CENTRAL ADMINISTRATIVE TRIBUNAL: ERNAKULAM BENCH

O.A. NOs.261/2004 & 262/2004.

Friday, this the 15th day of September, 2006.

Hon'ble Mr Justice G.Sivarajan, .. Vice-Chairman.

Hon'ble Mr. N.Ramakrishnan, .. Member(A)

O.A.NO.261/2004

K.Remavathy,
Office Superintendent Grade-II,
Personnel Branch,
Railway Divisional Office,
Palkkad, r/a Souparnam,
NSS Engineering College Post,
Ramakrishna Nagar, Palakkad. .. Applicant.

(By Advocate Mr. T.C.Govindaswamy)

Vs.

1. Union of India
   represented by the Secretary to
   Government of India, Ministry of
   Railways, Rail Bhawan,
   New Delhi.

2. The General Manager,
   Southern Railway, Park Town PO,
   Chennai-3.

3. The Chief Personnel Officer,
   Southern Railway, Park Town PO,
   Chennai-3.

4. The Divisional Railway Manager,
   Southern Railway,
   Palghat Division, Palghat.

5. The Divisional Personnel Officer,
   Southern Railway,
   Palghat Division, Palghat. .. Respondents.

(By Advocate Mr. P.Haridas)

O.A.NO.262/2004

T.Meenakshikutty,
Office Superintendent Grade-II,
Personnel Branch,
Railway Divisional Office,
Palkkad, r/a Thorattil House,
Kollengode Post, Palakkad Dist. .. Applicant.

(By Advocate Mr. T.C.Govindaswamy)

Vs.

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4. The Divisional Railway Manager,
Southern Railway,
Palghat Division, Palghat.

5. The Divisional Personnel Officer,
Southern Railway,
Palghat Division, Palghat. .. Respondents.

(By Advocate Mr. Thomas Mathew Nellimoottil)

The applications having been heard on 15-09-2006, the Tribunal on the same day delivered the following:

ORDER

Hon'ble Mr.Justice G.Sivarajan, Vice-Chairman:-

The applicants in both these cases are working as Office Superintendents, Grade-II in the scale of pay of Rs.5500-9000 in the

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Railways under the 5th respondent. They have filed these two O.As challenging the show cause notices issued to them inter alia on the ground that the said notices are only an empty formality, for, the respondents had already taken a decision to revert the applicants from the post of Office Superintendents, Grade-II to the post of Head Clerks in the pay scale of Rs.5000-8000. Both the applicants have now crossed the age of 58 years and 57 years respectively.

2. We have perused the impugned show cause notices (Annexures-A7 & A6 respectively) to find out as to whether the allegations made by the applicants that a decision has already been taken in the matter and that the show cause notices are only an empty formality. In para 3 of the show cause notice it is stated that "the competent authority, after going through the findings of the Vigilance Department, is satisfied that irregularities have been committed and in order to set right the wrongs committed, has decided that the panel has to be amended, promotion cancelled duly giving notice and opportunity to the persons who had adversely affected." Though it may appear from the wordings in the show cause notice that the amendment of the panel and the cancellation of the promotion are to be effected after giving notice and opportunity to the persons adversely affected, a glance through the files produced by the respondents discloses that upto the level of the Railway Board, a decision is stated to have been taken for amendment of the panel and for cancellation of the promotion based on such amendment and sought for approval of the Railway Board. However, we find that the Railway Board had issued directions to the competent authorities to

comply with the procedural formalities in regard to such reversion. The respondents in their reply also maintain the same stand. Under these circumstances, we felt that it will not be proper on the part of this Tribunal to direct the applicants to file their objections to the impugned show cause notices, for, even if, we direct so, the respondents in all probability are likely to maintain the stand which they have already taken upto the level of the Railway Board and in reply filed in this case. In these circumstances we are of the view that no useful purpose will be served by issuing directions to the respondents to consider the objections, if any, filed by the applicants and pass orders. We accordingly proceed to consider the case on merits.

