

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR

O.A. No. 06/1995 199
T.A./ No.

DATE OF DECISION 17.1.2001

MANGI LAL Petitioner

MR. S.C.SETHI Advocate for the Petitioner (s)

Versus

UNION OF INDIA AND OTHERS Respondent

MR. MANISH BHANDARI Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. A.K.Misra, Judicial Member

The Hon'ble Mr. A.P.Nagrath, Administrative Member

1. Whether Reporters of local papers may be allowed to see the Judgement ?

✓ 2. To be referred to the Reporter or not ?

✓ 3. Whether their Lordships wish to see the fair copy of the Judgement ?

✓ 4. Whether it needs to be circulated to other Benches of the Tribunal ?

(A.P.NAGRATH)
Adm.Member

17/1/2001

(A.K.MISRA)
Judl.Member

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

JAIPUR BENCH JAIPUR.

OA No.06/95

Date of Order: 17/4/2001

Mangilal S/o Moola, age 59 years, Retired Driver,
Western Railway Gangapur City, Western Railway resident
of Mali Mohalla, Near Temple Gangaji, Gangapur City
pin. 322201.

....APPLICANT

VERSUS

1. Union of India, through General Manager,
Western Railway, Churchgate, Bombay.
2. Divisional Rail Manager, Western Railway
Kota Division, Kota (Raj.).
3. Senior DEE/TRO, Western Railway,
Kota Division, Kota (Raj.).

....RESPONDENTS

.....

Mr. S.C. Sethi, counsel for the applicant.

Mr. Manish Bhandari, counsel for the respondents.

....

CORAM

Hon'ble Mr. A.K. Misra, Judicial Member.

Hon'ble Mr. A.P. Nagrath, Administrative Member.

ORDER

(per Hon'ble Mr. A.P. Nagrath)

Prayer of the applicant in this OA is that the respondents be directed to promote the applicant as Passenger Driver in scale of Rs.1600-2660 from the date his juniors were promoted w.e.f. 22.10.90 and to promote the applicant further as Mail/Express Gr.'A' scale 1640-2900 w.e.f. 28.10.92, when his junior were so promoted with all consequential benefits of payment of salary and allowances retrospectively not only as passenger driver and mail/express driver but also in respect of his retrospective promotion

to the post of Fireman Gr.'C', Fireman Gr.'B' and Fireman Gr.'A' and Driver Gr.'C'.

2. Case of the applicant is that he was not assigned with the correct seniority position right from the date of his appointment as Cleaner. Thus, in the channal of promotion to the post of Fireman Gr.'C' and further, he was not given promotion as per his due turn while his juniors got promoted earlier. The applicant alongwith others moved this matter in the High Court of Rajasthan by filing a writ petition which was later transferred to this Tribunal and was registered as TA No.634/86. The same alongwith other Transfer Applications were decided by this Tribunal on 19.1.90, directing the respondents to assign seniority to the applicants on the basis of their dates of appointment. It was also made clear in that order that the applicants shall be entitled to consideration for promotion to higher posts from the dates their juniors were promoted in accordance with the rules on the basis of the revised seniority list. In compliance of these directions, the respondents revised the seniority of the applicant in various Grades starting from Clear upwards and incorporated the name of the applicant in the seniority list in all Grades, up to grade of Driver 'C' designated now as Goods Driver in scale of Rs.425-640, revised to 1350-2200. The orders for revision in the seniority were issued on 1/8/91. As per this order, the respondents were required to hold a selection for the post of Passenger Driver in which the applicant was to appear and the promotion was to be granted to him keep in view the result of said selection. The applicant submits that he had to file CP 4/91 which was decided on 8.9.92 with the directions to the respondents to hold selection with a period of 3 months. This selectio

as per the applicant, was initiated on 8.9.92 and he appeared in the same but the result of the said selection has not been declared. It has been stated that these proceedings for the said selection were cancelled because of the order of restructuring and up-gradation of the post of Passenger Driver and Mail/Express Driver in implementation of the restructuring scheme. The respondents issued promotion orders for the post of Mail/Express Drivers and Passenger Drivers vide order dated 25.6.93(Annexure-A/1). These orders were based on modified selection as per the policy instructions. The applicant is aggrieved that his name was not included in this order while his juniors were promoted. His plea is that he should have been promoted as Passenger Driver w.e.f. 22.10.90 when his juniors were so promoted and further he should have been promoted as Mail/Express Driver W.E.F. 28.10.92 when his juniors were promoted to that post. The applicant retired on 31.5.93. Being aggrieved by the non-action of the respondents, the applicant filed OA No.275/94 and the same was rejected on 22.8.94 as the ^{junior} persons promoted were not impleaded as parties. However, while disallowing the OA, the applicant was permitted to file fresh petition according to law. He has come before us by filing the present OA.

