

FINAL ORDER

CENTRAL ADMINISTRATIVE TRIBUNAL: LUCKNOW BENCH

Tuesday the 9th day of May 2000

PRESENT

The Hon'ble Shri D.V.R.S.G.DATTATREYULU, MEMBER(J)

and

The Hon'ble Shri S.MANICKAVASAGAM, ADMINISTRATIVE MEMBER

O.A.No. 96 of 1991

Ramesh Chandra Srivastava .. Applicant

Vs.

1.Union of India through the
Secretary, Railway Board
New Delhi

2.The General Manager(Personnel), North
Eastern Railway, Gorakhpur

3.The Divisional Railway Manager(Personnel)
North Eastern Railway, Lucknow .. Respondents

Mr.J.P.Mathur .. Advocate for the applicant

Mr.Manik Sinha .. Advocate for the respondents

Order:Pronounced by the Hon'ble Shri D.V.R.S.G.DATTATREYULU
MEMBER (J)

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The applicant in this case prays for the relief of granting him the proforma promotion with effect from the date when his juniors like S/Shri S.P.Saxena and Gafoor Ahmed were given promotion, i.e. from 2.7.1985, with all consequential service benefits by quashing the orders dated 8.9 1989 and 18.3.1990 (Annexures A3 and A 6).

2. It is stated in the OA that the applicant was posted as a Personal Assistant to the Addl.Divisional Railway Manager, North Eastern Railway, Lucknow, in the pay scale of Rs.2000-3200, with effect from 30.4.1990. The selection has to be made for the available post in the year 1985 from among the eligible candidates working in the pay scale of Rs.1640-2900. In the eligibility list the applicant was placed at Sl.No.4 and that of Vasundara at Sl.No.5. The rules require that the test should be informed 15 days earlier so that the candidates can prepare for the required test consisting of a written examination/viva-voce test. The applicant was informed of the test on 9.4.1989 at 3.45 p.m. to the effect that the test was to be held on 10.4.1985. The applicant has therefore stated that he could not attend the test as he was not given the necessary time for preparation. Subsequently the examination was postponed due to some administrative reasons and the test was held on 10.6.1985. But the applicant was not informed of the same. The applicant subsequently came to know that Shri Gafoor Ahmed was promoted by an order dated 2.7.1985. The said Ahmed was junior to the applicant. Therefore the applicant made representations that he should be considered for promotion as he was not given

an opportunity to take part in the examination held on 10.6.1985. The applicant places reliance on the Railway Board's letter of 26.7.1972 wherein it is stated that if there is any administrative lapse, it should not result in any hardship to the employees.

3. The applicant has enclosed Annexures A-1 to A-6 and has also filed rejoinder to the reply filed by the respondents. The respondents in their reply have denied the allegations made by the applicant, para-wise. It is stated that the application is barred by limitation because the order^s questioned in this OA are dated 8.9.1989 and 18.4.1990 and the OA was filed in September 1991. It was further stated in the reply that the applicant was duly informed of the date of examination by post and also by a letter subsequently. The reply proceeds to state that the applicant has endorsed stating that he could not attend the test and this was taken as a refusal on the part of the applicant to attend the test. It is stated in the reply that others took part in the examination. The post for promotion is being a selection post, nothing can be done at this distant point of time. Subsequently there was restructuring of the department. The applicant belongs to Lucknow division. There is no arbitrariness or violation of any rule and the application deserves to be dismissed.

4. The respondents ^{had} have annexures R-1 to R-IV.

5. We have heard the counsel for both sides and perused the records.

6. The point for consideration is whether the applicant is entitled for ~~for~~ a direction for proforma promotion as prayed for by him with consequential benefits or not. 2.

7. It is not in dispute that the applicant is eligible for the promotional post which he sought and to which his juniors like Gafoor and others were promoted in pursuance of the examination held on 10.6.1985. On facts, it is to be seen that the respondents have stated in

the reply that the applicant was informed by phone and that a written message was sent to him on 8.4.1985, apart from the telephonic message sent on 30.3.1985 with regard to the test to be held on 10.4.1985. But there is nothing in record to show that any telephonic message was delivered to the applicant, as asserted in the reply. Nobody's affidavit was also filed stating as to when and at what point of time and from which office and to whom the alleged telephonic message was delivered regarding the test to be held on 10.4.1985. Therefore this assertion of the respondents has to be ignored.

