

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 37/1991

~~E.A. No.~~

~~100~~

DATE OF DECISION 10-06-1992

N.T.Joseph _____ Applicant (s)

Mr.K.Ramakumar _____ Advocate for the Applicant (s)

Versus

Union of India represented by _____ Respondent (s)

General Manager, Southern Railway,

Madras and others.

Smt. Sumathi Dandapani _____ Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. S.P.MUKERJI, VICE CHAIRMAN

The Hon'ble Mr. XXXXXXXXXXXXXXX

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

This application has been referred to me under the orders of the Hon'ble Chairman for resolving the difference of opinion which arose in the Division Bench which in its order dated 31.3.92 made a reference on the following question:-

" Having regard to the facts and circumstances of the case whether the application should be disposed of with direction for reconsideration of the claim of the applicant or it should be dismissed without granting any relief".

The background facts of the case can be summarised as follows.

2. When the applicant had been working as Head Commercial Clerk in the Trivandrum Division of the Southern Railway, in response of a circular notice dated 4.5.84 he volunteered for being considered for promotion to the post of Commercial Inspector in that Division in the scale of Rs.424-640(ex-cadre). Even though in the notice three vacancies were indicated, on the basis of the selection, a panel of five names against five anticipated vacancies was prepared after a written test followed by viva voce test on 1.2.85. The panel was issued on 13.3.85. The applicant's name

was not included in the panel of five. It transpired that on the day following the test held on 1.2.85, the Divisional Superintendent on 2.2.85 recommended the name of respondent No.4 who was junior to the applicant, for ad-hoc promotion as Commercial Inspector, even though his name was not in the panel. While recommending the name of respondent No.4, he considered the merits of the applicant also as the applicant was the seniormost employee still to be appointed as Commercial Inspector on an ad-hoc basis. All others senior to him had already been officiating as Commercial Inspector on an ad-hoc basis. He did not recommend the name of the applicant for ad-hoc promotion because his service record was not upto the mark and there was a punishment and another proceedings pending against him. Respondent No.4 who was already working in an equivalent grade was thereafter appointed as Commercial Inspector on an ad-hoc basis on a long term leave vacancy on 1.3.85. The applicant represented against his non-promotion on 6.3.85 when on 5.3.85 some adverse remarks ~~had~~ already been communicated to him. He moved the Tribunal by application O.A. 358/86 on 15.4.86 challenging his supersession and the adverse remarks communicated to him. The application was allowed by the Tribunal in its judgment dated 28.7.89 with the direction that the applicant's merits for promotion as Commercial Inspector as in February 1985 should be considered ignoring the uncommunicated adverse remarks of 1983-84 and he should be promoted as Commercial Inspector if any candidate lower in the merit list is so promoted. The review D.P.C. graded the applicant as No.6 in the panel and since there were only five vacancies, he was not included in the panel of five. The respondents had delayed the implementation of the order and when the applicant filed a Contempt Petition, they moved a Review Application also. The Review Application was rejected on 1.3.1990. A clarificatory order was issued on 21st May 1990 by the Division Bench to which I was a party, that since the applicant had got the same marks as those obtained by the 5th candidate in the panel and the validity of the panel is two years, the applicant should be appointed against the 6th regular vacancy arising within the period of validity of the panel. The C.C.P.

was disposed of on 6th November 1990. The earlier Contempt Petition No. 4/90 filed by the applicant was also disposed of by the same order dated 1st March 1990 when the respondents assured that the judgment will be complied within five days. The applicant had to move another Contempt Petition No.36/90 when he was promoted against the 6th regular vacancy with effect from 1.2.1987 and not from the date when respondent 4 was appointed as Commercial Inspector on 1.3.85. The C.C.P. was dismissed with liberty to the applicant to move a fresh application if he feels aggrieved by the appointment of respondent No.4. It is thereafter that this O.A.37/1991 was filed.

3. The applicant's plea is that even for ad-hoc appointment as Commercial Inspector against the leave vacancy, he being senior to the 4th respondent, had superior claims. The decision of the Divisional Superintendent to overlook his claim on the basis of uncommunicated adverse remarks, is wrong because on the basis of the Tribunal's decision in O.A. 358/86 those remarks could not be considered and since he was adjudged to be the 6th suitable person in the panel prepared as in February, 1985, by the review D.P.C. his claim could not be ignored. He has also argued that the pendency of the first chargesheet dated 5.3.84 could not be held out against him as the punishment imposed on 30.9.85 on the basis of that charge sheet was set aside by the appellate authority on 21.12.89. As regards the second charge sheet which resulted in the order of punishment dated 15.7.85 of withholding of increments for 24 months and was later reduced by the appellate authority to that of 'censure' on 4.10.85, the same cannot also be held out against him as the charge sheet had been served on him on 28.5.85 whereas respondent No.4 was appointed as Commercial Inspector on 1.3.85 when there was no such charge sheet against the applicant.

