

**CENTRAL ADMINISTRATIVE TRIBUNAL  
ERNAKULAM BENCH**

Original Application No. 37 of 2005

*Wednesday*, this the 30<sup>th</sup> day of May, 2007

**C O R A M :**

**HON'BLE MR. A.K. AGARWAL, VICE CHAIRMAN  
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER**

M. Ravi Kumar,  
S/o. K.P. Madhavan,  
Technician Grade II/ Train Lighting,  
(Electrical Department),  
Southern Railway, Mangalore.  
Residing at : Railway Quarters No.MH-1-D,  
Railway Colony, Mangalore. ... Applicant.

(By Advocate Mr. TC Govindaswamy)

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 Senior Divisional Electrical Engineer,  
Southern Railway, Palghat Division,  
PALGHAT.
3. The Divisional Personnel Officer,  
Southern Railway, Palghat Division,  
PALGHAT.
4. Shri D.I. Mohammed Ismail,  
Technician (Grade I)/Train Lighting,  
(Electrical Department),  
Southern Railway, Mangalore Railway Station,  
MANGALORE.
5. Shri C K Viswanathan Achari,  
Technician (Grade I)/Train Lighting,  
(Electrical Department),  
Southern Railway, Mangalore Railway Station,  
MANGALORE.
6. The Divisional Railway Manager,  
Southern Railway, Palghat Division,  
PALGHAT. ... Respondents.

(By Advocates Mrs. Sumathi Dandapani, Sr. with Ms.P.K. Nandini)

**O R D E R**  
**HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER**

The applicant, a Technician Gr. II, is aggrieved by his having been superseded by the impugned Annexure AI order dated 21-01-2003 when his juniors have been promoted to the grade of Technician Gr. I. His representation to the respondents vide Annexure A-2 letter dated 25-01-2003 was replied to by the respondent, vide Annexure A-3 order dated 05-02-2003 (also impugned), whereby the reason for supersession, spelt out by them was that the applicant was not found suitable for Tech. Gr. I/TL by the Committee.

2. Applicant has challenged the above said order stating as under:-

(a) The applicant's seniority in the grade of Tech. Grade II (scale Rs 4,000 – 6,000) is at serial No. 67, while that of the private respondents 4 and 5 are, respectively, 68 and 75. The next promotional post is Tech. Grade I (Pay Scale Rs 4,500 – 7,000) and the said post as per Recruitment Rules is non-selection one. As such, provisions of Rule 214(a) and (b) of I.R.E.M, reproduced below, would apply:-

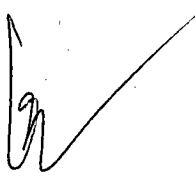
*214(a). Non selection posts will be filled by promotion of the senior most suitable Railway Servant. Suitability whether an individual or a group of Railway Servants being determined by the authority competent to fill the posts on the basis of the record of service and/or departmental tests, if necessary. A senior Railway servant may be passed over only if he/she has been declared unfit for holding the post in question.*

*(b) When, in filling of a non-selection post, a senior Railway servant is passed over, the authority making the promotion shall record briefly the reason for such sepersession.*

(b) Despite the above provisions, neither there had been any

declaration as to applicant's having been found unfit nor has any reason been given for supersession. In fact, there was nothing to indicate that the applicant was ever considered at all.

3. Respondents have contested the O.A. According to them, the applicant was proceeded against in a disciplinary proceedings, which culminated in a penalty of withholding of increment for a period of seven years (non recurring) vide order dated 7<sup>th</sup> February, 1996 and on appeal, the period of seven years of penalty was reduced to one year but the penalty to have recurring effect, which was confirmed in revision. The applicant had filed OA No. 63/98 which was decided by remitting the matter back to revisional authority for reconsideration and as the revisional authority stuck to his gun, the applicant had filed OA No. 161/2001 and the Tribunal by Annexure R-3(1) order dated 18-0-2003 confirmed the modified the order of the appellate authority i.e. withholding of one increment for a period of one year with recurring effect to the extent that withholding of of one increment for one year would not have the effect of postponing future increment. The respondents had taken up the matter before the Hon'ble High Court in CWP No. 37475/03, which had granted interim stay of order of the Tribunal. During January, 2003, the applicant was considered for promotion to the post of Technician Gr. I. However, as he was undergoing penalty he was not found fit for promotion and hence he was passed over and those found suitable were promoted, vide impugned Annexure A 1 order. Quoting the decision in **K.V. Jankiraman** (AIR 1990 SC 2010) the respondents have contended that when an employee is visited with a penalty, denial of promotion is a necessary consequence. The fact that the post is one of non



selection and the averments that the applicant is senior to the two private respondents have not been denied by the respondents. There was an allegation against the applicant that he had, without giving any reference to the court order etc., concealed this material information.

