

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PATNA BENCH, PATNA

O.A. No. 243 of 06

Date of order : 12th May 2010

C O R A M

Hon'ble Shri Justice Anwar Ahmad, Member [J]
Hon'ble Shri Shankar Prasad, Member (A)

Dr. B.R. Das, S/o Late Sahdeo Das, r/o Flat No. 201, Vidyambika Apartment, Shivpuri, Patna, working as Medical Superintendent, E.C. Railway Hospital, Mugalsarai, under Chief Medical Director, E.C. Railway, Hajipur.

....Applicant

By Advocate : Shri M.P. Dixit.

Vs.

1. The Union of India through the Chairman, Railway Board, Rail Bhawan, New Delhi.
2. The Director [Estt.] Railway Board, New Delhi.
3. The General Manager, E.C. Railway, Hajipur.
4. The General Manager [P], E.C. Railway, Hajipur.
5. The Chief Medical Director, E.C. Railway, Hajipur.

....Respondents

By Advocate : Shri M.N. Parbat..

O R D E R

Shankar Prasad, Member [A]:- In this 3rd round of litigation the applicant is aggrieved by order dated 24.03.06 passed pursuant to the direction in OA 100 of 06 that the applicant does not have any claim for promotion to Senior Administrative Grade [SAG in short] with reference to his erstwhile juniors. The applicant has sought for quashing of this order and for a direction to the respondents to grant benefits of promotion to the post of SAG with retrospective effect without any further delay as such delay will be contemptuous and against the order passed in an earlier round of litigation. During the pendency of the OA

the applicant has brought on record the order dated 27.09.07 promoting him to SAG. He had also sought for amendment of this relief clause for antedating the date of promotion to that of his juniors given from the year 2003.

2. The facts lies in a narrow compass:-

[a] The applicant had earlier preferred OA 676 of 98. Annexure A/4 to the OA, however, contains only the first page of ~~cost~~ title and the operative portion of the order. The said order reads as under:-

"Heard the Id. Counsel for the parties. At the out-set, in all fairness, the Id. Counsel for the respondents stated that the grievance of the applicant has already been redressed by the concerned respondents which is confirmed by the Id. Counsel for the applicant while referring to supplementary written statement filed on behalf of the respondents on 24.09.02. In that view of the matter this case is disposed of, accordingly."

[b] Annexure A/2 to the OA is the supplementary written statement filed in the aforesaid OA, indicating therein that the seniority of deserving candidates, including the applicant have been re-cast, and he has also been considered for consequential benefits arising out of re-fixation of seniority. A copy of the seniority list was annexed to the reply. This letter dated 04.02.02 of the Railway Board is Annexure A/3 to the present OA, and the name of the applicant appears at Serial No. 22 in part VI and having note that the above mentioned 22 doctors will be placed below the junior most doctors of 1973 batch and above the senior most doctors of 1974 batch.

[c] Annexure A/5 series contains the representations dated 09.02.05 and 09.02.06 of the applicant indicating therein that he is the senior most employee in ~~S.G.J.J~~ seniority position in the North Eastern Railway, but his juniors

have been promoted recently. The subsequent representation seeks promotion from 1997 on completion of two years of qualifying service. The applicant, thereafter, preferred OA 100 of 06. The said OA was heard by Single Member consisting of Hon'ble the Vice-chairman, and the same was disposed of with a direction to treat the OA as representation and to pass speaking order within two months. Para 3 and 4 of this order reads as under:-

" It is well settled that if a junior is granted higher rank or higher pay scale bypassing an officer, who is senior to him , without any legal justification, that senior officer, so bypassed, must be given the benefits as granted to the junior officer from the date from which that benefit has been granted to the junior officer / officers.

The grievance of the applicant is that if the order at Annexure 6 is implemented, the applicant would be forced to work under his juniors."