3. In this context, it is relevant to note here that, based on the seniority of the applicants in the post of Head Clerks, they were promoted on ad hoc basis as Office Superintendents, Grade-II in the year 1993 and 1995 respectively and they were continuing as such till 1999 when they were promoted with effect from 22-01-1999 on regular basis after completing the due selection procedure. This, however was subject to the outcome of two cases, O.A.No.30/99 and 53/99 pending before the Ernakulam Bench of the Tribunal evidenced by order dated 29-01-1999 (Annexure-A5 in O.A.261/04). Based on the said orders they are continuing on regular basis as Office Superintendents, Grade-II for the last seven years. It is also relevant in this context to note that O.As 30/99 and 53/99 were dismissed by orders dated 03-10-2001 and 08-01-2001 respectively and hence the condition imposed in the promotion order did not survive thereafter.

The applicants, on receipt of the show cause notices, made requests in their communications dated 24-02-2003 (Annexure-A8 in O.A.261/04) and communication dated 18-02-2003 (Annexure-A7) in O.A.262/04) for supply of certain documents. It was specifically stated therein that the said communication should not be considered as an objection to the proposal and that detailed objection will be filed only after perusal of the said documents. The respondents however did not choose to supply these documents to the applicants to enable them to file a satisfactory reply to the show cause notices. We find that the respondents, in para 9 of their reply in O.A.261/04 have stated that documents requested by the applicants are either irrelevant or cannot be made over to the applicants as per extant rules.

4. Mr. T.C.Govindaswamy, learned counsel for the applicants in both these cases submitted that this Tribunal, in the order dated 3.10.2001 in O.A.30/99, has clearly held after duly considering the submissions made by the official respondents in their reply statement that the entire selection process was regular and proper and therefore calls for no interference. Counsel further submitted that, as a matter of fact, if there was an investigation by the Vigilance Branch and if a vigilance report recording irregularity in the selection conducted in 1999 the respondents ought to have brought the same to the notice of the Tribunal in that proceeding which has not been done. The vigilance report, it is stated, was available with the respondents at that time. Counsel submits that the applicants are seniors who are otherwise entitled to promotion to the post of Office Superintendent, Grade-II and that as per the selection made by the respondents, the

applicant came out successful and they were promoted on regular basis as per orders dated 29-01-1999 and that by virtue of the extant rules Annexure-A6 (in O.A.261/04) RBE No.23/89 it must be deemed that the applicants are confirmed in the post of Office Superintendents immediately after completion of two years i.e., on 22.01.2001. Counsel submits that there is no case of misrepresentation, suppression or fraud on the part of the applicants and further the respondents have no authority to amend the panel or to cancel the promotion of the applicants since they are already confirmed in the said posts. The counsel has also relied on a division Bench decision of the Karnataka High Court rendered in P.Shiv Vs. Union of India [2004(1) ATJ 605] on a similar situation. Counsel also submitted that the respondents did not furnish the documents sought for by the applicants and that they have not stated as to why the said documents are irrelevant. Counsel submits that in the above circumstances the show cause notices impugned in these O.As cannot be sustained.

5. On the other hand, learned counsel appearing for the respondents in both these cases (two different standing counsel) submit that after the selection, a complaint regarding irregularities in the selection was received, the same was inquired into by Vigilance Branch of the Railways, it was found on evidence that there were irregularities in the selection to the post of Office Superintendent, Grade-II conducted by the Department; based on the said irregularities action was taken with the approval of the various authorities including the Railway Board for reverting the applicants in