4. Applicant has filed the rejoinder and contended that the reason afforded for not considering the case of promotion of the applicant in 2003 was that the applicant was undergoing penalty. In fact, the penalty was effective from 01.09.1996 and expired in 1997 and thus, the name of the applicant should have been included in Annexure A-1 in preference to his juniors and thus the applicant is entitled to consequential benefits. The applicant has also furnished a copy of the judgment of the Hon'ble High Court of Kerala vide judgment dated 19<sup>th</sup> May, 2005, dismissing the writ petition. Thus the appellate authority's order with the modification as cited above alone existed. The penalty having been over by 01.09.1997, there was no reason in not considering the applicant for promotion.

5. In their additional reply, the respondents have stated that in the promotion order dated 19-05-2006, the applicant's name figures and thus, the OA has become infructuous.

6. The private respondents No. 4 and 5, though served as early as in July, 2005, have not chosen to file any reply or represented. Hence, they have been set ex parte.

7. Counsel for the applicant submitted that the OA has not become infructuous just because the applicant got promoted w.e.f. May 2006.



The High Court having dismissed the Writ Petition filed by the respondents against the order of this Tribunal whereby the penalty is only withholding of one increment for one year, without cumulative effect, and thus since the currency of penalty was over by 31-08-1997, his promotion should be effective by 01-09-1987 or as and when his juniors had been promoted to Tech. Gr I. As regards the so called 'concealment of fact', it was submitted that since no reason for supersession had been given, the applicant had not reflected the other facts in the main OA and once the respondents have given the reason, he had furnished the full details in the rejoinder. Disclosure of these facts would have certainly improved the case of the applicant as he had been victorious in the OA and in the writ petition. Thus, non disclosure cannot be stated to be concealment, to derive any benefit.

8. Counsel for the respondent submitted that the applicant has since been promoted as Tech. Gr. I since May 2006, as the High Court's judgment was delivered only in May 2005.

9. Arguments were heard and documents perused. The question is what should be the date of promotion of the applicant as Tech. Grade-I - (a) from the date the juniors are promoted i.e. 21-01-1997 or (b) from the date of expiry of penalty period i.e. 01-09-1997 or (c) from the date the respondents have effected the promotion, i.e. 19-05-2006.

10. The rule on the subject, as spelt out in consolidated instructions dated 10-04-1989, as amended and OM dated in para 13 of the DOPT O.M. No. 22011/8/87-Estt (D) dated 09-04-1996, is as under:-

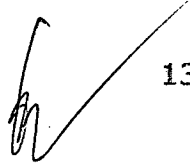


*"13. Punishment no bar in assessing suitability for promotion. An officer whose increments have been withheld, .... cannot be considered on that account to be ineligible for promotion to the higher grade as the specific penalty of withholding promotion has not been imposed on him. The suitability of the officer for promotion should be assessed by the DPC as and when occasions arise for such assessment in assessing the suitability, the DPC will take into account the circumstances leading to the imposition of penalty and decide whether in the light of the general service record of the officer and the fact of the imposition of the penalty he should be considered suitable for promotion. However, even where the DPC considers that despite the penalty the officer is suitable for promotion, the officer should not be actually promoted during the currency of the penalty."*

11. In the aforesaid OM, an illustration has been given as under:-

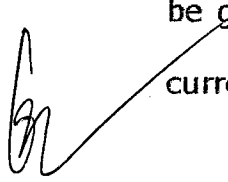
*As an illustration, an officer is undergoing a penalty of withholding of next increment for two years which will expire on 30-06-1992. The DPC which meets after the imposition of the above penalty for considering promotion during the Panel Year 1990 finds him fit for promotion in spite of the penalty and places him as position No. 2 in the panel for 1990. As the officer is undergoing penalty upto 30-06-1992, he can be promoted only thereafter. But on his promotion his pay and seniority in the higher post will be fixed according to his position in the panel for 1990 from which he stands promoted. "*

12. In a subsequent memorandum dated 15<sup>th</sup> December, 2004, it has been clarified that in the event of such promotion after the expiry of the currency, individual would have no claim for stepping up of his pay at par with his juniors and that the eligibility service in the promotional grade for further promotion shall commence only from the date of actual promotion and in no case it may be related, even notionally, to the date of promotion of the junior in the panel.

-  13. While the above is the rule as applicable to all the Government

employees, in so far as Railways are concerned, which issue separate orders, it is to be seen as to whether there has been any order on the subject deviating from the above. Nothing as such, has been shown on behalf of the respondents.

