

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH,

JAIPUR

Dated of order: 17.10.2003

OA No.230/2001

Yogesh Kumar Panchal s/o Shri Lohar Ram r/o 805 A, Railway Colony, Kota, at present employed on the post of Passenger Guard, Western Railway, Kota Division, Kota.

.. Applicant

Versus

1. Union of India through the General Manager, Western Railway, Churchgate, Mumbai.
2. Senior Divisional Operative Manager (Estab.), Western Railway, Kota Division, Kota.

.. Respondents

Mr. S.F.Jain - counsel for the applicant

Mr. S.S.Hasan - counsel for the respondents

CORAM:

HON'BLE MR. M.L.CHAUHAN, MEMBER (JUDICIAL)

HON'BLE MR. A.K.EHANDAFI, MEMBER (ADMINISTRATIVE)

O R D E R

PER HON'BLE MR. M.L.CHAUHAN.

The present application has been filed against the orders dated 5.2.2001 (Ann.A1) and 22.2.01 (Ann.A2) whereby certain persons were promoted to the post of Senior Passenger Guard and posted in the pay scale of Rs. 5500-9000 whereas name of the applicant was ignored on the ground that criminal case is pending against him. In relief, he has prayed that the impugned order Ann.A1 and A2 may be modified and the name of the be inserted in the panel and in promoted order. The applicant has further prayed that the respondents may be directed to consider the case of the applicant for promotion to the post of Senior Passenger Guard in the pay scale Rs. 5500-9000

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forthwith and the applicant may be allowed all consequential benefits.

2. The brief facts of the case are that the applicant at the relevant time was working as Passenger Guard in the pay scale of Rs. 5000-8000. The applicant was further eligible for promotion to the post of Senior Passenger Guard in the pay scale of Rs. 5500-9000. It is averred that the said post is non-selection post and the same is to be filled on the basis of the scrutiny of service record and seniority. The grievance of the applicant is that he has not been considered for the said post whereas the case of one Shri Ompal Singh, who is junior to the applicant, has been considered. The respondents have also issued panel dated 11.5.2001 and promotion order dated 22.2.2001 (Ann.A1 and A2). The applicant has further alleged that there was nothing adverse against him throughout his service career. Only one FIR No.144/96 was lodged in the year 1996 in which his name does not appear and no cognisance has been taken on the FIR by the Hon'ble Court. Thus, it cannot be said that any case is pending against the applicant and as such the applicant could not have been ignored for promotion to the post of Senior Passenger Guard. It is on the basis of these averments that the applicant has filed this OA thereby praying for the aforesaid reliefs.

3. Notices of this application was given to the respondents. The respondents have filed reply. In the reply it has been stated that FIR No.247/96 was registered on 17.10.96 in which challan was filed on 13.4.99 in the Court of A.C.J.M. No.4, Kota whereas select list was

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finalised on 5.2.2001 and in view of the letter dated 30.11.96 which is a supporting document to chargesheet (Ann.R5), it does not lie in the mouth of the applicant to state that there is nothing adverse against him so as to obstruct his promotion or there was nothing adverse on the date of consideration. It is further averred that the criminal case No. 100/99 is pending in the court of A.C.J.M. No.3, Kota but the charge could not pronounced because the record is summoned in revision petition pending before A.D.J., Kota. The respondents have further stated that the case of the applicant was considered alongwith other eligible candidates but his result was kept in sealed cover since serious DAF case and criminal case arising out of FIE No.247/96 of P.S.Mahavir Nagar, Kota was pending against the applicant. Under these circumstances, the applicant could not be promoted to the post of Senior Passenger Guard.

4. The applicant has filed rejoinder. Alongwith rejoinder, he has also annexed document Ann.A5 dated 20.11.86. It is an internal correspondence issued by the respondents wherein the opinion expressed by the Law Officer regarding course of action to be adopted where the proceedings/prosecution are pending against the delinquent official in the Court of Law has been reproduced. In the rejoinder the applicant has stated that the respondents are adopting pick and choose method in the matter of employees against whom criminal case/railway vigilance cases/departmental enquiries are pending. In similar cases against whom DAF proceedings are pending have been given further promotion whereas the same has been denied to the applicant.

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and ors., AIR 1997 SC 1539, in case of trials before Sessions Court, the trial shall be treated to have been commenced when charges are framed u/s 228 of the Code of Criminal procedure, 1973 whereas in cases of trial of warrant cases by Magistrate, if the cases are instituted upon police reports, the trials shall be treated to have commenced when charges are framed under section 240 of the Code of Criminal Procedure and in the case of trial of summons cases by Magistrates the trials would be considered to have commenced when the accused who appear or are brought before the Magistrate are asked under Section 251 whether they plead guilty or have any defence to make.

