the South Central Railway, Secunderabad Division and while officiating as a Junior Stenographer he was transferred and posted as Typist in the Southern Railway at Trivandrum on 2.8.1982 and while working there, he was transferred to the Construction Organisation and posted to work under the control of Deputy Chief Engineer (Construction), Southern Railway, Trichur. While in the Construction Organisation he was promoted as Junior Stenographer on ad hoc basis and further promoted as Senior Stenographer. During his service as Senior Stenographer his service has been meritorious and was continuously discharging duties for the last 19 years. During 1997-98 one vacancy of Senior Stenographer arose in the Open Line and ten persons were called for the suitability test and his junior was promoted. The applicant approached the Tribunal in O.A. 693/1999 challenging the suitability test and the consequent

promotion of his Junior. The OA was dismissed. Three more vacancies arose during 1999 and the applicant was eligible to be considered again for promotion. However, the notice for speed test was communicated late to the office where the applicant was working and he received the letter after the speed test was conducted. The applicant could not take part in the test and his junior Shri Abraham was promoted on regular basis on passing the test. The applicant then approached the Tribunal in O.A. 867/2000 against his non consideration for regular promotion. The O.A. was disposed of directing the third respondent to consider his representation in the light of the facts, rules and instructions on the subject. In purported compliance of the orders of the Tribunal, the third respondent has passed the impugned order rejecting his representation on the ground that he had not attended the suitability test on 27.7.1999. It is the contention of the applicant that the records would clearly show that the applicant did not attend the suitability test for reasons not attributable to him but on account of administrative lapse. Annexure A-7 would show that the letter intimating the conduct of suitability test and the letter furnishing the reason for not relieving the applicant were received under the same cover only on 18.10.1999. It is also submitted that the post of Senior Stenographer is not a selection post and the applicant could still be considered though there was a delay in communication and there was a deliberate attempt not only to prevent the applicant from attending the test but also to ensure that only Stenographers

working in the Open Line organisation particularly in the Divisional office are selected. It is also submitted that in terms of Para 226 of the Railway Establishment Manual Vol. I, staff who have already qualified in the suitability/trade test while in the Construction/Railway Electrification projects need not be subjected to such tests on the Open line and they may be promoted on the basis of their seniority as and when due in their turn and since the applicant had been found suitable by the Construction Organisation, there was no need to subject him to another suitability test.

3 Respondents have contested the averments of the applicant. In the first instance, it has been urged that the applicant is taking different stand on different occasions and he does not have a regular stand on the issues agitated. In the earlier OA Nos. 369/99 and 693/99 having dismissed by the Tribunal, were taken up before the Hon'ble High Court which dismissed the OP. Thus having lost the case against holding of the suitability tests, the prayer in the present OA is vitiated by constructive res judicata. Further, the applicant had not been appointed because he has failed in the suitability test and the result of the suitability test has not been challenged by him. His posting as Senior Stenographer in the Construction Organisation is purely on adhoc basis and the said posting does not grant him any claim for confirmation and the benefit of promotion on regular basis. It is not correct to say that the post of Senior Stenographer is filled on the basis of seniority and no test is required. In that case he

would not have appeared for the speed test in 1997-98 and he had challenged the test after appearing for the same. The suitability test was conducted on 27.9.1999 and it is denied that the communication dated 17.9.1999 was not served on the applicant.

4 The applicant has filed a rejoinder denying the averments in the reply statement and contending that the cause of action for filing OA 361/99 and O.A.693/99 was different and the question of res judicata arises only if the cause of action is the same. In the earlier OAs he had challenged the test conducted during the year 1998 and second OA related to the test conducted on 1999. Merely because the applicant got an opportunity to continue in the Construction Organisation as Stenographer the respondents are not justified in refusing the promotion in the Open Line which is rightly due to ^{him} with reference to his juniors.

5 The respondents filed an additional reply clarifying that the promotion of the applicant in the Construction Organisation is a stop gap arrangement purely on the basis of necessity and he cannot claim any seniority on that account as seniority is maintained separately in the unit of a Division.

6 We have heard the learned counsel for both the parties and have gone through the pleadings and records produced before us. The background of the earlier OAs filed by the applicant on the issue

of regular promotion to the post of Senior Stenographer and the facts of the case as submitted by the applicant are not in dispute. The applicant has sought the following reliefs in this O.A.:

- (a) Call for the records leading to the issue of Annexure A-15 and quash the same.
- (b) Declare that the non-consideration of the applicant for regular promotion as Senior Stenographer on par with his junior Sri Abraham (in Annexure A-5) is arbitrary and illegal.
- © Direct the respondents to consider the applicant accordingly based on his record of service and without subjecting him to another suitability test and direct further to grant the consequential benefits thereof, including regularisation of promotion as Senior Stenographer, with effect from the date of promotion of the applicant's junior Sri Abraham.
- (d) Award costs and incidental to this application
- (e) Pass such other orders or directions as deemed just fit and necessary in the facts and circumstances of the case."

7 A perusal of the above reliefs would show that the applicant is mainly aggrieved by the non-consideration for regular promotion which is dependent on passing the speed test and it is a continuous cause of action as speed test is admittedly being conducted periodically and the applicant is eligible to appear in the same whenever it is conducted. Therefore on the ground that he has approached this Tribunal against the said suitability (speed) test conducted in the years 1998 and 1999, the present OA cannot be hit by the principle of res judicata.