4. I have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The fact remains that on 1.3.85 when respondent No.4 who is admittedly junior to the applicant, was given ad-hoc appointment as Commercial Inspector, only one charge sheet which had been served on him on 5.3.84 was pending. The second charge sheet which had been served on him on 28.5.85 was nowhere in the picture.

The penalty which was imposed on him on 30.9.85 on the basis of the first charge sheet of 5.3.84 was set aside by the appellate authority vide the order dated 21.12.89 at Annexure-K who found "several weaknesses in our charges against him when compared with circumstantial evidence brought up by the employee". The appellate authority enumerated at least five infirmities in the proceedings and stated that "keeping all this in mind, I have no hesitation in allowing the appeal and quashing the punishment awarded". In the above circumstances, to deny the applicant what was due to him on 1.3.85 would to my mind, be unfair. So far as the second charge is concerned, it is now established law that disciplinary proceedings are considered to have commenced only when the charge ~~sheet~~ has been served(vide K.Ch.Venkata Reddy vs. Union of India, ATR 1987(1) 547; Union of India vs. K.V. Janakiraman, ATR 1992(1) SC 174). Since the second charge sheet was served on 28.5.1985, on 1.3.85 no disciplinary proceedings can be said to be pending against the applicant except the proceedings initiated by the first charge sheet dated 5.3.84 which were set aside on 21.12.89. Even otherwise, since the penalty of withholding of increments flowing from the first charge sheet of 5.3.84 which was later set aside was imposed on 30.9.85, there was no reason to withhold the applicant's promotion on 1.3.85 when the penalty had not commenced. The Railway Board's circular also indicates that if the penalty is of 'censure', as happened in case of the second charge sheet, promotion cannot be withheld. The following extracts from page 50 of ^{Maineek} Digest of Discipline Appeal & Conduct Rules (1989 edition) based on the Railway Board's circulars would be relevant:-

"Note:-(1) If a person becomes due for promotion after the finalization of the disciplinary proceedings and the penalty imposed is one of the following, he should be promoted only after the expiry of the penalty:-

- (a) Withholding of promotion.
- (b) Withholding of increment.
- (c) Reduction to a lower stage in a time scale, and
- (d) Reduction to a lower time-scale, grade or post.

Provided that where the penalty imposed is withholding of increment and it becomes operative from a future date, the person concerned should be promoted

in his turn and the penalty imposed in the promotion grade for a period which would not result in a greater monetary loss.

If the penalty imposed is "Censure" recovery from pay, withholding of passes and P.T.Os., or "Fine", he may be promoted when due."

In the above circumstances I see no reason why the applicant should be ignored for ad-hoc promotion as Commercial Inspector on 1.3.85 when he was adjudged to be 6th in the panel and five persons above him were already officiating on an ad-hoc basis as Commercial Inspector. These five were accommodated by regular promotion against the five vacancies but when a temporary vacancy for ad-hoc promotion materialised on 1.3.85, the applicant who was immediately below them in the panel was overlooked.

5. It also appears to be strange that when the D.P.C. had concluded the viva after the written test on 1.2.85, the Divisional Superintendent on the very next day considered the comparative merits of the applicant and respondent No.4 and recommended respondent No.4 in preference to the applicant when the D.P.C. itself by its collective wisdom placed the applicant at the 6th position in preference to respondent No.4.

6. I agree with my learned brother Shri N.V.Krishnan, Administrative Member that the question of a regular vacancy not being available before 1.2.87 for the applicant, was concluded by the earlier orders of this Tribunal, but has gone on to say that (while the applicant may have a case for regular promotion in preference to respondent No.4 had a clear vacancy been available before 1.2.87, the applicant cannot claim superior right over respondent No.4 for ad-hoc promotion.) I cannot persuade myself to agree to this line of argument. To deny the applicant who had been adjudged to be more meritorious than respondent No.4 by the Selection Committee, a promotion on the ground that the promotion was temporary or ad-hoc may not be reasonable. The learned counsel for the respondents conceded that respondent No.4 continued to function as Commercial Inspector on an ad-hoc basis without any break right from 1.3.85 till he was regularised in 1990. Had the applicant been accommodated in the above vacancy of 1.3.85 he would also have continued in similar manner till a regular vacancy

could be found for him on 1.2.87. A supersession is a supersession, whether it is for ad-hoc promotion or for regular promotion. Supersession of the applicant by respondent No.4 for ad-hoc promotion in view of the applicant having been included in the panel before that in preference to respondent No.4 cannot be sustained. The learned Administrative Member has compensated the applicant to some extent in a negative manner by observing that the ad-hoc appointments held by respondent No.4 until the applicant was appointed to a regular vacancy from 1.2.87 will not confer any benefit on respondent No.4 over the applicant. This negative compensation, however, does not make up the monetary loss which the applicant has unduly suffered by his supersession for ad-hoc promotion on 1.3.85.

