

Central Administrative Tribunal
Principal Bench: New Delhi

RA No.236/2012 in OA No.1278/2008
MA 2018/14, 2047/12, 2048/12 & 2528/12
with
RA No.255/2012 in OA 1238/2008

Reserved on: 08.11.2016
Pronounced on: 02.12.2016

Hon'ble Mr. V. Ajay Kumar, Member (J)
Hon'ble Dr. B.K. Sinha, Member (A)

1. Union of India Through
The General Manager,
Northern Railway,
Baroda House, New Delhi
2. Divisional Railway Manager,
Northern Railway, Delhi Division,
State Entry Road, New Delhi
3. Sr.Divisional Personnel Officer,
DRM's Office, Delhi Division,
Northern Railway, State Entry Road,
New Delhi.Review Applicants/
Original Respondents

Versus

Tarsem Singh s/o Sh. Munshi Ram,
Working as Technician, N.Rly.
Diesel Shed, Tuglakabad,
New Delhi & 47 Ors.Respondents/
Original Applicants

Present:- Sh. VSR Krishna with Shailender Tiwari, counsel
for review applicants/original respondents

Sh. Yogesh Sharma, counsel for respondents/
original applicants.

O R D E R

By Hon'ble Dr. B.K. Sinha, Member (A):

The instant two Review Applications i.e. RA Nos.236/2012 and 255/2012 are the culmination of a long drawn legal battle which have done several rounds of

litigation before the Tribunal and even before the Hon'ble High Court of Delhi in the form of writ petitions or review applications in addition to original applications.

2. The review applicants/original respondents have sought review of the Tribunal's common order dated 02.02.2009 passed in OA Nos.1238/2008 and 1278/2008.

3. The case, in brief, is that the original applicants (numbering 48) were Technicians Grade-III (Rs.3050-4590 pre-sixth CPC pay scale), Diesel Shed, Tugalakabad in the New Delhi Division under the Northern Railways. The immediate provocation for OA No.1238/2008 being filed was that the review applicants/original respondents had given a Notice dated 28.05.2008 asking the respondents/original applicants to show cause as to why they should not be reverted to their earlier Group-D posts as DSL Cleaner. In OA No.1278/2008, the original applicants had assailed the order dated 12.06.2008 circulating a list of Tech-III/Mech declared eligible for being subjected to trade test for the post of Tech Grade-II/Mech. in the scale of Rs.4000-6000/-.

4. The genesis of the matter had arisen from Railway Board's circular dated 28.09.2008 issued as a measure of implementation of the recommendations of 5th CPC as contained in para 54.23 of the report whereby it had been

decided to undertake a restructuring of Group-D posts within the railways out of functional consideration and to provide for better service particulars to the employees under the then existing arrangements put in place vide circular dated 19.09.1995. The minimum qualification for direct recruitment to the posts of Artisan Khalasis in diesel/Electric-Loco/EMU maintenance was matriculation/Apprenticeship pass under the Apprenticeship's Act in relevant trades/diploma in Electrical/Mechanical/Electronic Engineering with ITI pass in relevant trade being an additional desirable qualification in the case of matriculates. These Group-D posts were distributed in the ratio of 20% in grade Rs.750-940 (2550-3200) and 80% in the grade Rs.800-1150 (2650-4000) respectively.

5. Under the new arrangement, 50% of the posts in the above two grades as on 1.9.1998, were to be placed in grade of Rs.950-1500 (Rs.3050-4590/-), 10% of the posts in these two grades as on 1.9.1998 were surrendered in the grade of Rs.750-940/-. Accordingly, the revised percentage distribution in Group-D posts as a consequence of the circular dated 28.09.1998 was as follows:-

S1. No.	Scale	Existing percentage	Revised percentage
1	Rs.950-1150/Rs.3050-4590	NIL	50
2	Rs.800-1150/Rs.2650-4000	80	30
3	Rs.750-940/Rs.2550-3200	20	10
4	To be surrendered		10

The aforesaid Circular went ahead to provide that while the then vacant posts were to be surrendered with immediate effect and the balance in due course, they were not to be credited to the surplus staff bank nor could be used as matching surrender for creation of additional posts. The circular further provided as under:-

“4. The additional posts in grade Rs.3050-4590 in terms of these orders will be added to the skilled grade of Rs.950-1500 (Rs.3050-4590). However, there will be no consequent increase in the number of posts in the grades higher than Rs.3050-4590. In other words, the skilled Artisan cadre will not get automatically restructured in accordance with the prescribed percentages with enlarged base in the grade Rs.3050-4590.

