

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 275 of 2005

wednesday, this the 9th day of January, 2008

C O R A M :

**HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE MRS. O.P. SOSAMMA, ADMINISTRATIVE MEMBER**

S. Rahumudeen,
S/o. Shahul Hameed,
Adhoc Supervisor/Works,
Office of the Station Engineer/Works,
Southern Railway, Quilon Jn.
Residing at Shakila Manzil, Divya Nagar,
Pattathanam, Quilon.

... Applicant.

(By Advocate Mrs. K. Girija)

v e r s u s

1. Union of India, represented by
The General Manager, Southern Railway,
Headquarters Office, Park Town P.O.,
Chennai – 3.
2. The Divisional Railway Manager,
Southern Railway, Trivandrum Division,
Trivandrum – 14.
3. The Senior Divisional Engineer,
Southern Railway, Trivandrum Division,
Trivandrum – 14.
4. The Senior Divisional Personnel Officer,
Southern Railway, Trivandrum Division,
Trivandrum – 14.
5. The Chief Personnel Officer,
Southern Railway,
Headquarters Office, Park Town P.O.,
Chennai – 3.

... Respondents.

(By Advocate Ms. P.K. Nandini)

[Signature] This application having been heard on 7.1.08, the Tribunal on 9.1.08
delivered the following:

ORDER
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The applicant has claimed that his ad hoc services as Works Mistry should be treated as regular and the consequent benefits afforded. In yet another OA 74/99, the claim of the applicant that his promotion as Works Mistry was right from the beginning regular has been dismissed. The question in this OA, thus, is whether the applicant's promotion as Works Mistry should be regularized and if so from when.

2. Brief facts: The applicant was initially appointed as a Gangman in 1975 and was promoted as Ballast Train Checker (BTC) from October, 1982, vide order dated 14-02-1992. He was later on promoted on ad hoc basis as Works Mistry w.e.f. 05-01-1989 vide order dated 07-08-1989 (Annexure A-2). The applicant had requested for regularization of his services vide Annexure A-3 representation dated 20-12-2002 followed by another one (Annexure A-4) dated 23rd March, 2004 wherein he had ventilated further grievance of his not having been considered for promotion to the post of Supervisor/P.Way. As there was no response much less a positive response, the applicant has moved the Tribunal by filing OA No. 410/2004 which was disposed of by Annexure A-5 order dated 9th June, 2004, with a direction to the respondents to consider and decide the pending representation of the applicant. Vide Annexure A-6 communication dated 9th August, 2004, the respondents rejected the claim of the applicant holding that the applicant was not promoted as Works Mistry on regular basis and further as he did not volunteer for consideration for regular appointment as Works Mistry in response to 2000 notification, he was ineligible and hence not placed in the panel. Undaunted, the applicant had again filed OA

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No. 720/2004 but the same was sought to be withdrawn with liberty to file another OA for regularization of his ad hoc promotion. The same was allowed, vide order dated 5th October, 2004 at Annexure A-8. In pursuance of the above situation, the applicant had penned a representation dated 18th October, 2004 vide Annexure A-9 for regularization of his services as Works Mistry/supervisor (works). This was followed by a legal notice dated 6th January, 2005 vide Annexure A-10. It was thereafter that the respondents have issued the impugned Annexure A-11 order dated 27th May, 2005 rejecting the claim of the applicant for regularization. Hence this OA.

3. The applicant has raised the following grounds in support of his claim.

A. The applicant begs to submit that the 5th respondent, as a very superior officer and particularly one who belongs to the Personnel Department ought to have noticed the fact that the applicant had been working as Supervisor/Works with effect from 5.1.1989. The fifth respondent ought to have regularised the service of the applicant as a Supervisor Works with effect from 5.1.1989 and granted him the consequential benefits. Non-feasance on the part of the respondents to do so is highly arbitrary, discriminatory and unconstitutional.

B. The applicant begs to submit that the non-feasance on the part of the respondents to regularise the applicant as a Supervisor/Works with effect from 5.1.1989 and to grant him the consequential benefits, thereof, is highly arbitrary, discriminatory and unconstitutional.