7. In the conspectus of facts and circumstances, agreeing with my learned brother Shri N.Dharmadan, ^{the Hon'ble} Judicial Member, I dispose of the reference by observing that having regard to the facts and circumstances of the case, the application should be disposed of with a direction for reconsideration of the claim of the applicant keeping in view the observations made by Hon'ble Shri N.Dharmadan and me.

8. Registry is directed to place my opinion before the ^{appropriate} ~~concerned~~ S. Division Bench for pronouncement of appropriate final orders.


10.6.92

(S.P.MUKERJI)
VICE CHAIRMAN
10.6.92

n.j.j

ORDER OF THE BENCH

In the light of the opinion given on 10.6.92 by Hon'ble Shri S.P. Mukerji, Vice Chairman, to whom the difference of opinion between us was referred, we accept the contentions of the applicant and we are satisfied ^{u/k} that, interest of justice will be met in this case if we dispose of this application with a direction to the respondents 2 and 3 to consider the claim of the applicant for promotion to the post of Commercial Inspector Grade III with effect from 1.3.1985 and further promotions in case if he is found eligible for the same in accordance with law. This shall be done as early as possible without any delay, after giving an opportunity of being heard to the applicant and the fourth respondent.

The application is disposed as above. There will be no order as to costs.

N. Dharmadan
(N.Dharmadan)
Judicial Member

30.6.92.

V.K.
(N.V.Krishnan)
Vice Chairman

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 37
T. A. No.

1991

DATE OF DECISION 31.3.92

N. T. Joseph,

Applicant (s)

Mr. K. Ramakumar

Advocate for the Applicant (s)

Versus

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

Smt. Sumathi Dandapani

Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. N. V. KRISHNAN, ADMINISTRATIVE MEMBER

The Hon'ble Mr. N. DHARMADAN, JUDICIAL MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *No*
3. Whether their Lordships wish to see the fair copy of the Judgement? *No*
4. To be circulated to all Benches of the Tribunal? *No*

JUDGEMENT

MR. N. DHARMADAN, JUDICIAL MEMBER

The applicant is approaching this Tribunal for the second time with the grievance that he has not been given promotion as Commercial Inspector in preference to the fourth respondent. When he came on earlier occasion by filing O.A. 358/86, this Tribunal allowed the O.A. by Annexure-A judgment dated 28.7.89 to the extent of directing the respondents 2 & 3 to re-assess the merit of the applicant for promotion as Commercial Inspector as in February, 1985 "without considering the adverse remarks of the 1983-84 and subsequent years." It was further directed that

"he should thereafter be graded in the merit list and promoted as Commercial Inspector if any candidate lower in the merit list was so promoted." As regards the relief claimed against the fourth respondent, the Tribunal observed as follows:

"As regards promotion of his junior Shri Muthuramalingam, since he has not been impleaded as respondent, the applicant cannot claim any benefit at his cost."

2. Since the direction in the judgment Annexure-A was not implemented, the applicant filed CCP 34 of 1990 which was disposed of by Annexure-B order with the following observations:

"The applicant's grievance is that even before the sixth regular vacancy arose there was another vacancy arising out of deputation against which instead of the applicant another person who was not even in the panel, was appointed on an ad hoc basis. If the applicant is aggrieved by the appointment of that person on ad hoc basis, he is at liberty if so advised to file an original application in accordance with law. He cannot challenge the same through the CCP. The CCP is dismissed and notice of contempt discharged."

3. According to the applicant, in 1984 when the Sr. Divisional Personnel Officer issued Annexure-C' circular inviting application from volunteers, there were six vacancies of Commercial Inspector. This is clear from Annexure-D. The applicant volunteered as a candidate for selection and submitted his application dated 30.5.84. He also passed the written test held in connection with the selection and he was called for viva voce examination on 2.5.85. But when the selection list was published, the applicant was not included but the fourth respondent who was junior to the applicant was promoted and posted on ad hoc basis as Commercial Inspector, Trichur as per Annexure-P order dated 1.3.85. The applicant objected to the appointment. Later, it was