3. In reply to this OA, the respondents have raised a preliminary objection on the ground that the application is not filed within the period of limitation as the impugned orders are dated 25.6.93 and 5.4.93 while this application has been presented only on 2.1.95. Another plea taken by the respondents is that the application has become infructuous as the applicant has been given promotion to the post of Passenger Driver under the restructuring scheme vide order dated 17.8.93(Annexure R/1) and the said promotion

order has been given effect to from 1.3.93. Contention of the respondents is that the applicant is not entitled to any further relief as in view of the directions of the Tribunal in TA No.634/86 and in CP No.4/91, he was to appear in the selection for the post of passenger driver. The applicant had infact not appeared in any selection and was granted the benefit of promotion as passenger driver under the restructuring scheme. The respondents admit that name of the applicant was omitted erroneously in the order dated 25.6.93(Annexure A/1) and the mistake was rectified by another order dated 17.3.93 and in that view the respondents contend that the cause of action does not survive any further. The respondents have rebutted the claim of the applicant that his promotion as passenger driver should take effect from 22.10.90 because the candidates, who were given promotion by order dated 22.10.90 had passed the selection whereas the applicant has not passed any selection. Since his claim for promotion as passenger driver from 22.10.90 is not tenable, the respondents contend that a subsequent promotion to mail/express driver from 28.10.92 has no basis.

4. The entire controversy revolves around the question whether the applicant, who retired on superannuation on 31.5.93 and who had been given promotion as passenger driver w.e.f. 1.3.93 is entitled to the benefit of the promotion as passenger driver w.e.f. 22.10.90 when his juniors were promoted and further as mail/express driver from 28.10.90 when his juniors were promoted. The applicant has also filed a rejoinder to the reply of the respondents to counter the plea of the respondents in regard to limitation, by stating that the applicant had submitted a representation dated 4.5.93 for promotion and fixation of salary and payment of dues as per judgment of this



Tribunal dated 19.1.90. He has not met with any response, Further, he had already filed an OA No.275/94 which was disposed of with the liberty to file a fresh petition as per law. Thus, the applicant contends that the OA is within limitation.

5. Learned counsel for the applicant traced the entire history of the applicant's case to highlight that he has been given unfair treatment ^{from} / the very date of his appointment and that it was only on the intervention of the Central Administrative Tribunal that the respondents assigned him the correct seniority. Having done that, the respondents could not have denied him his rightful promotion to the post of passenger driver and mail/express driver from the dates, his juniors were promoted. The learned counsel also forcefully argued that the applicant was not only entitled to these promotions as prayed for but is also entitled to the relief claimed by him for payment of arrears in all the Grades w.e.f. from the revised dates. He referred to ^{the} letter dated 16.1.96, by which his juniors who had also been assigned revised seniority alongwith him consequent to orders of the Tribunal, have been promoted to the post of passenger driver w.e.f. 9.12.90 i.e. the date from which one Harbhajar Singh their junior has been promoted. This promotion has been granted on proforma basis whereas actual payment has been ordered to be only from 1.3.93, the date of restructuring. This letter has been taken on record vide order of this Tribunal dated 23.4.2001 and has been filed at Serial No.63 of OA. In the same order, the same set of juniors have been further ordered to be promoted as mail/express driver Gr.1640-2900 w.e.f. 15.12.93 on proforma basis. It was the plea of the learned counsel that having extended the benefit of promotion to the selection post of passenger driver to the juniors of the applicant from 9.12.90 when

their next juniors had been promoted, similar benefit cannot be denied to the applicant w.e.f. 22.10.90, the date on which his next junior was promoted as passenger driver. Similarly, the learned counsel stated that the applicant was also entitled to be promoted as mail/express driver w.e.f. 28.10.92 the date of which his next junior was promoted as mail/express driver.