[d] It is thereafter that the Railway Board has passed the order dated 24.3.06. The order indicates that the case of the applicant was considered for promotion to SAG in the meeting held in May, 2003 and meetings held on 22.09.04 and 04.02.06, but he was not found suitable. The operative part of the order is as under :-

" In his representation dated 09.02.05 [Annexure A/5 series of the OA] Dr. Das has mentioned two names , viz. Dr. Swatantra Kumar and Dr. A.P. Singh who have been promoted to SA Grade. He has also stated that for the last five years he has not been communicated any adverse remarks in his ACRs. In this connection it is stated that Dr. Swatantra Kumar and Dr. A.P. Singh were considered for promotion to SA grade in the SAG/IRMS panels approved on 22.09.04. On being found fit, they were promoted to SA grade. As already stated, Dr. Das was also considered in this panel, but he was not found suitable. So far as non-communication of adverse entries does not by itself guarantee promotion to Senior Administrative Grade. It may be added that in terms of Rule 209 [D] [1] of Indian Railway Establishment Code

Vol I, which are statutory rules framed under Article 309 of the Constitution of India, promotions to the Administrative Grades are made wholly by selection, mere seniority does not confer any claim for such promotion. It is also an established legal proposition that an employee only has the right to be considered for promotion and not to promotion itself. It is also a settled legal proposition that in promotion to selection posts, a more meritorious junior can steal a march over a less meritorious senior. Thus, having been considered for promotion to SA grade along with others as stated hereinabove and having not been found suitable, Dr. Das does not have any claim for promotion to SA Grade with reference to his erstwhile juniors."

[e] During the pendency of the OA the applicant moved MA 35 of 07 to bring on record the information that the respondents were likely to issue an order posting one Dr. J. Are, CMD, Hajipur as CMD Dhanbad though he is junior. He sought injunction against his posting. The Tribunal directed that no order need to be passed on the MA, and that if there is any delay in hearing the main OA, it may be placed for order. The applicant moved MA 436 of 07 to bring on record the orders promoting him to the SAG. He also sought injunction against the posting of Dr. V.J. Mahadik, SAG/IRMS as CMD stating that he was junior. It was ordered that the MA be listed along with OA.

[f] 3 . The grievance of the applicant, as made out in this OA, is that as per the order passed in earlier round of litigation, the respondents had assured to grant all consequential benefits, and that the Tribunal in the previous round of litigation had directed the respondents to grant promotion from the date of his juniors. In any case, the applicant had not been communicated any adverse ACRs , and therefore, there is no reason as to why he should not have been promoted. ^{so}

3. The rejoinder is filed.

4. Reliance is placed on a number of decisions, including the decision in 2004 [3] SLJ CAT page 212, interpreting the Railway Board's circular dated 02.06.02 relied upon by the applicant.

5. The respondents in their reply have stated that as per the provisions contained in Rule 209 [D], the appointments to the post of Senior Administrative Grade shall be made by selection on merit. The Selection Committee is headed by the Chairman, Railway Board, who is an ex-officio Principal Secretary to the Government of India and other members of the Railway Board who are of the rank of Secretary to the Government of India. The Railway Board's circular dated 03.06.02 lays down the procedures and amongst other, it is provided that as the promotion should be earned by dint of hard work, good work and good conduct. The circular further lays down that the DPC is not be bound by the gradings in the ACRs and can make its own assessment. The DPC shall assign an overall grading of 'Outstanding' 'Very Good+', 'Very Good', 'Good' and 'Unfit. The bench mark for promotion to SAG is 'Very Good'. Para 4 of the Guidelines reads as under:-

“ While merit has to be recognized and rewarded, advancement in an officer's career should not be regarded as a matter of course, but should be earned by dint of hard work, good conduct and result-oriented performance and potential for shouldering higher responsibilities, as reflected in the Annual confidential Reports, and it should be based on a strict and rigorous selection process.”