C. The applicant was promoted on ad hoc basis with effect from 5.1.1989 as a Supervisor/Works and the said post is a non-selection post which is filled up based on seniority-cum-fitness; the applicant admittedly was the senior most eligible

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person and his promotion was also in accordance with the rules; there are vacancies also. Despite these facts, no action is being taken by the respondents to regularise the promotion of the applicant. The total non-feasance on the part of the respondents to regularise the applicant's promotion as Supervisor / Works, therefore, with effect from 5.1.1989 is highly arbitrary, discriminatory, contrary to law and hence violative of the constitutional guarantees enshrined under Articles 14 and 16.

D. Annexure A/11 is totally without application of mind, arbitrary, discriminatory and hence violative of the constitutional guarantees enshrined under Articles 14 and 16. In this connection, the applicant begs to submit that the contention in A11 that the applicant was promoted against a work charged post is factually incorrect and untrue. As a matter of fact, the applicant's junior Shri Rajan was regularized as Works Mate long ago, while the applicant stands discriminated."

4. Respondents have contested the OA. According to them, regularization is not a matter of right and so long as no junior to the applicant is regularized, the applicant cannot seek regularization. The applicant's position as Works Mistry was only on ad hoc basis. When notification was issued calling for volunteers for consideration to fill up regular vacancy of Works Mistry, the applicant failed to volunteer. And the post got upgraded to Junior Engineer in the Restructuring scheme effective from 01-11-2003 and in that post, applicant's senior Shri K. Rajan was promoted

5. In his rejoinder, the applicant has contended that he was the senior most of the ad hoc Works Mistry as could be seen from Annexure A-12 order dated 20-05-2001 which clearly reflects that as on 31-03-1996 the seniority list of B.T.



Checker indicated the applicant as the senior most. Further the applicant had already qualified in the trade test as is evident from Annexure A-13 and A-14 communications. As the applicant is the senior most amongst the ad hoc Works Mistry, coupled with the fact that he already stood passed in the trade test, there is no requirement of volunteering for consideration for regular appointment as Works Mistry. It has also been contended in the rejoinder that the applicant's position as ad hoc Works Mistry was by reverting his immediate junior Shri S. Thankaraj who is senior to one Shri K.Rajan. But when it came to the question of regularization and further promotion under the restructuring scheme, the respondents have picked up the junior most K. Rajan as could be seen from Annexure A-15, overlooking the applicant's seniority and entitlement. The stand taken by the respondents about non availability of vacancy has also been resisted by the applicant as 'false'.

6. Respondents have filed their additional reply stating that Rajan's selection as regular Works Mistry and further promotion as Junior Engineer was on the basis of his having volunteered, while the applicant chose not to volunteer. Further they had reiterated that there was no vacancy and the mere fact of continued working cannot be the sole factor for regularization. The only available post of Works Mistry was upgraded in the restructuring scheme and Shri Rajan was accommodated.

7. In his additional rejoinder the applicant traced the entire hierarchy of BTC followed by Ad hoc Works Mistry and further and contended that he had been the senior most amongst the B.T.C. as could be seen from Annexure A-12; that he was appointed on ad hoc basis as Works Mistry and Shri Rajan is junior to the applicant; that the applicant had volunteered for regular post of Works Mistry

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which was not considered as could be established from the observation of the Tribunal in para 3 of its order in OA 305/1991 and 1342/1991 vide Annexure A-17. It has also been contended by the applicant that the respondents have been objecting the claim of the applicant when he asked for promotion as Permanent Way Mistry stating that the applicant having been promoted as Works Mistry in 1989 he cannot claim promotion as Permanent Way Mistry and when the applicant claimed regularization as Works Mistry, the same is objected to on some other reason.

8. Counsel for the applicant argued that applicant's promotion cannot be kept as ad hoc for such a long time. The length of service itself would suffice to show that there were vacancies and the applicant having qualified in the trade test is fully entitled to be regularized from the date of initial promotion. The respondents have clean forgotten about the revision of seniority of the applicant in 1996 whereby Thankaraj was reverted and the applicant promoted as Works Mistry.