7. Now the next point that arises for consideration is that according to the applicant he received the information regarding the test to be held on 10.4.1985 at about 3.45 p.m. on 9.4.1985. But it is stated in the reply that a written message was sent to the applicant on 8.4.1985 with the date 8.4 1985. But it is nowhere stated that at what point of time and on what date the said message was delivered to the applicant. In the absence of any such averment in the reply, it has to be concluded that the assertion made by the applicant that he received the message only on 9.4.1985 at about 3.45 p.m. has to be accepted. When once that is accepted, the required time of 15 days for attending the test to be held on 10.4.1985 is not complied with by the respondents.

8. As per the narration of facts and the events that progressed, we find that the test was held on 10.6.1985. It is not the stand of the respondents that any information was conveyed to the applicant to participate in the examination and the applicant has not attended the examination inspite of the information conveyed to him officially as per the rules to the applicant. What all the contentions of the respondents is that the applicant

is working in such a department and in such an office that the applicant must be deemed to be fully aware of the examination that was going to be held, especially when some of his colleagues were participating in the said examination. We are of the view that this will not absolve ~~the~~ the respondents ~~from~~^{of} its duty to inform the applicant as to the date, time and place of the examination. On the other hand, the stand of the respondent appears to be that as per the endorsement made in Annexure R-III the applicant had refused to take part in the examination. But a persual of the endorsement made by the applicant is to the effect that he could not attend the examination to be held on 10.4.1985 for the reason that he has not been given adequate time to prepare for the examination. Nowhere it is stated in Ex.R-III that the applicant had refused to attend the examination or that the applicant has not been interested in participating in the examination. Therefore, any interpretation which the officials construed according to their minds cannot be thrust as the stand taken by the applicant. The language simpliciter would go to show that the applicant has expressed his inability to take the examination rather than stating that he is not interested in the selection. Therefore the stand taken by the department ~~has~~^{has} absolutely no legal force and ~~are not~~^{not} based on materials available on record.

9. Now the question for consideration is that the examination was already over, selections had taken place and one Mr. Gafoor and others who were juniors to the applicant have been selected and appointed to higher posts. Having come to know of the same the applicant made a representation on 20.10.1989 (Annexure A-A 4) requesting that he should be given promotion as his juniors had been promoted. In this connection we find that the stand of the applicant is based on the

Railway Board's letter of 26.7.1972 which reads as follows:-

"2. Staff overlooked in promotions. - The staff who has been overlooked for promotion to higher grades either for wrong assignment of seniority or for other causes or has lost promotions on account of an administrative error should be dealt with on merits and on promotion, be assigned correct seniority. Pay in the higher grade on promotion may be fixed proforma at the stage at which the employee would have reached if he was promoted at the proper time".

6. An analysis of the above letter would go to show that if a person is overlooked for promotion to higher grades,

(a) for a wrong assignment of seniority,

(b) for any other causes (emphasis supplied)

(c) has lost promotion on account of an administrative error
(emphasis supplied)

should be dealt with on merits and on promotion he/she should be assigned the correct seniority, as if he/she was promoted at the proper time and fix the Pay.

10. The stand of the respondents in the reply that the applicant has failed to take the examination for the fear of his not being selected in view of the fact that the post is a selection post, has also no merit in view of the reasons discussed in the earlier paragraphs, especially when there is a lapse/error on their part and as per the Railway Board's letter of 26.7.19972 the applicant should be extended the benefit of promotion since the applicant has lost the chance of taking part in the examination due to the respondents error/lapse. Further the administrative lapse/error committed by the respondent department should not go to the disadvantage of the applicant.

11. The next question ^{for consideration is} that the promotional post being a selection post can the applicant seek straightaway the promotion. We are of the view that taking the experience of the applicant and the nature of job being performed by the applicant, the pre-requisite of taking the examination

has to be dispensed with in view of the facts and circumstances of this case. In this case we find that due to the error committed by the respondents it has resulted in great injustice to the applicant. Further the administration after going through the representation Ex.A-4 ought to have conducted a test if the department felt that such conduct of the test ^{is} essential for promotion to a selection post. But the department has not done that. On the other hand the department is consistently taking the stand that the applicant refused to take the examination which stand in our view is baseless in view of the materials available on record.

