

Reserved
(on 30.07.2018)

**CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD**

Dated: This the 20th day of August 2018

Original Application No. 330/01441 of 2017

Hon'ble Mr. Gokul Chandra Pati, Member – A
Hon'ble Mr. Rakesh Sagar Jain, Member - J

Lal Ji Prasad Gautam aged about 47 years, Son of Sri Shiv, Resident of Village-Karjauli, Post Khurhat, District Mau.

Presently working as Junior Clerk, Under the control of Senior Divisional Personnel Officer, North Eastern Railway, Varanasi.

.....Applicant

By Advocate: Shri Vinod Kumar

V E R S U S

1. Union of India through General Manager, North Eastern Railway, Gorakhpur.
2. Divisional Railway Manager (P), North Eastern Railway, Varanasi.
3. Senior Divisional Personnel Officer, North Eastern Railway, Varanasi.
4. Sri T. Dungdungiya, Chief Office Superintendent at the office of Senior D.P.O., North Easern Railway, Varanasi.

.....Respondents

By Advocate: Shri M.K. Singh

O R D E R

By Hon'ble Mr. Gokul Chandra Pati, A.M.

This O.A. has been filed by the applicant seeking following reliefs: -

- (i) *To issue an order or direction in the suitable nature quashing the order impugned dated 09.11.2017 passed by the respondent No. 2 i.e. Divisional Railway Manager (P) i.e. Divisional Railway Manager (P), North Eastern Railway, Varanasi (Annexure No. A-1 to this original application with compilation No. I).*
- (ii) *To issue an order or direction in the suitable nature directing the respondents department not to interfere in the peaceful functioning of the applicant on the post of Junior Clerk in pay scale of Rs.5200-20200 + 1900 grade pay and pay the regular salary as and when it may due.*
- (iii) *To issue any order or direction, which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.*
- (iv) *To award the cost of the application to the applicant."*

2. The facts, in brief, are that the applicant who was working as Peon was called to appear in the departmental test for promotion to the post of Junior Clerk in the pay scale of Rs.5200-20200 + 1900 grade pay under the departmental quota of 33 1/3% of vacancy. The applicant applied for

the aforesaid post under the notification dated 24.03.2015 and appeared in the test. The result was declared on 23.11.2015 in which the applicant was declared successful. Thereafter, the applicant was given promotion as Junior Clerk and he joined on the same post in the Office of Senior DPO, North Eastern Railway, Varanasi (respondent No. 3) on 02.03.2016. The applicant alleges harassment by the respondent No. 4 who also threatened that he would get him reverted. On 23.08.2017, the applicant made a complaint against the behaviour of respondent No. 4 to respondent No. 2. Thereafter, the applicant received the impugned order dated 09.11.2017, by which the applicant was reverted back to his earlier post of Aadeshpal (Peon). Feeling aggrieved with the impugned order, the applicant has filed the present O.A.

3. The respondents have filed the Short Counter Affidavit (in short SCA) controverting the contentions made in the O.A. It is submitted that in pursuance of advertisement for promotion to Junior Clark post, the applicant being 'best amongst failure' was declared successful and was placed in the panel of selected candidates purely on ad hoc basis for the period of six months. In the order dated 01.03.2016 (Annexure SCA-2) promoting the applicant, it is mentioned that the employee, who are selected for the post of Junior Clerk, has to pass English and Hindi Typing test within a period of two years. Otherwise, they will be reverted back to their original post. It is further mentioned in the aforesaid order that the applicant was promoted purely on ad hoc basis for a period of six months and if his working is satisfactory, then his name will be included in the final panel. It is the contention of respondents, in the SCA, that the working of applicant was not satisfactory as he tried to avoid the work allotted to him by taking long leave. Out of 20 months, on promoted post, the applicant has taken leave for six months. It is the further contended in the SCA that the applicant instead of improving, started making frivolous complaints against his superiors. It is also submitted by respondents that taking

cognizance of complaints made by the applicant, an inquiry was also ordered and it was found that the allegations made by the applicant are false (vide inquiry report at Annexure SCA-6).

