

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

D. A. No.
~~XXXXXX~~

293 of 1990.

DATE OF DECISION 28.02.1992

T.J.Mathew

Applicant (s)

P.Sivan Pillai

Advocate for the Applicant (s)

Versus

Union of India represented Respondent (s)
by General Manager,
Southern Railway and others

Mr.MC Cherian/MR.TA Rajan Advocate for the Respondent (s)
and Mrs.Saramma Cherian

CORAM :

The Hon'ble Mr. S.P.Mukerji - Vice Chairman

and

The Hon'ble Mr. A.V.Haridasan - Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *W*
2. To be referred to the Reporter or not? *W*
3. Whether their Lordships wish to see the fair copy of the Judgement? *W*
4. To be circulated to all Benches of the Tribunal? *W*

JUDGEMENT

(Hon'ble Mr.S.P.Mukerji, Vice Chairman)

In this application dated 5.4.90 filed under Section 19 of the Administrative Tribunals Act the applicant who has been working as Leave Reserved Assistant Station Master under the Southern Railway has challenged the impugned order dated 18.4.89 at Annexure.A.7 rejecting his representation for stepping up his pay to the level of his juniors. He has prayed that the respondents be directed to fix his pay in the scale of Rs.425-640 with retrospective effect from 1.8.82 or 1.8.83 or 28.4.84 as appropriate.

2. The brief facts of the case are as follows.
While the applicant was working as Relieving Assistant Station Master in the scale of Rs.330-560 he was suspended

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on 13.8.83 and was served with a charge-sheet on 18.8.83. The enquiry was completed on 22.12.83 and the enquiry report submitted on 9.1.84. The suspension was revoked on 14.4.84 and the order of punishment was passed on 28.4.84 reducing his pay to the lowest stage at Rs. 330 for a period of two years without effect of postponing his future increments. While the disciplinary proceedings were pending, on 5.12.83 (Annexure.A.2) the applicant along with other Assistant Station Masters in the scale of Rs.330-560 was promoted to officiate in the scale of Rs.425-640 against Release Vacancies. The promotion was to take effect "from the date the promotees assumed higher responsibilities." It was also mentioned in the same order that the promotion would be subject to the condition that the promotee has not been placed under suspension or no departmental proceedings had been initiated against him. It was also mentioned in the same order "that the promotees will continue wherever they are in the same capacity and the same nature of duties until further orders purely as a temporary arrangement". They are advised that they are liable for transfer out ^{of} the present station on short notice when the redistribution of higher grade posts is finalised."

According to the applicant the penalty vide Annexure.A.3 order was made effective from 3.5.84 and the period of penalty was over by 3.5.86. Vide order dated 19.6.86 at Annexure.A.4 the applicant was transferred as Leave Reserve Assistant Station Master in the scale of Rs. 425-640 ^{to} ~~at~~ Salem. He joined the post on 17.8.86 in the revised scale of Rs.1400-2300. In October, 1988 when he came to know that he was drawing less pay in that

scale than many of his juniors, he filed a representation dated 28.10.88 at Annexure.A.5 praying that his salary may be stepped up on par with his juniors. This was followed up by another representation dated 19.3.89 at Annexure.A.6. These two representations were rejected by the impugned order at Annexure.A.7 on the ground that "during the punishment period from 1.8.82 to 2.3.86 you were not eligible for promotion to the scale of Rs.425-640." and no junior to his was promoted between 3.5.86 and 19.6.86 when he took over the higher post and since all the ASMs referred to in his representation were promoted to the scale of Rs.425-640 prior to his becoming free from penalty his claim of parity of pay with them cannot be accepted. The applicant has argued that in accordance with the order dated 29.7.83 on restructuring at Annexure.A.1 the staff will be eligible to draw pay in the higher grade with effect from 1983 with the benefit of proforma fixation from 1.8.82. Since the applicant was promoted against a vacancy which arose according to him directly out of the upgradation and since as on 1.8.82 there^{was}/no disciplinary case pending against him nor was he under any disqualifications for promotion except a penalty of withholding of annual increments of 15 months to take effect from 1.8.82 he should have been promoted to the higher grade with effect from 1.8.82 and his increments in the higher grade withheld by the penalty order. He has also referred to the text of the promotion order at Annexure.A.2 whereby the promotees were allowed to continue in their existing post even on

promotion till their transfer to higher posts, to argue that his defacto date of ~~assuming~~ ⁱⁿ the higher post should be from 14.4.84 (when the suspension was revoked). He has further argued that in any case since between 9.8.84/28.4.84 and 2.5.84 there was no enquiry pending or any penalty in operation, he should have been fitted in the higher scale atleast from 28.4.84 and the denial of promotion vide Annexure.A.2 order is illegal.