these two cases to the post of Head Clerks. The standing counsel submitted that there were grave irregularities, particularly, in the supplementary Examination held on 24-10-1998, that six Head Clerks appeared in the written test in the Supplementary Examination, that there was only one Supervisor to supervise the same, that all the applicants were copying the answer papers and that one Shri Harikumar who was entrusted with the task of valuation of the answer papers, had awarded marks in a very liberal way without complying with the relevant rules in the matter of evaluation of answer papers. It is stated that the applicants and another candidate did not secure the requisite 60% qualifying marks in the written examination as per the discrepancies noticed in the evaluation. It is also stated that the marks originally awarded to the applicants was more than 60%. Standing counsel further submitted that on account of such irregular evaluation of answer papers in the supplementary examination eligible candidates did not get appointment and ineligible candidates were selected for appointment to the post of Office Superintendents, Grade-II. Standing counsel further submitted that in order to give appointment to the eligible persons who have passed the examination it was highly necessary to revert these two applicants who were found to be ineligible for selection. Standing counsel has placed the relevant files before us for our perusal. Standing counsel further submitted that the impugned communications are only show cause notices, that the applicants had filed their objections and that the respondents will consider the same and pass orders in accordance with law.

6. We have considered the rival submissions, perused the pleadings in the case and also the departmental files placed before the Bench. The question that arises for consideration is as to whether the respondents can, for the reasons stated in the show cause notice and in the reply filed in these cases, revert the applicants in both these cases from the post of Office Superintendent Grade-II which they were holding on regular basis for the last over seven years. This issue, according to us, has to be viewed from various angles.

7. Now let us consider the matter on the basis of the factual position. These two applicants were promoted to the post of Office Superintendent Grade-II on ad hoc basis considering their seniority in the post of Head Clerks in the year 1993 and 1995 respectively. While working as such the respondents made regular selection to the post of Office Superintendent Grade-II by conducting written test and interview. Written test was conducted for a few candidates first and a supplementary written test was also conducted. The applicants and four others sat in the supplementary written test. Based on the results of the written test and interview selection was made and both the applicants are included in the select list. They were also promoted on regular basis as per order dated 29-01-1999. Smt. Christy Jayanthi, who was not selected for promotion to the post of Office Superintendent Grade-II had filed O.A.No.30/99 challenging the very select list and the promotion of one Smt. P. P.Rosely, Head Clerk as irregular. The respondents contested the said O.A. stating that the selection was made strictly in accordance with law. The Tribunal held that the selection and promotions effected are legal and valid by its

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order dated 3-10-2001. The Vigilance Branch of the Railways conducted enquiry based on the anonymous complaint alleging illegality and irregularity in the selection simultaneously and an enquiry report was submitted on 30-08-2000. The respondents had filed their reply statement in that case only on 30-01-2001. There is no whisper in the said reply either regarding the anonymous complaint or regarding the enquiry conducted or regarding the enquiry report and the findings in the enquiry. Now the position is that the Tribunal in its order dated 3-10-2001 in O.A.No.30 of 1999 took the view that the selection and appointment to the post of Office Superintendent Grade-II are legal and valid, whereas the vigilance branch of the Railways took the view that there are irregularities in the selection process and that the selection and promotion of the applicants and another are irregular. When the decision of the Tribunal regarding the selection and appointment/promotion to the post of Office Superintendent stands, is it open to the respondents to take the stand, on the basis of the vigilance report, that the selection and appointment of the applicants are irregular. According to us, when a vigilance enquiry regarding irregularities in the selection was going on it was the duty of the respondents to bring the same to the notice of the Tribunal in the pending O.A. (O.A.No.30 of 1999) particularly when an enquiry report dated 30-08-2000 with the findings that irregularities in the selection was found was submitted. The appropriate course for the respondents was to seek for an order from the Tribunal that they will look into the case of the applicant in the light of the enquiry report rather than seeking for upholding the selection. After having courted an order from the Tribunal the respondents, according to us, are not justified in taking action for reverting the applicants on the ground of irregularities in the selection. Here, it must be noted that the respondents did not choose to cancel the entire selection made or at least to cancel the results of the supplementary examination. Now, respondents have chosen to cancel the selection and promotion of the applicants alone. The enquiry report and the subsequent proceedings based on the said report, it would appear, are with a view to help some one who had lost in the selection. We are not making any further observations in this regard.