6. The learned counsel for the respondents vehemently opposed the arguments of the learned counsel for the opposite side by raising the ground of limitation and also on the basis of any relief emerging in favour of the applicant because of the order dated 16.1.96. Contention of the learned counsel was that the order dated 16.1.96 was an event subsequent to filing of the OA and no averments have been made or rather could have been made regarding this order by the applicant in the OA. Since this document did not form a part of the OA, the applicant cannot be allowed to derive any advantage out of the same. The learned counsel stated that no relief is admissible arising out of this order as the respondents have had no opportunity to contest the claim on this basis. For this the learned counsel placed reliance on AIR 1979 SC 1652; Shanker Chakravarti Vs. Britannia Biscuit Co. Ltd. and another in support of his contention that if no pleading was raised there cannot be any opportunity to refute or substantiate the same. The learned counsel submitted that the applicant can be permitted to confine his plea only to the pleadings in the OA and to the relief, he had sought vis-a-vis his junior who were duly selected and promoted as passenger driver on 22.10.90. On that, as per the learned counsel the applicant has no case as all those promoted on 22.10.90 as passenger drivers had been subjected to a process of selection which they had duly

merits. There is no dispute that the applicant had been struggling for having correct seniority assigned to him and his efforts ultimately culminated into directions of the Tribunal in TA No.634/86 decided on 19.1.90. In compliance of these directions, the respondents revised the seniority of the applicant in all grades starting from the ~~sanitary~~ post of Cleaner to the post of Driver 'C' designated as Goods Driver. It is also not disputed that the applicant had to file a CP for non-action on the part of the respondents to grant him further benefits. This CP was disposed of by order dated 8.9.92 by which the Tribunal directed the respondents to conduct the selection for the applicant within a period of 3 months. This selection however, was not conducted as per the respondents because the restructuring scheme intervened in the matter. It is also accepted on either side that the applicant was promoted as passenger driver w.e.f. 1.3.93 under the restructuring scheme.

9. The post of passenger driver is a selection post and under the restructuring scheme the selection procedure has been modified to make it simpler and based on service record only, as a large number of promotions were involved. This did not mean that the method of promotion became non-selection. It continued to be termed as selection procedure though in the modified forms. We are of the view that the stand of the respondents that the applicant had to qualify in the separate selection to claim benefit from 22.10.90 is not tenable as the respondents did not hold any selection after the order in CP and before implementation of restructuring scheme. We have no hesitation in coming to the conclusion that the applicant is very much within his rights and entitled to promotion to the post of passenger driver w.e.f. 22.10.90 having been found suitable

qualified. Since, the applicant did not appear in any selection, he cannot claim benefit from the date from which duly selected candidates have been promoted. The applicant has been granted promotion w.e.f. 1.3.93 under the restructuring scheme and no further relief is admissible, in his favour. With that view, since the applicant cannot be given promotion as passenger driver from 20.10.90, his claim for promotion to still higher grade of mail/express driver is not tenable.

7. We have given our thoughtful consideration to the rival contentions. We do not find any force in the argument of the learned counsel for the respondents that the application is not within limitation. After orders passed by the Tribunal in TA No.634/86, the revised seniority list was issued on 1.8.91. The applicant had filed a CP for non-compliance of the orders of Tribunal and this was disposed of by order dated 8.4.92 by which the respondents were directed to hold selection for the applicant. It appears that this selection could not be held and the orders of restructuring intervened. Under these orders of restructuring all ongoing selections which had not been completed were abandoned. The applicant was due for consideration for promotion from the date, his juniors had been promoted but because of the restructuring scheme, he was given promotion only w.e.f. 1.3.93 by an order dated 17.8.93. The applicant filed OA No.275/94 which was disposed of on 22.8.94 with a liberty to file a fresh petition as per law. This OA has been filed on 2.1.95 and we do not find any reason to accept the plea of the respondents that the same is beyond limitation.

8. Having come to the conclusion that the OA has been filed within time, we proceed to examine the issue on

in the modified selection procedure. We are further fortified, in our view by action of the respondents themselves whereby they have issued an order dated 16.1.96 granting proforma promotion to 6 persons, who are decidedly juniors to the applicant before us, from retrospective effect w.e.f. 9.12.90. If they could do that in favour of juniors in the year 1996, the reason for leaving out the applicant, who had retired on 31.5.93 but was very much in service on 22.10.90 is not understood.