6. We have heard learned counsel for the parties.

7. *has argued &* The applicant *have* cited that the impugned order dated 24.03.06 *is*

has provided cause of action. If the applicant is seeking promotion from the date of his junior in 03, then, the cause of action is provided by order issued in 2003 promoting them. Besides this, the subsequent selection of 2004 and 2006 are separate cause of action. The Apex Court in R.N.Bose vs. Union of India and Others AIR 1970 SC 470 has held that if a decision has been taken and the government replies to the subsequent representation reiterating the earlier stand, the same does not extend the period of limitation. The Apex Court in P.A.Sadashiv Swamy vs. Union of India, AIR 974 SC has held that if the man is bypassed to promotion, he should challenge the supersession within six months or one year. The Apex Court in K.R.Mudgal vs. R.P.Singh and Others 1986[4] SCC 531 has held that all government servant should be allowed to quietly enjoy their post after 3 to 4 years. The Apex Court in Delhi Rohtas Light Railway vs. District Board, AIR 1993 SC 802 has held that true test of limitation is that parallel rights should not have been created in favour of the 3rd person. This has happened in the instant case.

8. We note, at the out-set, that the applicant has not impleaded any of the successful candidates in the present OA. It is well settled that there must be a post before an appointment, including the promotion can be made. Thus, one of the juniors from the three earlier selections will have to make way for the applicant in case the applicant succeeds. Even otherwise, if the applicant wants to be inducted in the panel of 2003, he will indirectly get the seniority over the persons promoted in between, and even from this point of view, they are the necessary parties. They have, however, not been joined. Three Judge Bench of the Apex Court in th State of U.P. vs. Prabodh Verma, AIR 1985 SC 167, has held that even if there is a challenge to rule, some of the successful persons have to

be impleaded in the representative capacity, otherwise, the writ petition should be dismissed.

9. The foregoing discussions would show that the OA is bad for non-joinder of necessary party. It has been vehemently argued by the learned counsel for the applicant that having given assurance that the applicant will be considered for grant of consequential benefits, the respondents are estopped from not promoting the applicant. Besides this, the Tribunal had already directed his promotion on the previous occasions. The orders have been extracted in earlier para above, which would show that it is a qualified order, and the same should be legally permissible. Proviso to IREC framed under Article 309 of the Constitution of India shows that the post in question is a *Nagashbandi* ⁱⁿ selection post. The Apex Court in Syed T.A.Nagashbandi vs. State of J&K, 2009 SCC 9 has held as under :

“If on an assessment of the materials on record, someone has been adjudged to be more meritorious and preferred to others it could not be said to be supersession of the senior by the junior, unlike in cases relating to promotion to a higher post with higher scales of pay by virtue of seniority.”

10. The above decision would show that selection posts have to be filled up by a positive act of selection, and that mere seniority has no role.

Under the circumstances, this contention of the learned counsel for the applicant the respondents are estopped or have not complied with the order of the Tribunal in the previous round of litigation has to be rejected.

11. The learned counsel for the applicant has placed reliance on the decision in Dr. R. Bhuddeo vs. Union of India and Others, 2004 [3] AISLJ 211 CAT. The Tribunal has held that one cannot claim promotion because no proceeding was pending. The Tribunal, after *J*

referring to a number of decisions, has held that below bench mark ACR has to be communicated.

12. The Apex Court in C.Jacob vs. Director of Stationery and Printing, AIR 2008 [2] SCC[L&S] 961 has considered the matter relating to disposal of representation by giving direction for consideration without examining the question of limitation.

13. The foregoing discussions would show that the applicant is seeking promotion from 2003 when his juniors were promoted. The cause of action actually arose in 2003 and that the OA is barred by limitation. The decision in C. Jacob would show that the decision taken on his representation pursuant to the order of the Tribunal would not extend the period of limitation. The OA is, accordingly, time barred.

14. The discussions above would show that we have held the OA to be barred by limitation as well as for non-joinder of necessary party. The OA is fit to be dismissed on this count only. There shall be no order as to the costs.

15. The MA[s] 35 of 07 and 436 of 07 also stand disposed of accordingly.

Shankar Prasad
[Shankar Prasad]/M[A]

cbs

Anwar Ahmad
[Anwar Ahmad]/M[J]