understood that the applicant was not empanelled for promotion to Commercial Inspector on account of the adverse remarks in his Confidential Reports, for the year 1983-84. Hence, he filed the earlier O.A. The applicant alleged that the fourth respondent is the favourite of the Divisional Railway Administration and hence in order to promote him as Commercial Inspector, the Divisional Commercial Supdt. on 2.2.85, the next day of the viva voce examination, written to the Divisional Personnel Officer a letter indicating that in view of the adverse remark in the C.R., the applicant should be bypassed for consideration of ad hoc promotion and that the next seniormost commercial clerk namely Shri Muthuramalingam (the fourth respondent) may be promoted as Commercial Inspector in the pay scale of Rs. 425-640 purely on ad hoc basis. When 46 other commercial clerks senior to Muthuramalingam are qualified and fit enough for consideration to ad hoc promotion as Commercial Inspector. The Divisional Personnel Officer without waiting for the recommendation of the Selection Committee which held the viva voce examination eliminated the applicant from the list based on the letter of the Divisional Commercial Supdt. Hence, according to the applicant, he should have been promoted from 1.3.85, the date from which the fourth respondent was promoted as Commercial Inspector. The applicant has also a further case that the direction in the earlier judgment has not been complied with in spite of the fact that he has filed a contempt application which

was disposed on the basis of the statement Railways.

4. The respondents 1 to 3 in the counter affidavit stated that the direction of the Tribunal was only to re-assess the merit of the applicant and he should be promoted as Commercial Inspector if any candidate lower in the merit list was promoted. Accordingly, the applicant's merit was re-assessed and he has been ranked as sixth in the panel and since there were only five vacancies to be filled at the relevant time, the applicant could not be included in the panel. The applicant was ranked as sixth person in the list, he could be considered for appointment as Commercial Inspector in the sixth regular vacancy arising during the validity of the panel. The original panel was prepared only for five vacancies and all the five vacancies have already been filled up on 12.4.1985. Since the Tribunal observed that the regular vacancy that has arisen due to superannuation also should be counted as the sixth vacancy ^b the applicant also eligible to be considered for the post. He was promoted as Commercial Inspector Grade -III w.e.f. 1.2.87 as per Exte R-1 letter dated 27.8.90. Hence, according to the respondents 1 to 3, they have taken all possible steps to comply with the orders of the Tribunal in Annexures A & B based on the seniority of the applicant.

5. The applicant has filed rejoinder and two additional rejoinders producing further materials to show that the direction in the judgments has not been complied with by the

respondents. He submitted that though the applicant has been promoted as Commercial Inspector Grade-III w.e.f. 1-2-87 he was denied the benefit of regular posting from the date of occurrence of regular vacancy after publication of the panel due to posting of the fourth respondent. He was agitating the matter ever since the promotion of the fourth respondent who is admittedly junior to him. Five immediate seniors of the applicant were promoted as officiating Commercial Inspector on ad hoc basis as per Annexure-F order dated 1.8.84. The fourth respondent, who was junior to the applicant was first transferred from Cochin Harbour Terminus and posted against the long leave vacancy of Shri N.K. Narayanan Namboodiri. He was again posted against leave vacancy of one O. Gopalakrishnan w.e.f. 29.6.85 as per order Annexure-G oder. On the expiry of leave, the fourth respondent was posted in the Headquarters Office, Madras as Commercial Inspector, in still higher grade against the zonal quota. By Annexure-H order, the fourth respondent was again transferred and posted against a regular vacancy of Shri Gopalakrishnan. Hence, according to the applicant, the caseof the Respondents 1 to 3 that the fourth respondent was posted only against long sick vacancies is not correct. According to the applicant if he/been promoted and posted against the vacancies in which the fourth respondent was posted from 1.3.85, he would ~~xxx~~ have obtained seniority from the

first date of his ad hoc promotion in the Commercial Inspector's grade and he would have entitled to get his next promotion prior to 30.7.87 on which date his immediate junior in the cadre was promoted. In fact this Tribunal has also adverted to the applicant's superior merit while disposing M.P.352/90 in CCP 4/90 in O.A. 358/86 and stated as follows:

"In view of the fact that he has obtained the same marks as the last person in the list of five candidates and the period of validity of the panel is two years, we clarify that if there is any sixth regular vacancy arising within the period of validity of the panel, the applicant who has obtained the same marks as the fifth person should be considered for appointment against the sixth vacancy."

He also explained the details about the disciplinary proceedings which was pending against him on 2.2.85. The charge in respect of the same was received by the applicant on 21.3.84 and he submitted his explanation on 24.3.84. After enquiry, the penalty of withholding of the increment for two years without the effect of postponing the future increments was imposed against the applicant. But in appeal as per Annexure-K order dated 21.12.89, the said penalty order was set aside by the appellate authority in the light of the orders of the Tribunal in O.A. 362/86. A second charge memo ~~
28.5.85~~ Annexure-N was also replied to by the applicant on 13.6.85. After the enquiry, Annexure-O penalty order dated 15.7.85 was issued imposing a penalty of withholding of increment for 24 months. But on appeal, this was reduced to a punishment of 'censure' by the appellate authority as per Annexure-P order dated 4.10.85. Thereafter, according to the applicant, there was only a punishment of 'censure' existing in the

Service Book of the applicant during 1985 and in the
light of Railway Board's letter No./71-RG-6-23 dated
1.6.71 and 22.11.71, the aforesaid punishment cannot be
relied on for denying the applicant promotion in the year
1985.