10. The plea of the learned counsel for the respondents that applicant cannot derive any advantage by citing this order of the department is also not acceptable to us. Hon'ble the Supreme Court in the case of Shanker Vs. Britannia Biscuit Co. Ltd. ~~the Apex Court~~ has laid down the following test to decide whether the particular evidence was to be made a ground for proving a contention or not. The relevant portion is extracted below:-

"The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it (emphasis supplied) and if entertained, it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not be read strictly, but it is equally true that pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet."

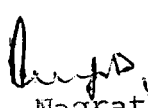
11. It is clear from the above observations of the Apex Court that the reason for not taking support of an evidenc

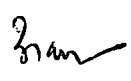
not specifically pleaded can give an unfair advantage as the other side had no notice of it. The respondents, in the instant case, cannot take a plea, that they did not have notice of their own order dated 16.1.96, ~~moreso~~ when for fair and just decision of the case, the Tribunal had decided to take this document on record as early as on 23.4.2001. From that date to the date of hearing, the respondents had sufficient time to contest the contention of the opposite side and to establish as to why the relief given to other juniors to the applicant was not extendable to the applicant. We, therefore, do not find the contention of the learned counsel for the respondents acceptable. There was no specific contention raised by the learned counsel that the benefit to the persons in list in the letter dated 16.1.96 has been granted from a retrospective effect because these person have passed any selection. We are not able to appreciate as to how the respondents can distinguish the applicant's case from the case of his juniors. More so, when at the relevant time, when the benefit became due, the applicant was very much in service. Even independent of this order dated 16.1.96, we are ~~now~~ of the considered view that having promoted the applicant as passenger driver after the process of modified selection, the applicant cannot now be said have not qualified the requisite selection for the post. He is, accordingly, entitled to proforma promotion w.e.f. the date his junior was promoted i.e. 22.10.90. Similarly, the applicant also is entitled to further promotion to the post of mail/expr driver Gr. 1640-2900 w.e.f. 28.10.92 the date on which, his next junior was promoted. While reaching this conclusion we have not accepted the argument of the respondents that the modified selection is not a selection as required under the rules for promotion to the post of passenger

driver. A selection whether modified or otherwise is a required procedure of selection under the Rules and it is the Departmental Authorities who decide the manner and method of selection, often as one time exception or on long term basis. Thus, this procedure of modified selection cannot take away the right of the applicant. However, while granting this benefit to the applicant we must make it clear that he is only entitled to proforma promotion and ofcourse as a consequence, he is entitled to all the retiral benefits based on his proforma pay as fixed reckonin his date of promotion as mail/express driver w.e.f. 28.10.92. The learned counsel for the applicant had placed reliance in the case of D.C. Deshpandey Vs. Divisional Railway Manager and Another 1997(36)ATC 225, in support of his contention that the applicant was entitled to payment of arrears. In this case, the applicant cannot claim arrears from the retrospective date as his seniority at the relevant time for various grade had not been determined and settled. Only when the revised seniority list was issued in support of orders of the Tribunal, he became available for consideration. In State of Haryana and Others, Vs. O.P. Gupta & Anr. 1996 SCC (L&S) 633. Hon'ble the Supreme Court has held that in such a situation when the individuals were not available for consideration of their promotion because of the then prevailing seniority list, they are only entitled to notional promotion from the back date and no arrears are payable. In view of this settled legal position, we are of the view that the applicant is not entitled to arrears of pay.

12. In view of the facts and circumstances as discussed above, we allow this OA partly and direct the respondents to grant proforma promotion to the applicant to the post of passenger driver scale 1600-2660 w.e.f. 22.10.90 and fur-

ther proforma promotion to the post of Mail/express driver in scale 1640-2900 w.e.f. 28.10.92. The respondents shall work out the notional pay of the applicant he would have received while working as mail/express driver as on 31.5.93 and shall revise his retiral benefits on that basis. The applicant is not entitled to payment of any arrears of pay. The revised pension and arrears of pension are payable w.e.f. 1.6.93. The respondents shall comply with these directions within a period of three months from the date of this order. For any delay beyond 3 months, the respondents shall pay to the applicant interest at the rate of 9% per annum on the amount becoming due as enhanced pension and also on the arrears because of this enhanced pension. No order as to costs.


(A.P. Nagrath)
Admn. Member


(A.K. Misra)
Judl. Member

p/d