

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR

OA No. 41/1994

Date of order: 25-04-1997

Vinod Prakash Mishra son of Late Shri F.P.Mishra, presently posted as D.A.M.E. (Diesel) Gandhidham, Western Railway, Ajmer Division.

Applicant

Versus

1. The Union of India through the Chairman, Railway Board, Rail Bhawan, New Delhi.
2. The General Manager, Western Railway, Church Gate, Bombay.

Respondents

Mr. R.N.Mathur, counsel for the applicant

Mr. Manish Bhandari, counsel for the respondents

CORAM:

Hon'ble Mr. Gopal Krishna, Vice Chairman

Hon'ble Mr. O.P.Sharma, Administrative Member

ORDER

Per Hon'ble Mr. O.P.Sharma, Administrative Member

In this application under Section 19 of the Administrative Tribunals Act, 1985, Shri V.P.Mishra has prayed that the respondents may be directed to consider the applicant as having been regularly promoted in substantive capacity to Class-II post (Group-B post) w.e.f.24.9.1975 and that he should be declared to have been promoted on regular basis in substantive capacity in senior scale of Class-I (Group-A) w.e.f. 24.7.1982. He has further prayed that the respondents may be directed to pay him all the arrears of difference of pay to which he should be entitled on this basis after making fixation in the pay scale revised from time to time, in senior scale of Group-A. He has also sought all other consequential benefits. The residuary prayer made by him is that the Tribunal may grant him any appropriate relief.

2. The averments of the applicant may be summarised as follows:- The applicant has been continuously working on the post of Assistant Mechanical Engineer (AME) in the Western Railway from the date he was

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promoted to the said post against a clear vacancy, on a temporary basis, by order dated 31.9.1975 (Ann.A2). The said appointment was made after he was duly selected for the said post on the basis of a written test and a viva-voce. In the select list the name of the applicant finds place at Sl.No.12, but he was not included in the main panel and to his knowledge his name was included in 'B' panel, in the reserve list. Inspite of his being included in the reserve panel, he was granted promotion against vacancies existing on account of retirement/promotion of certain incumbents. The respondents, however, had not calculated the vacancies accurately and if they had done so, the applicant's name would have appeared in the main panel itself.

3. Further, according to the applicant, he continued to work on the Group-B post without any interruption. However, he was surprised to receive a communication stating that he was again required to appear for the selection test to be held in March, 1985. Aggrieved by the said communication, he filed a Civil Suit in the Court of Munsif Magistrate, Ajmer who granted an interim direction to maintain status quo. Later the suit was transferred to the Jodhpur Bench of the Tribunal and was decided on 15.2.1991 (Ann.A3). The Tribunal held that the applicant cannot be asked to appear in the selection test again. With regard to the other reliefs claimed by the applicant, the Tribunal directed that the applicant can file another application, if so advised. After receipt of the said judgment of the Tribunal, the applicant submitted a representation to the authorities on 28.2.1991 but since no decision was taken on his representation, he filed another application before the Tribunal which was decided by the Jaipur Bench on 21.4.1993 (Ann.A4) with a direction to the respondents to take a decision on the said representation within a period of 3 months. The respondents have now rejected the applicant's representation vide Ann.A1 dated 19.8.1993. He has, therefore, in this applicant, now challenged the action of the respondents in rejecting his representation for being treated as regular holder of Group-B post of Assistant Mechanical Engineer.