8. The next aspect to be considered is that the applicants who are otherwise qualified and eligible for appointment/promotion to the post of Office Superintendent, Grade-II and were promoted on ad hoc basis in 1993 and 1995 respectively and later promoted on regular basis after undergoing the selection process on 29-01-1999 can be reverted for the reasons stated in the show cause notices. In the Railway Service, probation is only in the entry level posts [vide RBE No.23/89 dated 20-01-1989 (Clause 3.1.(A)(1)]. In other words, there is no probation in the post of Office Superintendent Grade-II being a promotion post. Further clause 3.1 (C) provides that on promotion, if the Recruitment Rules do not provide for any probation, a Railway servant promoted on regular basis (after following the prescribed procedure) will have all the benefits that a person confirmed in that grade would have. No probation is prescribed for this post is evident from the promotion order itself, for, no probation is required. Further

clause 3.1 (c)(iii) provides inter alia that the benefit of confirmation in a promotion grade will follow only after a period of 24 months has elapsed from the date of promotion on regular basis. The promotion/regularization order dated 29-01-1999 did not speak of probation as the Recruitment Rules did not provide for probation and the applicants had completed 24 months of regular service in the promoted post by February 2001. Hence, by virtue of the provisions of RBE No.23/89, the applicants are entitled to all the benefits of confirmation in the promoted post. In this context, it is relevant to note the Division Bench decision of Karnataka High Court in the case of P.Shiva Vs. The Union of India (Annexure-A11). In that case also after the selection and appointment of the applicant therein, one Shekhar, belonging to Samatha party gave a complaint to the Minster for Railways alleging irregularities in the selection; an investigation was conducted and it was reported that there was irregularity in the selection. As a part of investigation, all the answer scripts of candidates were re-valued. On such revaluation, it was found that in regard to the answer script of the petitioner two marks had been wrongly awarded to question No.7.11, which was an objective type question. It was found that the petitioner had answered the question as 'Rs 328' whereas the correct answer as per the key was Rs 322. The petitioner had secured 51 marks. If two marks for the wrong answer were reduced, marks secured by the petitioner in the written test became 49 which is below the minimum of 50 marks required for the written test. A show cause notice was therefore issued stating that the applicant had secured only 49 marks and not 51 marks, that as he had not secured the minimum of 50 marks he was not eligible for being called for viva-vice and that he had been wrongly called for viva voce and placed on the panel of selection of candidates. The respondents proposed to delete the name of the petitioner from the panel. Subsequently, the panel of selected candidates was modified by removing the name of the petitioner. This was impugned before the Central Administrative Tribunal and later before the Karnataka High Court. The Tribunal dismissed the application as it found that the petitioner had secured only 49 marks in the written examination and therefore was ineligible for being called for viva-voce or empanelment. The High Court in the writ petition after stating the facts and noting the relevant Rules observed that the "question therefore is whether the discovery of an error in awarding two marks in the written test (thereby reducing petitioner's marks to 49, which is below the minimum of 50 marks required for being called for interview, subsequent to the promotion, can result in cancellation of promotion. The question was considered in para 14 of the judgment thus:

> "14. If the error in award of marks had been found when the petitioner was still at the empanelment stage and had not been regularly promoted as Ticket Collector it is possible that, the panel could have been modified by removing his name from the panel by taking action as required by Rule 219(1), which provides:
>
> > "If after the formation and announcement of the panel with the approval of competent authority, it is found that there were procedural irregularities or other defects and it is considered necessary to cancel or amend such a panel, this should be done after obtaining the approval of the authority next higher than the one that approved the panel."

> But, where the candidate who succeeds in an examination and empanelled for selection, has passed the empanelment stage and has already been promoted, appointed as assumed charge of the higher post, the position so completely different. Cancellation of promotion on the ground that a candidate has not in fact secured the required marks for passing or acquiring eligibility for viva voce, is permissible only if there was any fraud or mal-practice or irregularities in the conduct of the examination or evaluation or if the candidate himself is guilty of any malpractice, misrepresentation or suppression of facts or wrongful act. In the absence of such reasons, a mere change in marks, as a result of a revaluation which is not part of the regular Selection process, cannot be a ground for canceling the promotion."

