

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

JAIPUR, this the 16th day of April, 2010

ORIGINAL APPLICATION No.491/2006

CORAM:

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

Vijay Verma
s/o Late Shri Hari Prakash,
working as Assistant Computer Programmer
in Mechanical Department, Jaipur
r/o B-39, Anand Vihar,
Railway Colony, Jagatpura,
Jaipur

... Applicant

(By Advocate: Shri C.B.Sharma)

Versus

1. Union of India through General Manager, North Western Railway, Jaipur.
2. General Manager (Personnel), North Western Railway, Hasanpura Road, Jaipur.

... Respondents

(By Advocate: Shri Anupam Agarwal)

ORDER (ORAL)

The applicant has filed this OA, thereby praying for the following reliefs:-

- a) By an appropriate order or direction, the respondents be directed to treat the applicant to be promoted on the post of Assistant Computer Programmer w.e.f. 1.4.2003 and to pay arrears of the said post along with consequential benefits.
 - b) The cost of the litigation may be awarded in favour of the applicant.
2. The grievance of the applicant in this case is that he was transferred to Mechanical Department of North-Western Railway zone in April, 2003 and is working on the post of Assistant Computer Programmer but he is being paid salary in the scale of Rs. 5000-8000 whereas he is entitled to the salary in the scale of Rs. 5500-9000. It is further pleaded that the applicant made a representation dated 25.10.2004 for fixation of salary in the higher pay scale, but the said representation of the applicant was rejected vide order dated 24.11.2004 on the ground that fixation of salary of the applicant cannot be done unless he is promoted on the said post. After a considerable lapse, the applicant filed OA No.270/2006, which was withdrawn vide order dated 1.11.2006 with liberty to file fresh OA. Now the applicant has filed this OA for the aforesaid reliefs.
3. Notice of this application was given to the respondents. The respondents have filed reply. In the reply, the respondents have stated that claim of the applicant for grant of promotion on the post of Assistant Computer Programmer (ACP) w.e.f. 1.4.2003 and to pay arrears of such post alongwith consequential benefits cannot be granted so long as he is not promoted as ACP. It is further pleaded that the applicant belongs to Data Entry Operator cadre and as per recruitment rules, the post of ACP is two grade higher.

than the post of Data Entry Operation. According to the respondents feeder category for promotion to the post of ACP is Console Operator. The respondents have also stated that the applicant who was Senior Data Entry Operator in the scale of Rs. 5000-8000 came on transfer and joined the North Western Railway in the same grade and pay on the basis of his option, as is clear from Ann.R/1 and he was posted in Mechanical Department. Since there was no post of Senior Data Entry Operator in Mechanical Department, the applicant was posted against the cadre post of ACP. It is further stated that the applicant has never discharged the duties of the post of ACP. According to the respondents, the applicant cannot be treated to be promoted as ACP without being promoted as Console Operator.

4. The applicant has filed rejoinder thereby reiterating the submissions made in the OA.

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

6. As can be seen from order dated 3.4.2003 (Ann.R/1), the applicant whose name find mention at SI.No.2 was holding the post of Senior Data Entry Operator in the pay scale of Rs. 5000-8000 and was transferred from his parent division/railway against the same post and grade and he, was directed to join Mechanical Department on 3.4.2003. Pursuant to the said order, the applicant joined the Mechanical Department on his being transferred to North Western Railway in the capacity of Senior Data Entry Operator in the pay scale of Rs. 5000-8000. Since there was no post

of Senior Data Entry Operator against which post the applicant was transferred, as such he was posted in the Mechanical Department in the same pay scale against the post of ACP. Admittedly, there is no order from the competent authority whereby the applicant was promoted to the post of Assistant Computer Programmer in the higher pay scale of Rs. 5500-9000 either on ad-hoc basis or in officiating capacity nor such order could have been legally issued, inasmuch as, the feeder grade for appointment/promotion to the post of ACP is Console Operator. Since the applicant was in the grade of Rs. 5000-8000 and he was neither promoted nor worked against the post of Console Operator, the applicant could not have been straightway promoted to the post of ACP, ignoring the feeder grade of Console Operator, and at two stages higher than the scale which the applicant was drawing. The respondents have categorically stated in the reply that the applicant was never asked to perform duties of the ACP. Thus, in view of what has been stated above, we are of the view that the applicant has not made out any case for grant of promotion to the post of ACP from retrospective date dehors the rules. The contention raised by the applicant on the basis of the certificate issued by the Deputy CME to the effect that applicant is working as ACP in the Mechanical Department Headquarter Office, is of no consequence and cannot be termed as appointment order/promotion order which has to be issued by the competent authority in accordance of the provisions contained in the recruitment and promotion rules. The respondents have stated in the reply that the certificate Ann.A/6 has been issued by

misleading his controlling officer of the Mechanical Department and there is no order issued by the Personnel Department thereby granting promotion to the applicant on the higher post. The respondents have also categorically stated that the substantive post of the applicant is Senior Data Entry Operator in the scale of Rs. 5000-8000 and he was transferred vide order Ann.R/1 in the same scale and against the same post. Simply because the applicant was posted against the post of ACP and his pay appears to have been drawn against the post of ACP as there was no post of Senior Data Entry Operator existing in the Mechanical Department, cannot be construed that the applicant has been granted promotion against the post of ACP which promotion could not have been legally granted to the applicant as he is holding a post which is two grade below than the grade of ACP and further the feeder grade for promotion to the post of ACP is Console Operator. Thus, in view of what has been stated above, the applicant is not entitled to any relief.