4. According to the applicant he held the post of Principal, System

Technology School which is Group-A post but it was downgraded when the applicant was appointed on the said post. He has held the post of Assistant Mechanical Engineer w.e.f. 24.9.1975 after having cleared the selection but in the order of his appointment Ann.A2, it was mentioned that he had been promoted to the Group-B post temporarily. The respondents had not disputed earlier when he had filed a suit before the Munsif Magistrate, which was eventually decided by the Tribunal on 15.2.1991, that the applicant had been posted to the Group-B post against a clear, non- fortuitous vacancy and they had also accepted that the applicant had successfully passed the selection test prior to his appointment in the Group-B post. However, since it was stated that the panel consisted of only 14 names, the applicant's name was not included in the selection panel. As Principal, System Technology School, Ajmer, he actually held a Group-A post because there is no provision for downgradation of the post. He also performed duties of Production Engineer simultaneously with holding the post of Principal, System Technology School, which is also a Group-A post. It was for these reasons that he had sought inclusion of his name in the panel of Group-B officers in the rank of Assistant Mechanical Engineer formed in 1975 and had prayed for reckoning his seniority in the said post from 1975. While the applicant's prayer has not been granted, he has been transferred to the post of AME (Diesel), Ratlam which virtually means his reversion. Since the Tribunal vide order dated 15.2.1991 had directed that the applicant should not be asked to appear in the selection test and should not be reverted to Group-C post on the ground that he has not appeared in the selection test, the necessary consequence of the Tribunal's directions is that the applicant shall be deemed to have been promoted on regular basis in substantive capacity after duly passing the selection test for Group-B post w.e.f. 24.9.1975. In similar circumstances, the Calcutta High Court had ordered enlargement of the panel to include names of those persons who had not been included in the original panel because of their seniority position and limited number of vacancies. The SLP filed against the said judgment was dismissed by the Hon'ble Supreme Court. On the basis of this judgment, the Gujarat High

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Court had also given similar directions in an other case for enlargement of, the panel. The SLP against the judgment of the Gujarat High Court was also dismissed by the Hon'ble Supreme Court. A Similar judgment had been delivered by the Nagpur Bench of the Bombay High Court as well. The copies of these judgements of the High Courts have been placed as Annexures-A9, A10 and A14 to the OA. The applicant has, therefore, prayed that he should be treated as a regular appointee to the post of Assistant Mechanical Engineer, a Group-B post w.e.f. 1975, the year of his original appointment and he should be given promotion to Group-A post w.e.f. 24.9.1975 with all other consequential benefits.

5. The respondents in their reply have taken a preliminary objection to the maintainability of the OA before the Jaipur Bench of the Tribunal because the applicant was posted at the time of filing the OA at Gandhidham, Gujarat and the order rejecting the applicant's representation had been issued by the General Manager, Western Railway, Bombay. With regard to the averments of the applicant, the respondents have stated that the applicant was given only an officiating promotion to the post of AME. Thereafter he was asked to appear in the selection for regular appointment to the said post. The Tribunal while deciding the suit filed by the applicant before the Munsif Magistrate, Ajmer, which was transferred to it, had only given a direction that the applicant shall not be asked to appear in the selection test and that he should not be reverted to a Group-C post, but the controversy with regard to regularization on the post of AME remained undisposed of. This post can be filled up only by way of selection. Although the applicant had appeared in the selection held in 1975, he could not get a place in the panel of 14 candidates prepared on the basis of the said selection, who were granted promotion on that basis. Therefore, the applicant's passing the selection test is of no avail because he was low in the seniority and, therefore, he could not find place in the select panel and could not get promotion on the basis of the said selection. Therefore, whenever subsequent vacancies are notified the incumbent is required to appear in the selection again. However, instead of appearing in the selection test, he approached the Munsif

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Magistrate, Ajmer praying that he should not be asked to appear in the selection test. The applicant's averments regarding wrong calculation of vacancies in the post of AME have been denied. The applicant's representation had been rejected because he was granted only an adhoc promotion on the post of AME and therefore, unless his services are regularised, he is not entitled to inclusion of his name in the regular list of promotees. They have added that posts can be downgraded or upgraded in the exigencies of service and on the basis of policy decision and, therefore there was nothing wrong in the respondents' downgrading the post of Principal, System Technology School to accommodate the applicant on the said post. They have denied that the applicant's appointment on the post of AME in 1975 was made on the basis of a clear, non-fortuitous vacancy. The applicant's appointment to the post of Principal, System Technology School was only a working arrangement. They have accepted that the applicant was asked to perform duties of Production Engineer but have denied other averments of the applicant connected with that averment. They have also denied that the applicant had been transferred to Ratlam. They have added that the Tribunal and the High Courts have no jurisdiction to order regularisation of an employee if it is not in conformity with the rules. Such power or jurisdiction can be exercised by only the Hon'ble Supreme Court. No other Courts has authority to order enlargement of panels and to direct creation of additional posts because the Courts and the Tribunals do not function as substitutes of administration.

6. The applicant has also filed a rejoinder to the reply filed by the respondents whersin he had contended that one Shri Raj Kumar Sharma was granted promotion to the higher post even though he was junior to the applicant. Presumably the claim is that Shri Raj Kumar Sharma has been granted promotion to a Group-B post on regular basis and, therefore, the same treatment should be accorded to the applicant.