4. The applicant also filed a representation dated 11.12.2017, on direction of this Tribunal dated 07.12.2017 to the respondents to dispose of the said representation. It is stated in the SCA that the applicant was asked to submit the self appraisal/details regarding his working on the post of Junior Clerk before the competent authority within three days. But the applicant failed to do the same. Then the respondent vide order dated 02.01.2018 rejected the representation dated 11.12.2017. Copy of the speaking order dated 02.01.2018 is annexed at Annexure SCA-13 to the SCA.

5. The applicant in reply to Short Counter Affidavit has filed the Short Rejoinder Affidavit mainly reiterating the contentions made in the O.A.

6. Heard, Shri Vinod Kumar, learned counsel for the applicant and Shri M.K. Singh, learned counsel for the respondents and perused the pleadings on record. Learned counsel for the applicant stressed on the point that if the applicant's performance was not satisfactory, he should have been reverted within six months as per the order dated 01.03.2016 instead of waiting for 18 months. He also submitted that no letter or notice was issued by the respondents informing about his unsatisfactory performance before issuing the impugned order. He has earlier filed a copy of the Full Bench judgment passed by the Principal Bench of this Tribunal in T. 844/86 dated 05.05.1989 in the case of Sh. Jetha Nand and others vs. Union of India and others, reported in Full Bench Judgment (CAT), page3 353 – 376 when the case was first heard on 25.07.2018 and argued that the applicant cannot be reverted after 18 months without disciplinary proceedings.

7. Shri M.K. Singh, learned counsel for the respondents argued that the OA has become infructuous as the applicant has joined in the reverted post in Group 'D' and has complied the impugned order. He further submitted that the applicant's representation has been rejected vide a detailed reasoned order dated 02.01.2018 (Annexure SCA-18) and narrated some of the incidents in which the applicant was involved as mentioned in the SCA.

8. We have considered the submissions as well as the pleadings by both the parties. Before examining the merit, the Full Bench judgment dated 05.05.1989 in the case of Sh. Jetha Nand (supra) which was relied upon by Shri Vinod Kumar, learned counsel for the applicant, to argue that the applicant cannot be reverted to Group 'D' post after officiating in a promotional Group 'C' post for more than 18 months, needs to be discussed. In this case, the following questions were referred to Full Bench:-

"In these circumstances, it is necessary to clarify the position of law with regard to employees working on ad-hoc basis for more than 18 months, some of those may have passed the test later and some may not have passed the test but whose work is satisfactory, could their services be regularised even if they have not passed the test? Whether they have a right to be regularised merely because their work is satisfactory and a person of more than 18 months has elapsed? If not, in what circumstances, they acquire any right, if any, to be retained in service and entitled to any relief against their reversion. Could they not be required to appear for the test. If they appeared and failed, whether any further chance should be given to them to appear and pass the test and until then whether they can be reverted or not? These and several other questions are arising in several cases and all too frequently. We, therefore, deem it necessary to refer the entire case to a larger Bench for decision on all the posts arising in this case and on all incidental points that may be relevant in this regard and for the final disposal of this case."

9. The question that is relevant for us to decide this OA is that if a Group 'D' employee, who is promoted on ad-hoc basis to a Group 'C' post after qualifying in the prescribed selection test and has worked on adhoc basis on the said promotional post for more than 18 months, whether he can be reverted after 18 months without following the Discipline and

Appeal Rules. The findings from the Full Bench Judgment dated 05.05.1989 as indicated below would be relevant in this regard:-

“46. It is true that the Railway Administration laid down a policy by a Circular dated 9.6.1965 that an employee who had officiated in a promotional post more than 18 months is not liable to be reverted without following the Discipline and Appeal Rules. This policy decision was, however, amended by a subsequent Circular of the Railway Board dated 15.1.1966, to say that the above principle would apply to a Railway servant who had been selected after a test and empanelled for appointment to the promotional post. The Railway have also made it clear that this principle would not be applicable to an employee who was officiating merely as a stop-gap arrangement or on adhoc basis. Thus the criteria laid down by the Railway Board is that a Railway servant, in order to have the protection from being reverted after 18 months of adhoc officiating in a promotional post applies only in the case of those Railway servants who have been selected or empanelled for the said promotional post.