6. The only question to be considered in the light of
the observations of this Tribunal in Annexure-A judgment
and Annexure-B order in the CCP/ as to whether the
respondents 1 to 3 have duly complied with the directions.

7. According to the applicant, when he approached this
Tribunal by filing O.A. 362/86, his grievance was that the
fourth respondent was given promotion over-looking his
claim because of the adverse remark in his C.R. for the
year 1984-85. This was considered by this Tribunal and a
positive direction was issued to the effect that the
respondents namely; the Divisional Railway Manager and
Divisional, Commercial Supdt. Trivandrum, Southern Railway
should re-assess the merit of the applicant for promotion
as Commercial Inspector as in February, 1985 "without
considering the adverse remarks on 1983-84 and subsequent
years." He should thereafter be graded in the merit list
and promoted as Commercial Inspector if any candidate lower
in the merit list was so promoted." When again he came with
a contempt application, the Tribunal further clarified and
observed:

"even before the sixth regular vacancy arose, there
was another vacancy arising out of deputation against
which instead of the applicant, another person who

was not even in the panel, was appointed on ad hoc basis. If the applicant is aggrieved by the appointment of that person on ad hoc basis, he is at liberty if so advised to file Original Application in accordance with law."

This observation was made by the Tribunal when the Railway came with the unambiguous statement that the applicant ^{regular} has since been promoted against the sixth/vacancy w.e.f.

1.2.1987 which was countered by the applicant with the details that there was another vacancy arising on account of deputation in which the applicant should have been accommodated.

8. In the reply filed by the Respondents 1 to 3, they have stated that the direction of the Tribunal was only to the extent of directing them to reassess the merit of the applicant and he should be promoted and posted as Commercial Inspector, if any candidate lower in merit list was promoted and according to them this has been complied with by promoting the applicant in the sixth vacancy w.e.f. 1987. Regarding the case of the applicant that earlier vacancy was available in which he could have been accommodated, the respondents 1 to 3 answered by stating that:

"Since only 5 vacancies were existed to be filled up and since the applicant was ranked as sixth, he should be considered for appointment if there is any sixth vacancy and that all the 5 vacancies have already been filled on 12.4.85 and there was no question of any further vacancy arising after that."

9. From the very beginning, the applicant's complaint is against the promotion and posting of the 4th respondent. He has even alleged malafides against the ad hoc promotion

of the fourth respondent by stating that he was penalised by the Divisional Railway Administration because on the very next day of the viva voce examination, i.e. on 2.2.85, the Divisional Commercial Supdt. wrote a letter to the Divisional Personnel Officer which is produced as Annexure R-2. The letter is extracted below:

" Mr. N. K. Narayanan Namboodiri, DCI/TCR, presently in sick list since 7/84 is an inpatient in the PER Railway Hospital, will be reportedly undergoing a Heart Surgery shortly and therefore his services may not be available for the next two or three months to enable him to recoup his health.

Since a lot of commercial work has fallen in arrears in that section and it has been difficult to manage the duties it is proposed to make ad hoc arrangements for filling in the post temporarily.

In accordance with the seniority of the Commercial staff who have volunteered for the recent selection of Commercial Inspectors, it is seen that Shri N.T. Joseph CC at TCR is the seniormost employee after the commercial clerks who are already working as Commercial Inspector on ad hoc basis. I have scrutinised his SR. It is seen that his service record has not been commendable in view of the punishments for charge against him earlier. Further, there is also another charge sheet for an irregularity committed at CHTS, for which he has submitted his explanation and is receiving scrutiny. I have also scrutinised his confidential report and he has been not yet fit for a promotion.

4. In the circumstances, Shri N.T. Joseph is bypassed for consideration for the proposed adhoc promotion. The next seniormost commercial clerk is Mr. S. Muthuramalingam, who is now working as SBC/CHTS. I have gone through his service record and it is noted that there are no adverse entries whatsoever. In these circumstances, Shri Muthuramalingam may be promoted as DCI in scale Rs. 425-640 purely on ad hoc basis till Shri N.M.N. Namboodiri becomes fit for resuming his duties.