7. During the oral arguments the learned counsel for the applicant stated that the applicant's appointment to the post of Assistant Mechanical Engineer, a Group-B post, vide Ann.A2 dated 24.9.1975 was on officiating basis and it could not be termed as adhoc and not based on any selection.

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He added that the applicant had been found competent enough to hold a Group-A post as already stated in the OA, as per Annexures- A6 and A7. Ann. Al dated 19.8.1993 by which his representation for treating him as regular appointee on the Group-B post of Assistant Mechanical Engineer has been rejected, shows that the applicant was successful in the selection test for the Group-B post but his name was not included in the selection panel on account of his low seniority position. Thus the applicant is a selected candidate and he could not be asked to appear in the selection test again before being regularised on the Group-B post. He further stated that there can be no two opinions about the competence of the applicant to hold the Group-B post on regular basis as, inter alia, the respondents had themselves asked the applicant to work against a Group-A post. Not granting him the same benefit as granted by the Calcutta, Gujarat and Bombay High Courts would amount to discrimination against the applicant for which there would be no justification. He concluded by stating that a perusal of the order Ann.A3 passed by the Tribunal while disposing of the applicant's transferred application showed that it referred to an admission by the respondents that a reserve panel existed and that the applicant's name was included therein. Therefore, it could not be said that the applicant's name was not in the selection panel of 1975, at all.

8. The learned counsel for the respondents during his oral submissions stated that the applicant cannot take new pleas in his present application which he had not taken in his transferred application, even if the Tribunal had not decided all the grounds and averments contained in the earlier transferred application. The applicant's asking for enlargement of the panel to include his name in the said panel amounted to taking a new plea and such a course of action is barred by the principles of constructive resjudicata and is also hit by the bar of limitation. The applicant had not produced any document to show that his name had been included in any "reserve" panel. He further claimed that there was no procedure in the Railways for maintaining a reserve panel, in addition to the regular panel of selected candidates on the basis of which appointments were made. He added that the panel could not be enlarged on

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account of the judgments delivered by the various High Courts because that would amount to acting contrary to the rules. Dismissal by the Hon'ble Supreme Court of SLPs filed by the government against the judgments of the High Courts did not mean that any principle, if laid down in these judgments, had been affirmed by the Hon'ble Supreme Court. If the directions to enlarge the panel were to be accepted as correct statement of a principle, what would happen to the persons senior to the applicant who had appeared in the selection test in 1985 and were appointed on the basis of their having been successful in the said test ? He categorically denied that there was any curtailment of vacancies on the basis of which the panel of 1975 had been formed and further stated that the applicant's appointment vide Ann.A2 had been made on account of transfer/promotion of another official, was not against a clear vacancy and it was purely on adhoc basis as was clear from note No. iii) appended to the order Ann.A2. He also stated that even if the number of vacancies had in fact been larger than 14, it would be up to the respondents to decided how many vacancies were to be filled up. Mere inclusion of the name of a person in the selection panel does not entitle him to be appointed on the post. Such an entitlement would arise only if a person junior to the applicant and not included in the selection panel had been appointed ignoring the applicant. He concluded by stating that the order Ann.A2 was passed in 1975 wherein the applicant's appointment was described as temporary and adhoc but the applicant had not challenged the nature of his appointment in 1975 and, therefore, he was not entitled to claim now that his appointment had wrongly been described as adhoc in the order Ann.A2 passed in 1975.

9. We have heard the learned counsel for the parties and have perused the material on record.

10. We may first deal with the preliminary objection raised by the respondents regarding maintainability of the application before this Bench of the Tribunal. By an order dated 27.4.1995 copy of which is on our record, the then Chairman of the Tribunal had ordered, on an application made by the applicant in this behalf, that the OA may be retained at this Bench of the Tribunal. Next preliminary objection is regarding taking new

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pleas in this application which were not taken in the earlier application. We are of the view that all the prayers for relief made in the present application are with a view to advancing the applicant's case from the stage after the Tribunal by order dated 15.2.1991 passed in the transferred application No. 1026/86 had directed the respondents not to ask the applicant to appear in the selection test again and not to revert him to the lower Group-C post on the ground that he has not appeared in the test. Request for enlargement of the panel on the basis of judgments of High Courts is one of the legal arguments of the applicant in support of various prayers for relief. We do, therefore, hold that the OA or any of the prayers made by the applicant cannot be rejected on this ground.