47. Reverence may be made to the Railway Board’s Circular dated 15.1.1966 and the two subsequent Circulars dated 5.12.1984 and 30.4.1985 wherein the words are:

“the safeguard applies to only those employees who have acquired a prescriptive right to the officiating posts by virtue of their empanelment of having been declared suitable by the competent authorities.”

This Rule laid down in Circular dated 15.1.1966 has been reiterated in Circular letter dated 5.12.1984 and Circular dated 20.4.1985. The promotion quoted above spells out the concept of right when a person is acting in adhoc capacity in a promotional post. If he is not been duly selected or until found suitable and empanelled for promotion, he does not acquire a prescriptive right for the Post provided also in these three Circulars. It will be seen that the prescriptive right to hold that post comes from the selection after a test. They are found suitable for being included in the panel of names for that post. The basic feature is that the Railway servant should first be qualified and found suitable by a test, to be empanelled for appointment to the promotional post. It is only then, he acquires a prescriptive right to hold the post. Such a person acquire a further right when he completes 18 months officiation in the promotional post and that is why he cannot be reverted without following the procedure under Discipline and Appeal Rules. In other words, such a person cannot be reverted except after drawing up charges against him and holding a regular disciplinary proceedings.

We answer the first question accordingly.

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56. In regard to the last question as to when an adhoc employee can be reverted the answer is that if he has been appointed in a stop-gap arrangement, he can be reverted at any time. If he has not qualified in the selection test, he can still be reverted. If he has qualified in the test and had continued in ad-hoc capacity for more than 18 months, he cannot be reverted except after following the Discipline and Appeal Rules. Further, we have also held that a person who has so far not qualified in the selection test and is holding an ad-hoc post in the promotional post, he should be given several chances to qualify in the selection test and if even after repeated chances given to him he fails, there would be no other alternative but to revert him. The cardinal principle is that he must have qualified in the selection test to become suitable for the post.

57. Coming to the facts of the present case, the Applicants have been officiating for nearly 10 years or more now but they have not passed the selection test in the year 1973, 1975 and 1978. They filed a suit and obtained an injunction order from holding the test for them in 1981 and they have not appeared in any selection test thereafter. Now they claim regularization without qualifying any selection test.

58. Our answer is that they cannot be regularized until they pass the selection test, for which they may be afforded some opportunities.

They may appear in the selection tests-one in the year 1989 and in case any one not succeeding, he may then again appear in the year 1990. The 'Record Note' pars 22 of the meeting dated 27.11.1975 quoted earlier in this order may be adhered to by the respondents. Meanwhile, the Applicants may not be reverted."

The ratio of above judgment is that if the employee concerned has qualified in the test as had continued in ad-hoc capacity for more than 18 months, he cannot be reverted except after following Discipline and Appeal Rules as per the existing guidelines of the Railway Board. Further, if they have not qualified the selection test, then instead of reverting, they should be allowed additional reasonable opportunity to clear the test.