5. Necessary O.O. may please be issued accordingly."

10. In that letter the Divisional Commercial Supdt. has mentioned about the details of the adverse entries in the C.Rs and two disciplinary proceedings. The respondents are mainly relying on Annexure R-2 and denying promotion to the applicant.

11. With regard to the adverse remark in the C.R., the Tribunal's direction is clear and unequivocal. After considering the entire aspects, the Tribunal directed that re-assessment of the applicant's merit should be made without considering the adverse remarks of 1983-84 and subsequent years. Other two of the impediments which really stood in the way of the applicant's right of being considered for promotion in 1985 as Commercial Inspector in preference to Respondent-4 are the disciplinary punishments imposed on him based on the charges received by him on 21.3.84. and 13.6.85.

12. Regarding the punishment of withholding of increments for 12 months based on the charges received by him on 21.3.84 Annexure-K order dated 21.12.85 shows that the appellate authority pursuant to the direction in O.A. 362/86 considered the same and set aside the punishment. The other punishment came by Annexure-O order withholding one increment for 24 months was also modified by the appellate authority by passing Annexure-P order to one of 'censure.' No other punishment was in force during the year 1985 for barring the promotion of the applicant to the post of Commercial Inspector and posting the fourth respondent in supersession of the applicant.

13. The learned counsel for the applicant also contended that even assuming that there was a punishment in the year 1985, the penalty would not have stood in the way of the applicant for giving him promotion in the light of the Railway Board's letter dated 1.6.71 and 22.11.74. The relevant portion of the said letter is extracted below:

"If a Railway servant becomes due, for promotion after the penalty of withholding of increment or promotion is imposed, he should be promoted only after the expiry of the penalty period, provided that where the penalty of withholding of increment becomes operative from a future date, the person should be promoted on his turn and the penalty should be imposed in the promotional grade for a period which would not result in greater monetary loss."

14. According to the applicant, the penalty imposed on the applicant was reduced subsequently and it becomes operative only from 1.3.86 so that the applicant could have been promoted in the year 1985 in the light of the provisions contained in letters of the Railway Board.

15. The learned counsel for the applicant relied on the decision in Shiv Shankar vs. Union of India and others, 1989 (1) SLJ CAT 247 and submitted that 'censure' is not a punishment and would not stand in the way of consideration of the applicant's case for promotion. We have gone through that decision. The Tribunal was considering the scope of minor penalty of 'censure' in the light of the wording in an O.M. dated 16.5.71 which clarified that the fact/imposition of the minor penalty of 'censure' on a Government servant does not by itself stand against the consideration of such persons for promotion. This decision is not applicable to the facts of this instant case for no such O.M. is available.

16. The punishment of 'censure' cannot be ignored while considering the rights of an employee for promotion as if it has no effect at all, treating it as only a 'warning'. Of course, an informal 'warning' not coupled with the finding of misconduct against a Govt. servant may not have any

effect and it will not adversely affect promotion. But the position will be different if such a 'warning' was given after consideration and assessment of the official career of a Govt. servant. Under such circumstances, it is likely to affect him adversely, particularly when a copy of it is directed to be placed in his C.R. after due communication to him. It was held by Delhi High Court in Nadhan Singh Vs. Union of India, 1969 SLR 241 while considering the effect of a 'warning' as follows:

"Under these circumstances, in my opinion, notwithstanding the word 'warning' used in the said memorandum, that memorandum really imposed the penalty of 'censure' on the petitioner based on the finding that he was guilty of misconduct."

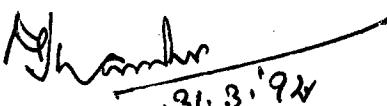
The respondents have not examined whether the punishment of 'censure' has been ordered to be placed in his C.R. and it has the effect of adversely affecting his promotion and it can be ignored in the light of the Railway Board's letters dated 1.6.1971 and 22.11.71 extracted above.

17. In the result, taking into consideration the facts and circumstances of the case, I am of the view that there is no consideration of the merit of the applicant for promotion w.e.f. 1.3.85 in preference to the fourth respondent envisaged in the earlier judgment and order of the Tribunal in Annexure-A and B. Hence, I am of the view that the claim of the applicant for promotion as Commercial Inspector Grade-III w.e.f. 1985, the date on which the fourth respondent was promoted to that post, requires further consideration by the respondents 2 & 3

in accordance with law taking into account our observation in this judgment.

18. Accordingly, I accept the contentions of the applicant and I am satisfied that interest of justice will be met in this case if I dispose of this application with a direction to the respondents 2 & 3 to consider the claim of the applicant for promotion to the post of Commercial Inspector Grade-III w.e.f. 1.3.1985 and further promotions in case if he is found eligible for the same in accordance with law. This shall be done as early as possible without any delay, after giving an opportunity of being heard to the applicant and the fourth respondent.

