

CENTRAL ADMINISTRATIVE TRIBUALPATNA BENCH, PATNAO.A. 109/2006[Patna, this the day of 02 - 03 - 2012]CORAM

HON'BLE DR. K.B.S. RAJAN [MEMBER [J]]
HON'BLE SHRI NARESH GUPTA [MEMBER[A]]

1. Arjun Choudhary S/o Late Shiv Bhajwan Choudhary, Resident of village Barmasia, P.O.& P.S. Katihar Distt- KatiharApplicant

By Advocate: 1 Shri S.K. Bariar.

Versus

1. The Union of India through Secretary, Ministry of Railway, Rail Bhawan, New Delhi.

2. The General Manager, N.F. Railway, Maligaon, Assam.

3. The Divisional Railway Manager, N.F. Railway, Katihar.

4. The Divisional Personal Officer, N.F. Railway , Katihar.

5. The A.P.O. N.F. Railway, Katihar.Respondents.

By Advocate : Shri Mukundjee.

ORDER

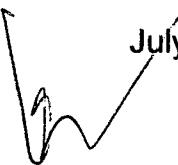
HON'BLE DR. K.B.S. RAJAN [MEMBER [J]]:- The applicant, a Scheduled Caste Candidate, was initially appointed as Assistant Station Master (ASM) in the pay scale of Rs 5000 - 8000 in the North Frontier Railway, Maligaon and at present he is posted at Labha of the said Railway. His seniority position in the said post was 119 and his next two juniors were also S.C. Candidates. Annexure A-1 refers. The next hierarchical promotion is to the grade of Rs 5500 – 9000 (a non selection post) and the applicant figured in the promotion panel dated 04-07-2003 at serial No. 47, but with the remarks "S.F. 5 pending/unsuitable" and thus was not promotion. The other two juniors were also named in the promotion order at serial No. 48 and 49. The remarks column in the case of serial No. 48 reflected "undergoing punishment" and thus, he was also not promoted. It is the case of the applicant that the applicant had never been served with any charge sheet under S.F. 5, nor was he ever communicated any adverse remarks in the A.C.R.

2. Restructuring took place in end 2003, effective from 01-11-2003 and the applicant was promoted to the higher grade of Rs 5,500 – 9000/-. This promotion was on the toes of his supersession in the regular panel of 04-07-2003. His junior was also promoted effective from the date of expiry of the currency of penalty which was as of 23-06-2004.

3. The next hierarchical grade is Rs 6,500 – 10,500 for which the residency period in the grade of Rs 5500 – 9000 is 2 years. Both the juniors were promoted to the higher grade respectively from 23-06-2006. and 29-08-2005. The applicant made a representation dated 23-12-2004 in regard to his promotion, vide Annexure A-5. The respondents have rejected the same vide order dated 27-12-2006 at Annexure A-6. The applicant has thus, filed this OA seeking the following reliefs:-

- (i) The applicant humbly prays that the letter-dated 27.12.2005 (A/6) maybe treated as illegal and be quashed and set aside.
- (ii) The applicant also humbly prays that the respondents may directed to promote the applicant in the pay scale of Rs.5500-9000/- w.e.f. 04.07.2003 or from the date of junior are promoted i.e. 29.08.2003.
- (iii) The applicant further prays that respondent may be directed to promote the applicant to the post of S.S. In the pay scale of Rs.6500-10500/- w.e.f. 04.07.2005 or from date of juniors are promoted i.e. 29.08.2005.
- (iv) Applicant also prays for consequential monetary benefits with 10% @ interest.

4. Respondents have contested the O.A. They had raised the preliminary objection of limitation, as according to them, the cause of action having arisen in July, 2003, the applicant had approached the Tribunal in 2006 only. Mis-joinder



of parties is also another technical objection raised by the respondents. As regards merits of the matter, the respondents have stated that initially, the remarks of 'S.F. 5 pending' was shown inadvertently and the same was replaced later by the term, 'unsuitable.' They have further stated that for the year ending 31-03-2001 (F.Y. 2000 – 2001), the applicant could secure^{b2} the grading of only Below Average and an intimation to this effect was sent to the applicant vide Divisional Railway Manager (Operation), N.F. Railway, Kathiar's (Annexuree R-1) letter dated 06-08-2001 with clear instruction that the applicant was to submit his representation, if any, against the adverse remarks within one month. But the applicant chose to remain silent and now he is making incorrect statement. And, as regards his promotion under the restructuring scheme, the order of promotion was dated 31-12-2004 and the respondents had taken into account the ACR for the period 2001-2002, 2002 – 2003 and 2003 – 2004 and the applicant was given promotion with retrospective effect from 01-11-2003. In so far as residency period is concerned, the respondents have contended that in certain deserving cases, the said period of residency may be relaxed to one year but only with the approval of the General Manager. Again, according to the respondents, the promotion under restructuring was based on modified selection procedure and since the junior to the applicant was already in the promotion panel though undergoing currency of penalty, he was considered for further promotion as Station Superintendent in the grade of R 6500 – 10500 and empanelled on completion of two years residence period.

5. The applicant filed his rejoinder stating that he had never been communicated the adverse remarks of ACR for the year 2000 – 2001 and letter dated 06-08-2001 was forged and fabricated one. He had also mentioned about the Railway Board letter dated 08-01-1991 in which certain instructions in respect of adverse remarks had been given which includes that apart from communicating, certain extent of counselling should also be done.