7. The matter on the point whether a person who has been asked to perform current duties of the post and has not been promoted on the higher post is entitled to regular pay scale was examined by this Tribunal in QA No.368/2006, Radhey Shyam Sharma vs. UOI, decided on 24th July, 2008 and it was held that being merely asked to work on the higher post cannot be treated as promotion and regular pay scale can be granted only to those persons who have been promoted against the higher post by the

order passed by the competent authority. At this stage, we wish to reproduce para 7 and 8 of the judgment, which thus reads:-

7. Law on this point is no longer res-integra and the same stood decided by judgments rendered by the Hon'ble Apex Court as well as by Hon'ble High Court. The matter was considered by the Hon'ble Courts, on the basis of provisions contained in FR-49 on which reliance has been placed by the learned counsel for the applicant. The Hon'ble Courts have repeatedly held that benefit of salary of higher post can be given only if a person is appointed on the post and not otherwise. At this stage, it will be useful to quota decision of the Guwahati High Court in the case of Golap Chandra Chetia vs. The Assam Administrative Tribunal, Guwahati and ors., 2004 (4) SLR 500 whereby the Hon'ble High Court in Para 3 and 4 has made the following observations:-

"3. It is contended by the counsel for the appellant before us that by virtue of FR-49 he having worked on the post of Financial Adviser for more than 39 days he is entitled for fixation of the salary on the basis of FR 49. The relevant portion of FR 49 reads as under:

"FR 49- The State Government may appoint one Government servant to hold substantively, as a temporary measure, or to officiate in, two or more independent posts at one time. In such cases his pay is regulated as follows:-

(a) Where a Government servant is formally appointed to hold full charge of the duties of a higher post or posts which is or are in the same office as his own and in the same cadre line of promotion, in addition to his ordinary duties, he shall be allowed the pay of the higher post, or the ten per cent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding 39 days. Provided that the concurrence of the Financial Department shall be obtained for making such arrangements and for payment of additional pay."

4. It is amply clear from FR 49 (a) that a Government servant can be asked by the Government to hold substantively, as a temporary measure, or to officiate in, two or more independent posts at one time and in that case his pay shall be regulated as provided under Clause (a) of FR 49 on fulfilling other conditions mentioned therein. The necessary condition for application of FR 49 is appointment on two or more (sic) independent posts at one time. We have gone

through the orders issued by the Government wherein the appellant was directed to hold the charge of the Financial Adviser in the Health and Family Welfare Department from this it is clear that he has not been appointed on the post of Financial Adviser but he has been directed to hold the charge of the post. In the absence of any appointment in the post, FR 49 has no application as it stood before its amendment in 1991. That being the case, we do not find any infirmity in the orders passed by the Tribunal as well as by the learned single judge."

8. Further the Apex Court in the case of Mohd. Swaleh vs. Union of India and Ors., 1998 (1) SLJ 1 has held that a person who was deputed to hold current charge of duties of Registrar cannot claim remuneration of the said post. That was a case where the appellant therein was deputed to work as Registrar in addition to his duties of Deputy Registrar by the Chairman, Central Administrative Tribunal. The Appellant demanded pay of the higher grade. The Hon'ble Apex Court held that since no promotion can be made by the Chairman, as such, higher pay cannot be allowed and the condition laid down in FR-49 is not satisfied.

In the instant case also, the applicant could not have been promoted on the higher post as he does not fulfill qualification. On that parity, the applicant is not entitled to grant of higher pay scale. The Hon'ble Apex Court also held that principle of 'quantum meruit' is not applicable where the field governed by the specific statutory rules namely Rule 49 of FRs and such principle is attracted where liability arises under the Contract Act. At this stage, it will be useful to quote para 24 of the judgment, which thus reads:

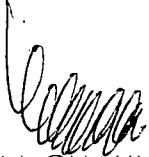
"24. Learned counsel for the appellant made a submission that the principle of quantum meruit, (sic) would apply to the facts of the case and relied upon the decision of the Supreme Court in State of West Bengal vs. B.K. Mondal and Sons., AIR 1962 SC 779. In that case it was held that though the contract for certain works was not executed as per the provisions of Section 179 (3) of the Government of India Act, still compensation could be paid under Section 70 of the Contract Act. In our view the said decision which is based on Section 70 of the Contract Act is not applicable to the present situation where the field is governed by specific statutory rules namely Rule 49 of the Fundamental Rules."

Thus, according to us, the applicant is not entitled to any relief.

8. The reasoning given by this Tribunal in the case of Radhey Shyam Sharma (supra), as reproduced above, is squarely applicable in the facts and circumstances of this case. Accordingly, we are of the view that the benefit of salary of higher post can be given only after the person is appointed to the higher post and not otherwise. This being not a case of such nature and in view of what has been stated above, the applicant has not made out a case for our interference.

9. Accordingly, the OA being bereft of merit, is dismissed with no order as to costs.


(B.L.KHATRI)
Admv. Member


(M.L.CHAUHAN)
JUDL. MEMBER