8 Presently in this OA, we are concerned with the non-consideration of the applicant for the post of Senior Stenographer. According to him a speed test was conducted on 29.9.1999 in the Divisional office and the communication was sent to the concerned organisations including the one in which the applicant was working.

The respondents have contended that the official communication was received by the Central Diary Organisation TVC on 17.9.1999 and was sent to the applicant on the same day. The contention of the applicant was that it was served on him only on 21.10.1999 that is after the test was over and immediately he had represented to the authorities. The applicant has produced the details of the inter-departmental correspondence in the matter, according to which the office letter dated 4.10.1999 calling for reasons for not relieving the applicant had been sent to the Deputy Chief Engineer (Construction) and in Annexure A-7 letter dated 16.12.1999, the Executive Engineer (Construction) intimated the Senior DPO that the call letter for the speed test and the letter asking for the reasons for not relieving the employee were received by the office on 18.10.1999 only. It was after detailed verification of the entire episode about the doubts raised on the non-receipt of the letter by the Divisional office that it was confirmed by Annexure A-10 that the letters were received only on 18.10.1999. In the face of the above records it is clearly proved that there was a delay in communication of the notice and the applicant could not appear in the test on account of not receiving the notice for the test in time. It is surprising that the respondents have taken the stand that the letters were despatched on 16.9.1999 itself. Mere despatch of the letter does not ensure its receipt in time unless it had been sent by special messenger and acknowledgment obtained. That is not the case here. Therefore this contention of the respondents have to be rejected. It is not

denied by Mr. K. A. Abraham who is junior to the applicant had appeared in the speed test and on passing the same had been regularised and the applicant had been representing since then on the strength of the instructions of the Railway Board and in terms of Para 214 of the Railway Establishment Manual, which reads as "when in filling of a non-selection post, a senior railway servant is passed over the authority making the promotion shall record briefly the reasons for such supersession" that his case should have been reviewed. No such reasons have been recorded.

9 In terms of Para 223 of the Railway Establishment Manual, if an employee is unable to appear for trade test even within six months, he should be subjected to a suitability test and the promotion granted with proforma seniority. All the above Rules thus cast a responsibility on the respondents not to pass-over a /; senior employee unless there is a declaration of unfitness for holding the post for which reasons have to be recorded in clear terms. None of these formalities have been fulfilled. Instead of rectifying the situation the respondents have glossed over the facts. In fact they have advised vide their letter dated 13.8.2003 that the applicant will be allowed to appear for the eligibility test to be held, when no test was conducted in 2003 or thereafter till date. The applicant has submitted that several vacancies of Senior Stenographer had arisen since then and the respondents are not regularly holding the test.

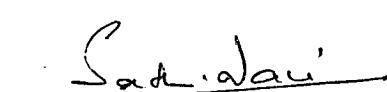
10 The applicant has also taken the stand that since he was holding the post of Senior Stenographer for the last 20 years and that he was subjected to the suitability test when he was initially promoted as Senior Stenographer in 1985 and when the Senior Officer of the Railways namely the Chief Engineer (Construction) Organisation had issued a certificate of meritorious service, it is not necessary to subject him to the suitability test again as such exemption is provided for under Rule 226 of the Railway Establishment Manual Vol.1. He has relied on Annexure A-1 letter dated 29.10.1985 issued promoting him as Senior Stenographer in the Construction organisation. We are not able to accept this argument because Annexure A-1 orders is only promoting him on an adhoc basis. There is no indication that this promotion was granted after adjudging his suitability and passing a speed test. The mere statement that he was found suitable for promotion on adhoc basis does not imply that he had passed the suitability test entitling him to be considered for regular promotion and continuance for 20 years in the Construction Organisation does not give him any right for regularisation in the Open Line which has to be in accordance with the rules. Unless the competent authority had sanctioned any relaxation of the provisions regarding speed test, this requirement is mandatory under the Rules and in any case relaxation cannot be demanded as a right. Therefore if the applicant has to be regularly appointed as Senior Stenographer he has necessarily to pass the trade (speed) test and hence the only question to be considered is

whether he has been deprived of the opportunity to appear in the test. We have already stated that it is obvious that the applicant could not appear in the test due to non-communication of the notice to him in time. The respondents should have accepted his explanation which was confirmed by his superiors and given him an opportunity to appear again in the trade test. There would not have been any difficulty in conducting a trade test immediately thereafter after informing the applicant. The respondents had decided to hold the test in 2003. He should have been given an opportunity at least then and having not done so the applicant has been deprived of his right for promotion in the regular line and he has been superseded by several of his juniors. Though his prayer for regularisation without subjecting him for a suitability test cannot be granted, he has a right to be subjected to suitability test after giving due notice. The respondents are therefore directed to hold a suitability test and assess his suitability for regular promotion within a period of three months. If the applicant is successful in the trade test he will be entitled for regularisation of his promotion as Senior Stenographer w.e.f. the date of appointment of his junior Shri K.A. Abraham. The O.A. is allowed to the extent indicated above. No costs.

Dated 13.6.2006.


K.B.S. RAJAN
JUDICIAL MEMBER

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SATHI NAIR
VICE CHAIRMAN