11. The panel of 14 persons for the post of Assistant Mechanical Engineers prepared in 1975 on the basis of the selection in which the applicant had also appeared, has not been placed on record by the applicant or by the respondents. However, the said panel was shown to us during the hearing by the applicant. It is not disputed that the name of the applicant does not figure amongst the 14 names therein. The applicant showed to us during the hearing a "reserve" panel but it does not bear anybody's signatures and it was not presented alongwith the OA. The respondents have disputed existence of any reserve panel. There is a reference to such a reserve panel in Ann.A3, the judgment of the Jodhpur Bench of the Tribunal delivered on 15.2.1991 in TA No. 1026/86 which was originally the suit filed by the applicant before the Munsif Magistrate, Ajmer. In para 4 of the said order, the Tribunal has observed that it has been admitted by the learned counsel for the respondents that there were some more persons in the reserve list, some of them were senior to the applicant and some were junior in the selection panel and they were also promoted to Group-B posts. However, the undisputed position is that the applicant's name was not there in the selection panel of 14 persons. The applicant may have appeared in the selection test and may also have qualified therein but since he was not sufficiently high in the seniority list, his name could not be included in the selection panel. According to the respondents, his passing the selection test is of no avail when his

name could not be included in the selection panel and if he has to figure in the selection panel he has to appear in the selection test once again, competing with similarly situated persons. We are of the view that even if there existed any reserve list and the applicant's name figured therein, it cannot be said that the applicant was a selected candidate for the purpose of regular appointment to a Group-B post of Assistant Mechanical Engineer.

12. The order of appointment of the applicant to the post of Assistant Mechanical Engineer at Ann.A2 dated 24.9.1975 reads as under:

(Only relevant portions are reproduced)

"x x x x x x x

ii) Shri V.P.Mishra, Foreman, Diesel Shed, AER is temporarily promoted and posted as offg. AME (Fuel) (Cl.II), OCG vice Shri M.M.Pinto.

x x x x x x x

Notes: i)

ii) The officiating promotion in Class II of S/Shri V.P.Mishra and T.D.Dharmani has been made purely as an ad-hoc arrangement and will not confer on them any right for regular promotion over their seniors in the cadre, nor does this mean that their names are on the regular panel.

x x x x x x x"

This order shows that the applicant's appointment was purely temporary and adhoc in nature. This order by itself does not confer any right on the applicant to be treated as a regular appointee to the Group-B post of Assistant Mechanical Engineer. Thus the fact of the absence of the applicant's name from the selection panel coupled with the nature of the order passed (Ann.A2) appointing the applicant to the post of Assistant Mechanical Engineer shows that the applicant was not a regular appointee to the post of Assistant Mechanical Engineer, a Group-B post. No doubt, the applicant continued to hold the said Group-B post uninterrupted thereafter. He also held the post of Principal, System Technology School, Ajmer which, according to the applicant, carried higher responsibility and

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was originally a Group-A post, downgraded when the applicant was appointed to this post. This fact, however, by itself does not prove that the applicant had been treated by the respondents or was entitled to be treated as a regular appointee to the Group-B post. We have also carefully perused the judgments of the High Courts some of which contain directions regarding enlargement of the panels. All the facts of the case decided by the Calcutta High Court are not available from this judgment. The judgment of the Gujarat High Court is quite detailed and gives essential facts of the case. Similarly the judgment of the Nagpur Bench of the Bombay High Court is detailed and contains essential facts. However, we do not find that by these judgments the High Courts have laid down any general law regarding enlargement of the panels. Panels have to be prepared by the respondents according to the rules and regulations prevalent at the relevant time and each case has to be treated on its own facts and on its own merits. Therefore, we are not inclined to view that the applicant is entitled to any benefit on the basis of these judgments. The fact that SLPs against these judgments were dismissed by the Hon'ble Supreme Court does not mean that any principle of law has been laid down by the Hon'ble Supreme Court. Therefore, the rejection of the applicant's representation vide Ann. Al dated 19.8.1993 cannot be faulted.