19. The application is disposed as above. There will be no order as to costs.


31.3.94
(N. DHARMADAN)
JUDICIAL MEMBER

kmn

N.V.Krishnan, AM

20. I regret my inability to agree with the conclusions reached by my learned brother. In my view, the applicant has no right to be considered for ad hoc appointment as Commercial Inspector in preference to the 4th respondent, Shri Muthu Ramalingam, merely on the ground that the enquiries which were pending against him on 2.2.85, when the latter was given ad hoc promotion by superseding the applicant, have now been concluded in the applicant's favour.

21. It is not necessary to repeat the facts of the case as they have been stated in my learned brother's judgement. In my view, the order dated 6.11.90 at Annexure-B passed by the Tribunal in CCP No.36/90 in OA 358/86 is conclusive of the following facts which cannot be reopened now:

(i) The judgement as clarified by the order dated 21.5.90 was that the applicant should be appointed against the sixth regular vacancy.

(ii) The respondents stated that the sixth regular vacancy arose on 1.2.87 when a retirement took place and that the applicant is already appointed to that post. This statement is accepted by the Tribunal and it did not proceed to make further enquiries whether a regular vacancy arose earlier to 1.2.87 when someone was sent on deputation and the fourth respondent was appointed on ad hoc basis.

(iii) The Tribunal has accepted this statement and came to the conclusion that its orders have been complied with and there is no contempt.

Thus the contention that there was no other regular vacancy prior to 1.2.87 stands accepted and is not open to question.

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22. The complaint of the applicant was that even before the 6th regular vacancy arose there was another vacancy arising out of the deputation to which, instead of the applicant, another person, who was not even in the panel, was appointed on an ad hoc basis. The Bench, therefore, found (Ann.B) that if the applicant was aggrieved by the appointment of that person on an ad hoc basis, he was at liberty to file an original application.

23. In the aforesaid circumstances, the Annexure-B order precludes the existence of any other "regular vacancy" having arisen before 1.2.87. That question is concluded by the Annexure-B judgement. Hence, I am of the view that there is no need to examine that issue again. Therefore, it has to be held that the fourth respondent was appointed on an ad hoc basis only to a temporary or short-term vacancy.

24. The question then is whether the applicant has any preferential right to be considered to these vacancies in preference to Respondent-4.

25. It is quite clear from Exbt. R2 that a short term vacancy arose at Trichur due to the illness of Narayanan Namboothiri. The selection process was then on. There were only five ^{regular} vacancies and five persons, all senior to the applicant, were already working as ad hoc Commercial Inspectors (Annexure-D). Hence, persons thereafter among the volunteers was considered for adhoc posting in the sick leave vacancy. The applicant, ^{who was the next person} was also considered for ad hoc promotion on 2.2.85. He was superseded because his service record was not found commendable in view of the punishments given earlier for various charges and there was another charge of irregularity for which he has submitted ^u this explanation. Therefore, the respondent-4 immediately junior to him, who had also volunteered for working as Commercial Inspector, was given ad hoc promotion.

26. The learned counsel for the respondents produced before us the records relating to this appointment as well as the service book of the applicant. On the date Exbt.R2 superseding the ~~opponent for ad hoc appointment~~, order was recorded, proceedings had already been initiated in respect of the memorandum of charges issued on 5.3.84. Punishment of withholding increment for 2 years was imposed by the order dated 30.9.85 (Annexure-M). This was set aside in appeal by the order dated 21.12.89 (Annexure-K). However, another proceeding was also initiated in which the charge memorandum was issued on 28.5.85/and in which he was penalised on 15.7.85 by withholding increment for a period of 24 months (Annexure-O). In appeal, this penalty was reduced to Censure on 4.10.85 (Annexure-P). In other words, during the period when the ad hoc appointment of Respondent-4 was subsisting, the applicant was superseded for ad hoc appointment due to his bad record. ^{(An. N) u} From the original records, it is seen that when O.Gopalakrishnan was transferred to the Railway Board, the fourth respondent was posted in his place from 1.10.85, i.e. when the penalty of reduction of increments against the applicant was still in force. Therefore, when the ad hoc appointment of Respondent-4 was made from time to time ^{u were} against various posts, there ~~was~~ good and sufficient reasons to supersede the applicant for such ad hoc appointment.

27. Merely because of the fact that in one of the disciplinary proceedings, the punishment was reduced to Censure on 4.10.85--which, according to the applicant, will not stand in the way of his promotion--or the fact that in the other disciplinary proceeding, the penalty imposed was quashed in December 1989, the applicant does not get a right to be considered retrospectively for ad hoc appointment in place of Respondent-4. For, ad hoc appointment

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by itself is not a right to be claimed by any employee.

