
Date of Decision: 21.2.94.

OA 441/93

D.M. KALA

... APPLICANT.

Vs.

UNION OF INDIA & ANR.

... RESPONDENTS.

CORAM:

HON'BLE MR. GOPAL KRISHNA, MEMBER (J).

HON'BLE MR. O.P. SHARMA, MEMBER (A).

For the Applicant

... SHRI PANKAJ BHANDARI.

For the Respondents

... SHRI S.S. HASAN.

PER HON'BLE MR. O.P. SHARMA, MEMBER (A).

Applicant D.M. Kala has filed this application u/s 19 of the Administrative Tribunals Act, 1985, wherein he has made the following prayers :

- i) The order dated 6.10.92 (Annexure A-1) promoting him to the post of Executive Engineer may be modified so that the applicant is entitled to promotion in the pay scale of Rs.3000-4500 from 28.11.89, the date on which his juniors were promoted.
- ii) Memorandum (Annexure A-2) dated 1.3.93 may also be modified and the applicant be given promotion from 28.11.89 instead of 7.2.90 and arrears of pay and all consequential benefits may be given to him. The respondents may also be directed to revise the pay fixation of the applicant and consequently the pensionary benefits.

2. When the applicant was working as Assistant Engineer in the Western Railway, a memorandum of charges under Rule-9 of the Railway Servants (Discipline & Appeal) Rules dated

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5.5.87 was issued to him. Letter dated 14.10.91 (Annexure A-7) is a communication to the applicant informing him that in consultation with the Central Vigilance Commission, he has been exonerated of the charges framed against him vide memorandum dated 5.5.87. Meanwhile, however, before the applicant was informed about his exoneration, order dated 28.11.89 (Annexure A-6) was issued promoting Shri R.C. Jain, the immediate junior of the applicant, to the post of Executive Engineer on adhoc basis. Shri Jain joined duty as Executive Engineer on 7.2.90. Subsequently, after his exoneration vide communication dated 14.10.91 the applicant was granted promotion as Executive Engineer by a telegraphic message dated 1.10.92. The applicant assumed charge as Executive Engineer on the same date, namely 1.10.1992 (Annexure A-15). A formal order promoting the applicant to the post of Executive Engineer on adhoc basis was issued on 6.10.92 (Annexure A-1). Annexure A-2 dated 1.3.93 is a memorandum containing a certificate that the applicant is deemed to have been promoted provisionally as Executive Engineer w.e.f. 7.2.90 and that he is not eligible for any payment of arrears for the period preceding the date of his actual promotion.

3. Applicant's case is that the promotion order of his immediate junior Shri R.C. Jain was issued on 28.11.89 and he assumed charge of the higher post, namely Executive Engineer, on 7.2.90. The disciplinary proceedings initiated against the applicant resulted in his complete exoneration. On exoneration he was granted actual promotion w.e.f. 1.10.92 and notional promotion w.e.f. 7.2.90, on which date his immediate junior Shri R.C. Jain assumed charge. According to the applicant, he is entitled to promotion not from 7.2.90 but from 28.11.89, the date on which the promotion order of his junior Shri R.C. Jain was issued. It was no fault of his that Shri Jain took

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considerable time in joining the promotional post. Shri Jain could have joined duties on 28.11.89 also. Secondly, he has been granted notional promotion from 7.2.90 but no arrears of pay for the period from 7.2.90 to 1.10.92 have been granted to him. It was for no fault of his that he was not allowed to join the higher post. Therefore, full pay and allowances should be granted to him for the period for which arrears of pay have been denied to him. The applicant retired from service on 31.3.93 and he has claimed not only arrears of pay, as aforesaid, but also revision in his pensionary benefits consequent upon grant of the claimed promotion from 28.11.89 and arrears of pay from that date till the date of his actual promotion on 1.10.92.

4. The respondents in their reply have stated that the applicant was given notional promotion from 7.2.90 because the applicant's junior Shri R.C. Jain joined the promotional post on that date. They have reproduced para-3 of the Office Memorandum dated 12.1.93, issued by the Department of Personnel and Training, according to which, amongst others, an employee who ^{been} has completely exonerated in the disciplinary proceedings may be promoted notionally with reference to the date of promotion of his junior but he will not be entitled to any arrears of pay for the period preceding the date of actual promotion. It

is in view of the provisions of this memorandum that the respondents have denied grant of arrears of pay to the applicant. They have stated that the said memorandum has been annexed as Annexure R-2 to their reply but actually it is not available as part of their reply.

5. We have heard the learned counsel for the parties and have gone through the records. It is undisputed that the applicant has been completely exonerated in the disciplinary proceedings initiated against him. He is, therefore, entitled

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to promotion from the date on which his junior was promoted. The date of order of promotion of his junior Shri R.C. Jain is 28.11.89. Shri R.C. Jain could have joined duty on 28.11.89 also. Therefore, the notional promotion ~~xxxx~~ granted to the applicant should be from 28.11.89 and not 7.2.90, the date on which Shri R.C. Jain actually joined duty.

6. Next question is about the grant of pay and allowances to the applicant for the period for which he was granted notional promotion. The respondents have relied upon the memorandum dated 12.1.88, issued by the Department of Personnel and Training for denying the arrears of pay and allowances to the applicant for the period during which he was granted notional promotion. The relevant provisions of this memorandum stand superseded in view of the judgement of the Hon'ble Supreme Court in Union of India and Others Vs. K.V. Jankireman & Others (1993 SCC (Labour and Services) 387). In the said judgement, the Hon'ble Supreme Court have held that in cases in which the employee is completely exonerated, notional promotion should be given from the date his juniors were promoted. Arrears of pay are to be granted if the employee is completely exonerated. In para 25 of their judgement the Hon'ble Supreme Court have held, as follows :


"The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases."

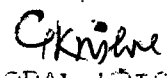
In this case, the applicant was prevented from performing duties on the higher post of Executive Engineer for no fault of his. Therefore, he is entitled to pay and allowances from the date from which he was eligible for notional promotion to the date from which he was actually granted promotion. In other words,

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the date of promotion of the applicant shall be 28.11.89 and he would be entitled to arrears of pay and allowances from 28.11.89 to 30.9.92, the date preceding the date on which he actually joined duty. The applicant shall also be entitled to other consequential benefits including revision of his pensionary benefits in accordance with the above refixation and grant of arrears. The respondents are directed to implement this order within a period of four months from the date of receipt of a copy of this order.

7. The OA is allowed accordingly, with no order as to costs.


(O.P. SHARMA)
MEMBER (A)


(GOPAL KRISHNA)
MEMBER (J)