It was further observed in paragraph 15 as follows:

> ".....In the absence of any malpractice or blameworthy conduct of the part of the candidate, or any fraud or irregularity either in the conduct of the examination or in the evaluation or in the declarations for results and in the absence of any provision for review/revaluation, as a part process of selection/promotion, the written examination, results which has been acted upon, resulting in promotion, cannot and will not to varied on the ground that an error had crept in. This is because of doctrine of finality and estoppel"

Thereafter the principles relating to promotions based on examinations were summarized thus:

(i) The examination result of a candidate, published and given effect cannot be altered: (a) where the candidate is not guilty of mal-practice or misrepresentation or any blameworthy conduct; or (b) where there is no fraud or irregularity in the conduct of examinations of evaluation or tabulation; or (c) where the Rules do not provide for

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candidate of results on the basis of review or revaluation of the answer scripts.

(ii) Where the Rules governing recruitment provide for empanelment or preparation of select list is based on the result in an examination, and a candidate empanelled or placed in the selection list on being declared as successful in the examination, is promoted on the basis of such selection, such promotion cannot be cancelled or withdrawn on the ground that on a revaluation which is not a part of the process of selection under the Rules, he was found to have failed in the examination. Any revaluation or review of the examination results, necessarily, should be prior to the promotion or appointment based on the selection list.

(iii) But, where there is fraud, or irregularities in the conduct of examination/valuation/tabulation or malpractice or blameworthy conduct on the part of the candidate himself, the result of an examination can be altered and all consequences can be set at naught, as discovery of fraud overrides doctrine of estoppel or rule of finality or principle of equity.

Based on the above, High Court further observed in para 17 as follows:-

> "We are therefore, of the view that once the petitioner was selected and empanelled on the basis of the marks secured in the examination and promoted as Ticket Collector in pursuance of such selection, his promotion cannot be cancelled merely on the ground of an error in evaluation, in the absence of any circumstances mentioned in para 15 (iii) above. To hold otherwise, would mean that there can be no finality to any process of selection, thereby leading to uncertainty and chaos."

9. Since the facts of the case are similar in content, according to us, the principles stated therein and the consideration of the matter in the light of the said principles applies equally to the present case. As we have already noted, the case of the respondents in the first case is that there was wrong awarding of marks for two questions wrongly answered and in the other case there is a mistake in the totaling. In

the decided case the applicant therein was promoted based on selection with effect from 01-04-2001 by an order dated 27/28.06.2001 and the show cause notice was issued on 21-09-2001 after conducting vigilance enquiry in between. Even in such a situation it was held that where the candidate who succeeds in an examination and empanelled for selection has passed the empanelment stage, and has already been promoted/appointed and assumed charge of the higher post the position is completely different and the cancellation of promotion on the ground that a candidate has not in fact secured the marks for passing or acquiring eligibility for viva voce is permissible only if any mal practice or irregularities in the conduct of the examination or evaluation or if the candidate himself is guilty of any malpractice, misrepresentation or suppression of facts or wrongful act was found. In the absence of such reasons a mere change in marks as a result of revaluation which is not part of the regular selection process cannot be a ground for cancelling the promotion. In this case, the applicants were holding the post of Office Superintendents, Grade-II on ad hoc since 1993 and 1995 respectively and they were promoted on regular basis in 1999 and entitled to the benefits of confirmation since February 2001. In the circumstances, by applying the principles laid down in the decided case discussed supra, we are of the view that action against the two employees for reverting them to the post of Head Clerks is not justifiable.

10. In the present case, the applicants appeared for the written test and viva voce, they were selected and empanelled on the basis of

the marks secured in the written test and viva voce; they were appointed on regular basis on 29-01-1999 in the higher post; they had completed two years regular service in the higher post by February 2001 and they had acquired a right to the said post. No fraud, misrepresentation or suppression of any facts is alleged against the applicants. The allegations as could be seen from the vigilance enquiry report are that in the supplementary examination there were 6 candidates for the examination, that there was only one supervisor, that the answer papers were copied by the candidates, that the person who was entrusted with the task of valuation of the answer papers had given marks for wrong answers and that there were calculation mistakes in totaling of marks etc. All these circumstances, according to us, cannot be a ground for canceling the promotions already taken effect and after the promotees had acquired a right to the higher post by virtue of the extant Rules.