10. Coming back to the facts of the present case, the applicant admittedly cleared the recruitment test on the basis of 'best amongst failures' basis as indicated in the order dated 01.03.2016 (Annexure SCA-2), which stated in unambiguous terms that the employees who have cleared the test will be allowed promotion on ad-hoc basis for 06 months and after reviewing their performance during the ad-hoc period, they will be eligible for regular promotion. The applicant was allowed to continue on ad-hoc basis as Junior Clerk (Group 'C' post) till 09.11.2017 i.e. more than 18 months, before the respondents found that the performance of the applicant during six months of his ad-hoc promotion was not found satisfactory, due to which he was reverted by the competent authority. If the applicant's performance was not satisfactory, then noting prevented the respondents to revert the applicant immediately after six months from initial date of ad-hoc promotion of the applicant, before he completed 18 months i.e. any time before 01.09.2017, when the applicant had completed 18 months time. Since he had cleared the selection test, as per the ratio of the judgment of Full Bench in the case of Sh. Jetha Nand (supra), the applicant cannot be reverted from Group 'C' post to Group 'D' post after 18 months i.e. after 01.09.2017 without adopting the procedure laid down under the Discipline and Appeal Rules.

11. There was an argument advanced by learned counsel for the respondents stating that the applicant did not pass the test mentioned in the order dated 01.03.2016. This will not be any help for the respondents since no such ground was taken in the impugned order dated 09.11.2017. The incidents mentioned in the pleadings about misconduct of the applicant, of the respondents will also not be helpful, since no disciplinary proceeding was initiated against the applicant as per rules inspite of the allegation of unsatisfactory performance and other misconducts.

12. We also note that the applicant was continued under ad-hoc promotion in a Group C post after he was duly qualified in the selection test. The Master Circular No. 31 for promotion to non-gazetted posts on selection basis states the following for ad-hoc promotion to such posts:-

“15. Ad hoc Promotions: -

1. ***Government is averse to making ad hoc promotions and continuing the same for a long time, which results in hardship to the employees when reverted.***
2. ***Normally ad-hoc promotion should not be made in vacancies of regular nature. In any case such arrangements should not be allowed to last beyond 3 to 4 months except in exceptional circumstances like Stay Orders from the Court etc.***
3. ***Ad hoc arrangements should normally lapse after 4 months. Further continuance can only be ordered by the CPO personally who should determine the reasons for non-finalization of selection and then authorize extension for the adhoc promotions for a minimum period so that selection committee can finalize the panels. Delays in forming panels must be explained and put up for GM's perusal and acceptance.***

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7. ***Some of the situations, which may lead to ad hoc promotions, are illustrated below: -***

- a. ***Due to absence of a panel;***
- b. ***Revision of Recruitment/Promotion Rules is under process or is contemplated; and***
- c. ***Revision of seniority list.***

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In view of the provisions in the Master Circular No. 31 of the Railway Board, the ad-hoc promotion beyond 6 months in the case of the applicant was a violation of the para 15 of the Master Circular No. 31 as extracted above. Hence, continuation of the applicant in the promotional post beyond 6 months will imply that his performance

was satisfactory, otherwise he would have been reverted immediately after 6 months as per the condition of his selection vide order dated 1.3.2016 (Annexure SCA-2 to the Suppl. Counter Affidavit filed by the respondents).

13. In view of above, the OA succeeds. The impugned order dated 09.11.2017 (Annexure A-1) reverting the applicant to Group 'D' post is not sustainable under law. Accordingly, the said impugned order dated 09.11.2017 is set aside and quashed and the respondents are directed to reinstate the applicant in the promotional post as per the order dated 01.03.2016 within two months from the date of receipt of a certified copy of this order and also to allow the applicant's continuity with notional benefit on the Group 'C' post, which he was holding before passing the order dated 09.11.2017 from the date of reversion till the date of reinstatement of his service in Group 'C' post. But no any arrear differential salary for the aforesaid period will be allowed to the applicant on principal of 'no work no pay'. The respondents will be at liberty to take appropriate disciplinary action against the applicant if there is any allegation of misconduct under the appropriate rules.

14. The OA is allowed accordingly. There will be no order as to costs.

(Rakesh Sagar Jain)
Member – J
/pc/

(Gokul Chandra Pati)
Member – A