5.2 We have given thoughtful consideration to the submissions of the learned counsel for the applicant and we are of the view that the submissions made by the learned counsel for the applicant is bereft of merit. As can be seen from para 2(iii) of the PBE No. 13/93, as reproduced above, railway servants in respect of whom prosecution for a criminal charge is pending, such persons shall not be promoted even if he is already borne on a selection panel/suitability list till after the results of the proceedings against him are known. There is, however, no objection to promote him if he is not under suspension and the proceedings already initiated are for the imposition of only a minor penalty. This provision has been made in para 3.1 of the aforesaid circular. Thus the relevant words where such method can be adopted as can be seen from para 2(iii) are 'prosecution for criminal charge is pending'. Here we are not concerned with the trial of the case and when such trial will be commenced, as such the decision of the Apex Court in the case of Common Cause

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(supra) as relied by the learned counsel for the applicant is not relevant in the instant case. As already stated above, since the prosecution for criminal charge is pending, according to us, prosecution for criminal charge shall be ~~pending~~ <sup>when</sup> the sanction for prosecution has been given by the appropriate authority, even if the challan has not been presented before the competent court. That appt, in the instant case, the challan against the applicant stood filed on 13.4.99 whereas the select list was finalised on 5.2.01. Thus, according to us, the prosecution for criminal charge was pending against the applicant when the DPC was held and as such he is not entitled for promotion even if he is borne on select panel or till the result of the proceedings are known in terms of para 3.1 of the RBE No.13/93.

5.3 The matter is no longer res-integra and the same stands concluded by the decision of the Supreme Court in the well known case of Union of India vs. K.V.Jankiraman, 1991(5) SLR page 602. In para 16, the Apex Court has made the following observations:-

16. On the first question, viz., as to when for the purpose of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a chargesheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of

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preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point....."

Thus the contention raised by the learned counsel for the applicant stands squarely answered in view of the law declared by the Hon'ble Apex Court in the case of K.V.Jankiraman (supra).

5.4 Much emphasis has been laid by the learned counsel for the applicant on Ann.A5, a confidential letter dated 20.11.86 issued by the General Manager (E), Churchgate, Mumbai to the DRM (E), Jaipur and copy to others, which is based on the <sup>opinion</sup> ~~information~~ given by the Law Officer whereas the Law Officer has observed as under:-

"Mere lodging of FIR does not constitute a case in the Court of Law. Even if a charge sheet is filed and case is under trial, the case not being connected with the employee working in the Railway, there is no legal objection to promote him if it is not against public interest."

The learned counsel for the applicant argued that on the basis of this letter, the applicant is entitled for promotion even if the chargesheet has been filed against him and the trial is pending. This letter is dated 20.11.86 and does not mentioned what was the instructions issued by the Railway Board <sup>at that time</sup> governing promotion in such cases. The relevant provisions which govern the field is FBE No.13/93 issued on 21.1.93 whereby earlier instructions have been superseded. This <sup>case</sup> has to be decided according to the instructions which governs the field. That part the opinion given by the Law Officer does not stand scrutiny of law in view of the decision of the Apex <sup>case</sup>

Court in the case of E.V.Jankiraman and also the instructions issued by the Railway Board as reproduced above. As such the contention of the learned counsel for the applicant has been noticed only for the purpose of rejection.

5.5 Similar contention of the learned counsel for the applicant in the rejoinder ~~is~~ that certain persons against whom criminal cases/railway vigilance cases/departmental enquiries are pending have been given promotion, whereas the same has been denied to the applicant cannot be entertained as the applicant has raised this point for the first time in the rejoinder and the respondents have not been granted opportunity to rebut the same. Even otherwise also, if the promotion has been granted to the persons wrongly and in violation of the Railway Board instructions that will not confer any right to the applicant to grant similar relief to him in violation of the rules/instructions. Further contention of the learned counsel for the applicant is that the criminal case against the applicant has not been concluded, even after expiry of 2 years from the date of meeting of the first DPC, as such in terms of para 5 of the FBE No. 13/93 it was incumbent on the promoting authority to review the case of the applicant for grant of ad-hoc promotion in terms of guidelines laid down therein. This contention has been raised by the applicant only during the course of arguments, as such no opportunity could be given to the respondents to place their version on record and as such no direction can be given qua this point. Needless to add that in case the applicant makes out a case in terms of para 5 of FBE No.13/93 for grant of adhoc promotion, we see no reason why the competent authority <sup>will</sup> ~~has~~ not

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5. We have heard the learned counsel for the parties and gone through the material placed on record.

5.1 The learned counsel for the applicant submits that since the criminal case is at the charge stage and no charge has been framed against the applicant, the sealed cover method should not have been adopted in this case. For that purpose, the learned counsel for the applicant has placed reliance on RBE No.13/93 which deals with promotion of Group C and Group D railway servants who are under suspension or against whom departmental proceedings or prosecution have been initiated and more particularly para 2. Para 2 of the said RBE is reproduced hereinbelow:-

"2. Cases of Railway servants to whom the procedure will be applicable - The procedure given below shall be applicable to:-

- (i) Railway servants under suspension;
- (ii) Railway servants in respect of whom a chargesheet for major penalty has been issued and the disciplinary proceedings are pending and
- (iii) Railway servants in respect of whom prosecution for a criminal charge is pending."

The learned counsel for the applicant while inviting our attention to para <sup>3.1.6</sup> ~~2.1.6~~ has stated that the sealed cover procedure can be adopted only when trial has commenced and filing of chargesheet is not sufficient to adopt the sealed cover procedure in terms of para 2(iii). Further submission of the learned counsel for the applicant is that in view of the decision of the Hon'ble Apex Court in the case of Common Cause vs. Union of India

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considered the matter objectively.

6. With these observations, the present CA is disposed of with no order as to costs.

  
(A.K. EHANDARI)

Member (A)

  
(M.L. CHAUHAN)

Member (J)