14. In the case of ***Union of India v. K. Krishnan, 1992 Supp (3) SCC 50***, the facts are that the respondent therein was a postman and he was successful in the examination conducted for promotion to the post of Postal Assistant. However, before his promotion could be effected, he was, in a disciplinary proceeding, punished by withholding of increment in salary for a period of one year and six months. As a result of this penalty the decision to promote him was not implemented. On his making an application before the Central Administrative Tribunal for a direction to the authorities to promote him, following the decision in ***Parveen Kumar Aggarwal v. Indian Council of Agricultural Research*** and another unreported judgment, the Tribunal allowed his prayer holding that he was entitled to be promoted with effect from December 1, 1989 on the ground that the denial of promotion to the respondent amounts to a second punishment which is not permissible. This judgment was under appeal. While the Apex Court has held that the non promotion of the respondent in the above case did not amount to second punishment, at the same time held that the provisions of Rule 157 of the Post and Telegraph Manual Volume III, inter alia providing that even where the competent authority considers the candidate fit for promotion in spite of punishment in a departmental proceeding, the promotion shall not be given effect to only during the currency of the penalty and the currency of penalty expiring on September 14, 1990, the respondent




therein may be promoted immediately thereafter with effect from September 15, 1990, provided he was not otherwise disqualified for promotion by incurring some other disqualification.

15. In another case of *Union of India v. B. Radhakrishna*, (1997) 11 SCC 698, by order dated 17-12-1985 passed in departmental proceedings penalty of withholding of increment for a period of two years (current up to 28-2-1988) was imposed on the respondent. In the meanwhile the DPC met and on the basis of the recommendation of the DPC, the respondent was promoted as Senior Accountant by order dated 11-11-1987 with effect from 1-4-1987. Subsequently, by order dated 23-5-1994, the said order was modified and the promotion of the respondent was made effective from 1-3-1988, i.e. from the date on which the penalty of withholding of increment ceased to operate. The respondent filed a petition (OA No. 1117 of 1994) before the Central Administrative Tribunal, Bangalore Bench and the said petition was allowed by the Tribunal. Reference to the case of *Union of India v. K. Krishnan* (supra) was made and the Apex Court has held, "The order dated 11-11-1987 promoting the respondent as Senior Accountant with effect from 1-4-1987, on which date the punishment of withholding of two increments imposed on the respondent was operative, was, therefore, not correct and it has rightly been rectified and the promotion has been granted with effect from 1-3-1988, i.e., the date on which the said punishment ceased to operate."

16. Thus, the above decisions go to show that if an individual, during the currency of a penalty of withholding of increment, had



been found suitable for promotion to a higher post, his promotion shall be effective from the date of expiry of currency of penalty. In the instant case, since the penalty had been over by 31-08-1997, the applicant's claim to further promotion after 01-09-1997, or from the date his juniors had been promoted, is fully justified. The respondents have issued promotion orders (Annexure A-1) w.e.f. 21.01.2003 when there was no penalty under currency. But, based on the original penalty order whereby the penalty was to subsist for a period of seven years from 01-09-1996, which would expire on 31-08-2003, the DPC did not recommend the promotion of the applicant vide para 8 of the counter. The impugned order was passed while the case of the applicant was pending before the CAT and the Tribunal by its order dated 18<sup>th</sup> February 2003 decided the said OA. Though there was a stay of this order by the Hon'ble High Court, according to the applicant, the applicant was afforded the arrears of pay and allowances, due to the reduction of period of currency of penalty from seven to one year. Of course, no review DPC was conducted. The Hon'ble High Court having dismissed the Writ Petition, the respondents ought to have conducted a review DPC and considered the case of the applicant and since this is a non selection post, subject to rejection of unfit, the applicant ought to have been promoted, against any one of the eight vacancies in respect of which the impugned promotion order was passed. Instead, they have considered the case of the applicant against a vacancy that existed after the pronouncement of the order of the Hon'ble High Court and issued the recent promotion order dated 19-05-2006, vide Annexure R3(5) added to the additional Reply. In other words, though the applicant was victorious in reducing the period of penalty from seven to one year, the respondents acted upon the

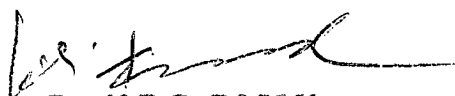


original penalty order by delaying the promotion of the applicant by more than seven years. The same is a clear mistake on the part of the respondents, and thus, the claim of the applicant is fully legal, valid and justified.

17. Hence, **the OA is allowed.** Respondents are directed to conduct review DPC and if the applicant had been found fit for promotion to the post of Tech. Grade I (Pay scale Rs. 4,500 - 7,000/-), pass suitable orders accordingly. In that event, promotion of the applicant would however, be, notional from the date his juniors were promoted and actual from the date he enshouldered the higher responsibilities of Tech. Gr. I. As there would be an increase in the pay at the time when the applicant had been actually promoted by virtue of the same being preceded by notional promotion, the resultant arrears of pay and allowance shall be paid to the applicant within a period of three months from the date of communication of this order. The applicant would be entitled to count the period of notional promotion as qualifying service for further promotion, as held in the case of *Union of India vs K.B. Rajoria*, (2000) 3 SCC 562.

18. No costs.

(Dated, the 30<sup>th</sup> May, 2007)



**Dr. K B S RAJAN**  
**JUDICIAL MEMBER**



**A.K. AGARWAL**  
**VICE CHAIRMAN**

cvr.