28. This principle can be illustrated by taking a more simple example. Assuming that a post of UDC falls vacant in an Office due to the incumbent going on leave for four months, the appointing authority may make an ad hoc promotion. The senior-most LDC--A--is bypassed because a D.E. is pending. Therefore his junior B is appointed on ad hoc basis as UDC. B is reverted after four months when the regular incumbent joins. If, subsequently, the disciplinary proceedings against A terminates in his being found innocent, he cannot claim, as of right, that, in the leave vacancy to which his junior B was promoted on ad hoc basis, he should be promoted retrospectively.

29. Such a submission cannot be entertained in respect of a purely ad hoc promotion. That submission would be appropriate only if the supersession was in respect of a regular appointment. In other words, if, in the present case, it is assumed that the applicant was not the 6th person in the list, but say, the 3rd person (i.e. below S.No.2 in the Annexure-D list of persons who were called in the interview) and if he was superseded by the DPC on account of a D.E. or some adverse entries in the character rolls and he was cleared of all those blackmarks later, he could have then laid a claim that he should be considered for promotion with effect from the date on which his immediate junior Shri Mohamed Ali was promoted on a regular basis.

30. The applicant does not get such a right for claiming the benefit of ad hoc appointment in the aforesaid circumstances. However, he is only entitled to a clarification that the ad hoc appointments held by Respondent-4

until the applicant was appointed to a regular vacancy from 1.2.87 will not confer any benefit on respondent-4 over the applicant. With this clarification, this application deserves to be dismissed.



(N.V.Krishnan)
Administrative Member

ORDER OF THE BENCH

In view of the difference in opinion, we refer the following question:

"Having regard to the facts and circumstances of the case whether the application should be disposed of with direction for reconsideration of the claim of the applicant or it should be dismissed without granting any relief!"


(N. DHARMADAN)

JUDICIAL MEMBER


(N. V. KRISHNAN)

ADMINISTRATIVE MEMBER

knn

CPC) 85/93 in OA-37/91

17-6-93
(35)

Mr. V.R.R. Nair
Mrs. Dandapani

At the request of the
learned counsel for respondents
list on 23-6-93

CRR
(CRR)

ND
(ND)

17-6-93

23-6-93
① List on 4-7-93

By order
A.R.
C.O.
23/6/93

7-7-93 Call on 14-7-93

By order
A.R.
C.O.
7-7-93

Reply statement
to the question
by
6/7/93

14-7-93 Call on 21-7-93

By order
A.R.
C.O.
14/7/93

21.7.93

85
CPC 86/93 in
O.A. 37/91

Mr. K. Ramakumar - for applicant
Mrs. Sumati Dandpani.

Petitioner alleges contempt, stating that he was granted only adhoc promotion from 1.3.85 while he should have been granted regular promotion. The controversy is more academic than real. The question would centre round assigning of rank. Learned counsel for respondents 3 & 4 submits that the ranking given to the petitioner N.T. Joseph in Exbt.

R.4 (Copy of Provisional Seniority List of Commercial Inspectors prepared as on 31.3.93 and circulated vide letter No. P(S)612/III/CMI/ Seniority dated 31.3.93 by Chief Personnel Officer) will prevail for all purposes. We record this. In this view, it is unnecessary to consider the Contempt Petition and we close the same.

R. Rangarajan
A.M.

Chettur Sankaran Nair (J)
V.C.

(20) Mr K Ramakumar
Mrs Sumathi Dandapani

Counsel for petitioner not ready. Post after
two weeks.

R Rangarajan
A.M

Chettur Sankaran Nair (J)
V.C

4-8-93

25/8/93

CSN(J) P.M

CS

Other petitioner, nor

Counsel present on m.p. 1244/93

Post after six weeks.

By order

Ph
C.O.

C.I

25/8/93

12.10.93

(10) Mr. Ramakumar (represented)

Mrs. Sumati Dandapani (represented)

M.P. 1244/93: Both sides not ready. Post
after one month.

By order

Ph
C.O.

12-10-93

(37)

Mr K Ramakumar (represented)
Mrs Sumathi Dandapani.

M.P. 1244/93.

Petitioner not ready. Post on 9.12.93.

By order,

Ph
C.O.

18.11.93

(34) Mr K Ramakumar
Mrs Sumathi Dandapani

M.A. 1244/93

Learned counsel for applicant submits
that instead of pressing this clarification
petition, he may be permitted to file a fresh
D.A. and canvass the issue.

We grant leave and dismiss this Miscellaneous
Application.

Q PV Venkatakrishnan Chettur Sankaran Nair (J)
A.M. V.C.

9.12.93

*R
10/12
m.C.C.T*