13. However, the implications of the Tribunal's judgment Ann.A3 dated 15.2.1991 in TA No. 1026/86 have to be carefully considered. Paragraphs 5 and 6 of the Tribunal's judgment read as follows:

"5. The only plea of the applicant now pressed before us is that he should not be asked to appear again in the test for Class II post and he should be continued on the present post and should not be reverted back to Class III. We are also of the opinion that since the applicant has been working on Class II post for more than about 16 years, that he was also placed in the panel, may be reserve list, but his name in the reserve list was included after scrutiny and after passing the test and, therefore, in view of these circumstances, it is neither equitable nor justifiable to revert him back to Class III post or to ask him to appear in the test again.

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6. We, therefore, deem it proper to allow this Application only to the extent that the applicant shall not be asked to appear again in the examination and that he shall not be reverted back to Class III post on the ground that he has not appeared in the test. The Application is, therefore, allowed to this extent. The rest of the pleas have been dropped by the learned counsel for the applicant and, if so advised, he can file a separate Application for them. No order as to costs."

14. The applicant was appointed to the Group-B post in 1975 and has continued to work uninterruptedly thereon. In its directions reproduced above, the Tribunal has stated that the applicant shall not again be asked to appear in the examination and he shall also not be reverted to Group-C post on the ground that he has not appeared in the test. The implication of these directions in our view is that the applicant has been treated by the Tribunal as entitled to continue on the Group-B post of Assistant Mechanical Engineer. A further implication of the Tribunal's above directions is that he is not to be treated as an adhoc employee who is normally liable to reversion on appointment of a regularly selected candidate. This flows from the Tribunal's observation that he shall not be reverted to Group-C post on the ground that he has not appeared in the test. In substance, therefore, the Tribunal's order has to be read as meaning that the applicant is a regular holder of a Group-B post, despite the fact that his name was not in the selection panel.

15. Problem, however, arises with regard to assignment of seniority to the applicant in Group-B post and claim for further promotions. The applicant was not assigned any seniority in the Group-B post by the Department because he was not treated as a regularly selected candidate and the Tribunal has also not given any direction regarding assignment of seniority to him in the Group-B post of Assistant Mechanical Engineer. Promotions cannot be divorced from seniority. These are indeed very much dependent on a person's seniority in the cadre, which is the basis for drawing up the eligibility list for promotion. While the applicant was holding the post of Assistant Mechanical Engineer and was litigating for

regularisation on the said post, a large number of persons must have become senior to him by efflux of time. In the present application he has not impleaded any persons who might have become senior to him in the Group-B post. Since the Department has not treated him as borne on the cadre of Assistant Mechanical Engineer, they have assigned him no seniority; and, therefore, all the persons who are regular holders of the post of Assistant Mechanical Engineer are ipso facto senior to the applicant. We cannot, therefore, give any direction regarding assignment of any particular seniority position to the applicant and consequentially his promotion to a Group-A post on a regular basis.

16. Since, however, the applicant has held the Group-B post of Assistant Mechanical Engineer for a pretty long time and by the Tribunal's order Ann.A3 dated 15.2.1991 he has been treated virtually as a regular appointee to the said post (without of course assignment of any seniority to him), it would be unjust and inequitous that he should not be considered for promotion to Group-A at all. The total length of service of the applicant in the Group-B post, reckoned from 1975, would be about 22 years as of today. In the circumstances of the present case, we, therefore, deem it appropriate to mould the relief claimed by the applicant and direct that if persons who have put in the same length of service as the applicant in the Group-B post of Assistant Mechanical Engineer or lesser length of service, on a regular basis, have been considered for promotion and promoted to Group-A, the applicant shall also be considered for promotion to Group-A post by the respondents in accordance with the rules governing such promotion and if he is found fit he shall be promoted to Group-A post on adhoc basis, depending on the availability of vacancy without disturbing the seniority of any of the other incumbents of the Group-B or Group-A posts. In other words, grant of adhoc promotion to the applicant shall not have any effect on the seniority position of others in Group-B or Group-A posts. Such grant of adhoc promotion to the applicant shall also not entitle him to claim any seniority over any person appointed on a regular basis to a Group-A post before or after the applicant's appointment thereto on adhoc basis and he

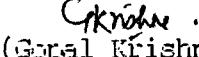
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will only be entitled to pay and allowances of Group-A post from the date he assumes charge thereof after his appointment on adhoc basis depending upon the availability of vacancy in Group-A post.

17. The CA is disposed of accordingly with no order as to costs.


(O.P.Sharma)

Administrative Member


(Gopal Krishna)

Vice Chairman