11. Another important aspect is that the vigilance enquiry report is result of an anonymous complaint dated 7-02-1999 received by the vigilance wing. The inquiry report, as already noted is dated 30-08-2000. There is a communication No.3(v)/99/2 dated 29.06.1999 (Annexure-A10) issued by the Central Vigilance Commission which says that no action to be taken on anonymous/pseudonymous petitions/complaints. It is stated that under the existing orders issued by the DO (P&T) letter dated 29.09.1992 no action should be taken on anonymous and pseudonymous complaints and should be ignored and only filed but there is ~~no~~ provision available in the said order that in case such

complaints contain verifiable details, they may be enquired into in accordance with existing instructions. It was observed that the exception provided in this order has become a convenient loophole for blackmailing. It is also stated that the CVC has initiated a number of steps to provide a channel of communication against the corrupt public servants and that in view of the said measures there is very little possibility that genuine cases of corruption will not be brought to the notice of the appropriate authorities by those who were earlier resorting to anonymous complaint route. The CVC has, therefore, ordered under powers vested in it under Para 3(v) of the DOPT Resolution No.371/20/99-AVD III dated 4th April 1999 that with immediate effect no action should at all be taken on any anonymous complaints and that they must just be filed. The CVC has issued one more communication No.98/dSP/9 dated 31-01-2002 (Annexure-A9) stating that it has come to the notice of the Commission that some Government departments, organizations and, in particular, banks are not complying with the CVCs instructions and have been taking cognizance/action on anonymous complaints, that often the contents of the complaint described as verifiable, is used as a justification for such action and that the instructions of the Commission does not permit this line of action. It was ordered that under no circumstances should any investigation be commenced or action initiated on anonymous complaints. These should invariably be filed and any violation of this instruction will be viewed seriously by the Commission.

12. Thus, it is clear that the position from 1992 was that no action should be taken on anonymous complaints. Exception provided in the DO (P & T) order of 1992 providing for action on verifiable facts was also taken away from June 1999. Strict compliance of the said directions was also insisted in the 2002 order. In the circumstances no action should have been taken on the anonymous complaint dated 7-02-1999. Even if action was taken immediately thereafter on the basis of the exception provided in the 1992 order it should have been dropped with effect from 1-06-1999, for it was a mandate of the CVC not to take any action on anonymous complaints under any circumstances.

13. It is contrary to the aforesaid provisions binding on the respondents the vigilance enquiry was proceeded with and report dated 30-08-2000 was submitted. The attempt of the respondents by issuing the show cause notices to the applicants is to implement the finding in the enquiry report against the applicants who are not guilty of any fraud, misrepresentation of suppression of facts. According to us the respondents were not justified in proceeding against the applicants involving serious civil consequences.

14. The applicants are aged 58 and 57 respectively. They have been satisfactorily discharging the duties of Office Superintendents Grade-II since 1993 and 1995 respectively. The present attempt to revert them to the post of Head Clerks is affected by legal mala fides and is arbitrary.

8. For all these reasons, the show cause notices Annexures A7 and A6 respectively issued to the applicants and impugned in these two applications cannot be sustained. We accordingly quash the said notices. We also hold that the promotion order dated 29-01-1999 (Annexure-A5) promoting the applicants to the posts of Office Superintendents Grade-II on regular basis is legal and valid.

9. These two O.As are allowed as above. We make it clear that all that is said about the legality of the vigilance enquiry, the enquiry report and the action taken thereon are confined to the validity of the show cause notices issued against the applicants only. There will be no order as to cost.

Dated, the 15th September 2006.

(N.RAMAKRISHNAN)
MEMBER(A)

(JUSTICE G.SIVARAJAN)
VICE-CHAIRMAN.

vs/np