3. In the counter affidavit the respondents have argued that since his juniors were promoted in December, 1983 or so and the cause of action arose in 1983 but the applicant made a representation only 5 years later on 28.10.88 at Annexure.A.5 and another representation on 19.3.89 which being time barred, cannot give any title to the applicant. We are not able to accept this argument of the respondents because ^{applicant} ~~he~~ has impugned the order dated 18.4.89 at Annexure.A.7 rejecting his representations. His cause of action in the application arises out of this order and therefore this application cannot be stated to be time barred.

4. The respondents have also referred to the representation of the applicant dated 16.6.86 in which he sought promotion on the expiry of the penalty period of 2.5.86. They have argued that the applicant is estopped by acquiescence to question his non-promotion prior to 2.5.86. They have clarified that since there were 288 Station Masters in the scale of Rs.425-640 as on 1.4.82 and the last person had been promoted on 28.2.82, the applicant cannot claim promotion to Rs. 425-640 ^{grade} as a result of the restructuring orders. He can be promoted only in the resultant vacancy which accrued after 1.8.82 on promotion of his seniors, to the higher grade due to restructuring. They have also pointed out

that

✓ none of them had been given proforma promotion to higher grades with effect from 1.8.82/1.8.83. His immediate senior (item No.75 in Annexure.A.2) was given promotion to the scale of Rs.425-640 on 6.2.83 and his pay also was fixed strictly on that basis. Accordingly the applicant cannot claim proforma promotion with effect from 1.8.82. They have further stated that the applicant was undergoing an earlier penalty of withholding of increments for 15 months starting from 1.8.82 and before the expiry of that penalty, he was placed under suspension with effect from 13.3.83. Thus at the time of promotion order at Annexure.A.2 the applicant was under suspension and a charge-memo for major penalty was pending against him. He was thus not entitled to get any promotion till the expiry of his second penalty. He was given the earliest chance of promotion immediately after that date. Having accepted this promotion from 1986 he cannot claim pre-dating his promotion. The reduction of his pay was as a result of the imposition of the penalty and thus he cannot claim parity with the pay of his juniors on his promotion to the higher scale.

5. In the rejoinder the applicant has argued that if posts are upgraded due to restructuring the question of Release Vacancies does not arise. He has referred to the Railway Board's letters of 1.6.71 and 22.11.71 directing that the penalty of withholding of increments should be operated in the higher grade after promoting the employee. He has also referred to the Railway Board's letters dated 29.1.72 and 10.1.74 according to which when a person is awarded the major penalty including reduction to lower stage, his case should be referred to the competent authority for consideration whether he is

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suitable for promotion in spite of the penalty imposed on him. If he considered suitable for promotion his case for promotion and fixation of pay should be dealt with in the same manner as that a person who is awarded a minor penalty i.e., he should be promoted in his turn reverting the junior-most person if necessary and his pay fixed under the normal rules. In case he is considered to be unsuitable for promotion his case should be referred to the next higher authority. The applicant has argued that after finalisation of the disciplinary proceedings, the competent authority did not consider him unsuitable for promotion and thus withholding his promotion is irregular.

6. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The main question is whether during the period of currency of punishment, the applicant could be promoted or not. The applicant was undergoing a penalty of withholding of increments for 15 months starting from 1.8.82. Before the expiry of this period he was put under suspension with effect from 30.8.83 and another penalty was imposed on him operative from 3.5.84 to 3.5.86. Between 1.11.83 and 3.5.84, however, no penalty was current though disciplinary proceedings which resulted in reduction in pay for two years were going on between 18.8.83 when he was charge-sheeted and 28.4.84 when the order of punishment was passed reducing his pay to the minimum of the pay scale for a period of two years. Accordingly the promotion order dated 5.12.83

could not be operative for him in view of the following condition indicated in para 2 of that order:

"Their promotions is subject to the condition that-
There are no prima facie cases against them as a result of fact finding enquiry or otherwise and they have not been placed under suspension or no departmental proceedings have been initiated against them or there are no proposal to initiate proceeding at an early date or they are not undergoing any penalty debarring them from promotion."

Additionally since from 1.8.82 to 1.11.83 the earlier penalty was current he could not be given notional promotion also with effect from 1.8.82 and between 3.5.84 and 3.5.86 when the second penalty was current. The Hon'ble Supreme Court in their judgment dated 20.11.91 in Civil Appeal NO.4718/91 considered the question of withholding of promotion during the currency of a penalty in case of a Postman. He was successful at the test for promotion as Postal Assistant but before the order could be issued he was found guilty in a disciplinary proceedings and was punished by withholding of increment in salary for a period of 18 months. As a result of this penalty the decision to promote him was not implemented. The Tribunal in an application filed by him held ^{that} the denial of promotion to him during the period of currency of punishment amounts to second punishment which is not permissible. Over-ruling the Tribunal the Hon'ble Supreme Court in the aforesaid Civil Appeal held as follows:

"We have considered the matter closely and in our opinion the view taken by the Tribunal both in the impugned judgment and in the earlier decisions holding that as a result of the provisions of Rule 157 forbidding the promotion of a State employee during the currency of the penalty results in a second punishment is not correct. There is only one punishment visiting the respondent as a result

of the conclusion reached in the disciplinary proceeding leading to the withholding of increment, and the denial of promotion during the currency of the penalty is merely a consequential result thereof. The view that a Government servant for the reason that he is suffering a penalty or a disciplinary proceeding cannot at the same time be promoted to a higher cadre is a logical one and no exception can be taken to Rule 157. It is not correct to assume that Rule 157 by including the aforementioned provision is subjecting the Government servant concerned to double jeopardy. We do not find any merit in the argument that there is no justification or rationale behind this policy; nor do we see any reason to condemn it as unjustified, arbitrary and violative of Articles 14 and 16 of the Constitution of India. On the other hand, to punish a servant and at the same time to promote him during the currency of the punishment may justifiably be termed as self-contradictory. The impugned judgment is, therefore, set aside.

(emphasis added)

In view of the aforesaid ruling of the Hon'ble Supreme Court the applicant cannot claim promotion between 1.8.82 and 1.11.83 and 3.5.84 and 3.5.86.

7. Even otherwise, the applicant cannot claim promotion to the grade of Rs.425-640 with effect from 1.8.82 because there were a large number of persons senior to him working either in that scale or Rs.425-640 or in the lower scale of Rs.330-560 who had to be accommodated in the vacancies arising directly out of restructuring before the applicant could be given promotion against such a post with effect from 1.8.82. The respondents have clearly stated that there was no post directly resulting from restructuring in the higher scale which was available to the applicant after accommodating his seniors for notional promotion from 1.8.82. As a matter of fact persons even senior to the applicant had to be accommodated against vacancies resulting from promotion of their seniors. These

resultant vacancies could not be ante-dated to 1982. The person immediately senior to the applicant Shri Kaladharan was thus accommodated in a resultant vacancy with effect from 6.12.83. Thus the applicant cannot claim notional promotion due to restructuring with effect from 1.8.82 even if no penalty or disciplinary proceedings had been going on against him. It also appears to us that having accepted the position of his non-promotion in his representation dated 16.6.86 (Exbt.R.1) and claiming promotion after the currency of the second penalty was over, the applicant cannot at this stage reopen the question of his promotion from 1.8.82.

8. In the facts and circumstances, we see no merit in this application and dismiss the same without any order as to costs.


(A.V. HARIDASAN)
JUDICIAL MEMBER


(S.P. MUKERJI)
VICE CHAIRMAN

28-02-1992

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