9. For a promotion to be made regular the requisites are that there must be a post, that the incumbent should be eligible for regular promotion and while considering promotion, formalities as of a regular promotion are observed. When these three are fulfilled then there is no reason to stamp the promotion as 'ad hoc'. In the instant case, applicant's promotion as ad hoc Works Mistry vide Annexure A/2 was in pursuance of the Tribunal's order in O.A. No. K-239 of 1987 and K-174 of 1988, and further, it was by reverting the junior that the applicant was promoted. Had there been no vacancy the question of promotion would not have arisen. Again, the formalities as for a regular promotion must have been complied with since the order is one of composite

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nature affecting reversion of one candidate and promotion of the applicant as well as fixation of pay. Further, the applicant would not have been promoted unless he was eligible as eligibility criteria is the same both for ad hoc as well as regular promotion. Thus, there is no legal impediment in treating the applicant as regularly promoted.

10. The respondents in their counter had maintained that Shri K. Rajan was senior to the applicant. The contention has been falsified by the applicant by filing Annexure A/12 seniority list of BTC where the applicant was the senior most followed by Shri Thankaraj and Shri Rajan was shown as junior most. For promotion to the post of Works Mistry on regular basis, the applicant had also qualified in the written as well as viva as could be seen from Annexure A/13 and A/14. Thus, when the respondents considered regular promotion in 1999, as the seniority position was different than as at Annexure A/12, Shri Rajan was promoted whereas in the wake of issue of Annexure A/12 order promotion made on the basis of earlier seniority ought to have been reviewed but the respondents completely forgot to perform that drill. Had further action in pursuance of revision of seniority vide Annexure A/12 been ^{taken} ~~made~~ this confusion would not of have arisen and instead of Shri K. Rajan it was the applicant who could have been promoted. Even the requirement for volunteering was fulfilled by the applicant as the respondents themselves have admitted the fact of applicant's having volunteered which is evident from para 3 of order dated 9.6.1992 in O.A. 305 of 1991 and 1342 of 1991. Thus, all the requirements for regularisation / promotion on regular basis having been complied with, the applicant is certainly entitled to be considered for regular promotion. It was on account of Shri K. Rajan having been erroneously promoted that the applicant who was senior, who had passed the

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trade test and who also volunteered as early as 1989 had been kept high and dry. This is a clear mistake on the part of the respondents. Thus, the respondents who ~~were~~ ^{had} committed the mistake cannot be permitted to turn around and justify their action and the mistake of the respondents cannot be allowed to ~~be~~ ^{recoil} upon the applicant. The Apex Court in a recent case decided on 14.12.2007 (*Union of India vs. Sadhana Khanna*, C.A. No. 8208/01) held that the mistake of the department cannot recoil on employees. In yet another recent case of *M.V. Thimmaiyah vs. UPSC*, C.A. No. 5883-5991 of 2007 decided on 13.12.2007, it has been observed that if there is a failure on the part of the officers to discharge their duties the incumbent should not be allowed to suffer. In that case, the failure was in writing the ACR. In the instant case, the failure is in not conducting a review DPC.

11. In view of the above discussion, the O.A. Succeeds. It is declared that the applicant is entitled to grant of regular promotion from the date Shri K. Rajan was promoted. Consequently, the applicant is also entitled to the benefit arising out of such regular promotion as was extended Shri K. Rajan, namely promotion as Junior Engineer with effect from 1.11.2003. Such promotion shall be only notional and same shall be actual from the date the applicant assumes duty of higher post. In addition, other consequential benefits such as entitlement to compete for Group 'B' post etc. ^{are} ~~is~~ also available to the applicant.

12. The respondents are directed to pass suitable orders for notional promotion etc. As stated above and such orders should be passed within a period of three months from the date of communication of this order.

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13. No order as to costs.

(Dated, the 9th January, 2008)



(O.P. SOSAMMA)
ADMINISTRATIVE MEMBER



(Dr. K B S RAJAN)
JUDICIAL MEMBER

CVR.