12. As already discussed, as per the Railway Board's letter dated 26.7.1972 if there is ^{an} administrative lapse/error, the employee concerned should have been given the benefit of proforma promotion. It is also pertinent to mention that in Annexure A-2 in paras 3 and 4 it has been stated that the applicant's case may be considered for promotion on a proforma basis with reference to his immediate junior Mr. Gafoor Ahmed.

13. The next contention raised by the respondents is that the OA is barred by limitation. It is true that the applicant had received the replies dated 8.9.1989 and 18.3.1990 (Annexures A-3 and A-6). Strictly speaking the applicant ought to have approached the Tribunal within one year. This gave rise to the respondent department to contend that the OA is barred by limitation. In the given facts and circumstances where the applicant has not deliberately refused to take the examination, we hold that this is a fit case where justice should be done not strictly keeping the limitation to deny the legitimate benefit to the applicant especially when the department ^{has} ~~has~~ committed an error/lapse at the relevant point of time and that the applicant is not much conversant with the legal knowledge. We are therefore

of the view that the limitation aspect should be deemed to have been condoned when the OA was taken on admission. Further under Sec.21 of the Administrative Tribunals Act, 1985, an application can be admitted even after a lapse of time prescribed for filing the OA if the applicant is able to establish sufficient cause and the sufficient cause has to be inferred from the circumstances of the given case and not as a straight-tight jacket interpretation, *Specialty in view of the Railway Board letter.*

14. The learned counsel for the applicant had referred to and relied on the decision reported in 10 ATC 593 (State of Maharashtra-Vs.-Jagannath Achyut Karandikar) (Supreme Court) and would say that when there is hardship to the employee the rules must be interpreted in a liberal manner. ~~We have perused the above decision.~~

15. The learned counsel for the respondents placed reliance on the decision reported in 1999 SCC(L&S) 1322 and submitted that when a cause of action is barred by limitation no relief should be granted. We have perused the above said decision and hold that it is distinguishable on facts. That was a case where the plaintiff therein was promoted to the post of Sub-Inspector of Police in the year 1973. But the plaintiff therein chose to file the suit in the year ~~1973~~ (1989) seeking a declaration that he should have been promoted during the years 1968-69, 1970-71. Therefore applying Art.58 of the Limitation Act that a suit for declaration has to be filed within 3 years, that case was dismissed on the ground that the suit was filed after a lapse of 8 years. But here it is not so. A perusal of annexures A-3 and A-6 would go to show that the applicant had filed the OA on 1.4.1991 immediately ~~with the rejection order~~ ^{with} the rejection order passed on 18.3.1990 and therefore the plea of limitation raised by the respondent department has to fail, and the decision

referred to and relied on by the respondents counsel does not lend any support to their case.

15. The learned counsel for the respondents also relied on the decision reported in (1998) 8 SCC 682 (UOI and another -Vs.-S.S.Kothiyal and others) and would say that when the limitation is there, relief should not be granted. We have perused the above decision. We find that therein the petitioner was considered for promotion during 1970, 1971 and he was found unfit. Only during 1972 he was found fit and accordingly promoted. But he filed a petition in 1978 challenging his non-promotion during 1970. Therein it was held that the said case was barred by limitation. But here it is not so. ~~as we have held in the previous para that the present application is not barred by limitation.~~ Therefore the above decision does not lend any support to the case of the respondents.

16. Thus on the basis of consideration of the material placed before us and in view of the discussion above, we hold that the applicant succeeds and the following orders are passed.

(a) The impugned orders dated 8.9.1989 and 18.3.1990 (Annexures A-3 and A-6) are quashed.

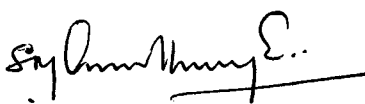
(b) The respondents are directed to give proforma promotion to the applicant with effect from the date of his junior Shri Gafoor Ahmed was given promotion, i.e. from 2.7.1985.


(c) The applicant is entitled to consequential benefits of seniority, further promotion, fixation of pay, increments etc.

(d) The applicant is not entitled to any arrears of pay and allowances and is entitled only to arrears of ^{retiral} ~~pensionary~~ benefits, consequent upon the grant of notional promotion from 2.7.1985.

17. The respondents shall implement the above orders within three months of receipt of a copy of this order by them.

18. The OA is allowed to the extent indicated above with no order as to costs.


(S. MANICKAVASAGAM)
MEMBER (A)


(D.V.R.S.G. DATTATREYA)
MEMBER (J)

9.5.2000

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