6. Counsel for the applicant argued that the respondents have shifted their stand. First, their contention was that Form S.F. 5 was issued. They have

backed out from this contention at the time of filing the written statement. Next comes about the unsuitability. Their contention is that the Adverse Remarks had been communicated in 2001 itself, whereas the same had not at all been issued to the applicant. As regards promotion w.e.f. 01-11-2003, counsel for the applicant argued that for the said promotion from that date, though the order of promotion was dated 31-12-2004, the requirement was that only the three ACRs preceding the said period (01-11-2003) would have been considered. In order to justify the non selection of the applicant in regular promotion for which also the three years ACR were the same, that the respondents have comfortably twisted the issue stating that for restructuring the ACRs for 2001-02 onwards were alone taken into account.

7. Counsel for the respondents submitted that the preliminary objection as to limitation and misjoinder of the parties first should be considered. Again, as regards merit, para 3 of the written statement reflects the eligibility conditions wherein it has been mentioned that the applicant was found unsuitable for promotion to the higher Grade of Rs 5500 – 9000, while the juniors to him were found suitable. The applicant was considered for promotion to the above grade at the time of restructuring, while the other two were considered for the next higher post in the wake of restructuring as they had already been holding the grade of Rs 5,500 – 9000. The counsel had fairly conceded that remarks "S.F. 5 pending" was a bonafide mistake and the same had been duly rectified.

8. Arguments were heard and documents perused. First as to limitation. The applicant initially agitated against his non promotion in September, 2003 by way of representation, which remained unanswered. Later on he was promoted w.e.f. 01-11-2003 by Annexure A-4 order. On receipt of the said order, the applicant had again moved the respondents through Annexure A-6 giving clearly as to his entitlement and eligibility and the mistakes committed by the respondents. And, in view of no response from the respondents, the applicant had filed this OA in 2006. Thus, there is no question of limitation coming in the way of the applicant. As regards mis joinder, and non exhaustion of

departmental remedies, these are technical objections, which are conventional and customary and not supported by any plausible grounds or reasons. Thus, none of the technical objections could be held tenable.

9. The only point for consideration is whether the adverse remark for 2000 – 2001 was actually communicated to the applicant and whether the respondents' contention that for promotion on the basis of restructuring, effective from 01-11-2003, ACRs of 2000 – 2001 were not considered, could be held tenable.

10. Though the respondents claimed by reference to Annexure R-1 about communication of adverse remarks for the year 2000 – 2001, when the applicant made a mention about non issue of SF 5 to him and non communication of Adverse Remarks to him vide Annexure A-3, there had been no reply rebutting the later part i.e. non communication of adverse remarks. If the communication of adverse remarks had not been actually made, non consideration of the case of the applicant for promotion to the grade of Rs 5500 – 9000 in July, 2003 itself was not correct. For, it has been held in the case of Union Public Service Commission vs Hiranyalal Dev (1900) 2 SCC 242 that **it cannot be gainsaid that the Selection Committee could not have taken into consideration the adverse remarks entered in the records which had not been communicated.** Again, when under restructuring, promotion was effective from 01-11-2003, consideration of ACR for the period of 2003 – 2004 is not appropriate, even if the DPC for the purpose was held in December, 2004. This contention of the respondents that only the ACRs of 2001-02 onwards had been considered appears to be "tailor made".

11. The applicant has certainly made out a cast iron case in his favour. He is entitled to be considered for promotion to the grade of Rs 5500 – 9000 in the DPC held prior to 04-07-2003 without taking into account the adverse remarks of 2000-2001 which remained throughout uncommunicated. In the event of his being considered for promotion, his promotion in that grade shall be from the



date his junior has been promoted and his seniority shall be maintained for purpose of promotion under the restructuring w.e.f. 01-11-2003 in the grade of Rs 6500 – 10500.

12. The next question is how to accommodate the applicant when there would be no vacancy as the vacancy had been filled up by promoting the junior. The only option is to create temporarily, supernumerary post. In the case of Punjab SEB vs Kuldip Singh (2005) 13 SCC 362, the Apex Court did not interfere with the direction of the High Court for creation of supernumerary post when there was a wrongful denial of promotion to the respondent therein. Of course, the Apex Court dealt with the aspect of arrears of pay and allowances. Creation of supernumerary post is with a view to avoid reversion of the junior who has been holding the post of Station Superintendent from 2006. The seniority of the applicant in the higher grade should also be suitably fixed, if need be, by giving due notice to those who would be affected by such fixation.

13. **The O.A. is thus, allowed.** It is declared that the respondents were not right in superseding the applicant in the regular promotion that took place prior to restructuring on the ground of existence of adverse remarks, which in fact was not communicated. The respondents shall hold review DPC and in the event of the applicant being found suitable, shall pass necessary orders in respect of the following:-

- (a) Promotion of the applicant in the pay scale of Rs 5,500 – 9000 from the date the junior (not suffering any penalty) had been promoted.
- (b) The pay in the higher grade should be fixed notionally, from the said date of promotion and actually from the date when the applicant had been promoted to the said grade (in the process of restructuring).
- (c) Seniority of the applicant in the grade of Rs 5500 – 9000 shall be prepared for the purpose of promotion under the restructuring scheme effective from 01-01-2003 or from the date of completion of the residency period. And, if the applicant is found suitable, such a promotion shall also be made. And, the pay fixation shall be notional from the date the junior had been promoted and actual



from the date when the applicant actually shoulders the higher responsibilities.

(d) Seniority in the post of S.S. (Rs 6,500 – 10,500) shall be suitably worked out and revised seniority issued, by due notice to all those who would be affected.

(e) This order shall be complied with, within a period of eight months from the date of communication of this order.

No costs.

Naresh Gupta
((Naresh Gupta))

Member (A)


(Dr. K.B.S. Rajan)

Member (J)

/mks/.