5. In pursuance to the above changes, the revised methodology for filling up the posts of skilled Artisans in grade Rs.3050-4590 in diesel/electric/EMU maintenance trades will be as under:-

- (i) 60% by direct recruitment from successful course completed Act Apprentices, ITI pass candidates and matriculates from the open market.*
- (ii) 20% from serving semi-skilled and unskilled staff with three years of regular service with educational qualification as laid down in the Apprentice Act; as outlined in Railway Board's letter No. E(NG)I/ 96/PM7/56 dated 2.2.1998; and*
- (iii) 20% by promotion of staff in the lower grade as per prescribed procedure.*

6. With a view to give the benefit of the grade Rs.3050-4590 to the existing staff with the prescribed qualification stated in para 5(i) above in a reasonable time, the following procedure of filling up the posts in grade Rs. 3050-4590 is laid down for the present:

- (i) The additional posts in the grade Rs.3050-4590 becoming available in terms of these orders will be filled up by the employees possessing the prescribed qualification indicated in para 5(i) above and who are on roll as on 1.9.1998, on passing the prescribed trade test.*
- (ii) The 60% vacancies earmarked for direct recruitment which accrue from 2.9.1998 onwards*

maybe filled up from serving employees on roll as on 1.9.1998 and who possess the prescribed qualifications as in para 5(i) above as outlined in Railway Board's letter No.E(NG)I/96/PM7/56 dated 2.2.1998 for a period upto 31.8.2002 or till such time as no such employees eligible as on 1.9.98, remains awaiting placement in the grade, whichever is earlier."

6. As per the above provisions, all Group 'C' posts created in the grade of Rs.3050-4590 were filled from amongst the existing employees who had the prescribed qualification and passed the prescribed test till such time as no such employees eligible as on 1.9.1998 remained awaiting placement in the grade or till 31.08.2002, whichever was earlier. The above triggered of a spate of litigation. The Jodhpur Bench of this Tribunal allowed OA No.143/2001 and OA No.144/2001 decided by a common order dated 11.04.2002 directing the respondents to extend the benefits to the applicants therein. Thereafter, 48 similarly situated employees (respondents/original applicants in the instant RA) approached this Tribunal by filing OA No.39/2004 which was allowed vide order dated 21.04.2007 directing the respondents to allow the benefits to the applicants at par with the applicants before the Jodhpur Bench of the Tribunal. We consider it necessary to extract the relevant portion from the decision passed in OA No.39/2004, which reads as under:-

“11. We are satisfied that by selecting respondents 4 to 42, the opportunity conferred on the applicants stand over looked. We find that applicants are similarly situated like the persons who had approached the Tribunal in OA 143/2001. They are entitled to the benefits, which have been snatched away from them. We, therefore, direct the respondents to accommodate the applicants property against the posts to which they ought to have been considered and appointed as coming within the parameters prescribed under the Railway Board’s orders.

12. Although private respondents were impleaded, there is no representation forthcoming from them. The applicants will be entitled to notional promotion as well as placement earlier than the direct recruits. We do not think that Railway Administration is justified in contending that the applicants were to wait for their turn for promotion when Railway Board’s orders were clear and specific that possession of qualifications alone was relevant. Consequently, the rights of the applicants are upheld by us. We direct that appropriate orders should be passed within three months from the date of receipt of a copy of this order extending the benefits. Application is allowed. There shall be no order as to costs.”

7. The review applicants in the instant RAs tried their level best for annulment of the Tribunal’s order under review either in the form of review applications and writ petitions before the Tribunals and/or High Court but did not succeed. Therefore, the aforesaid decision of the Tribunal in OA No.39/2008 got implemented by the respondents and all the 48 applicants were promoted as Technician Grade-III w.e.f. 15.10.1999 with notional promotion and placement earlier than the direct recruits. Thereafter, the review applicants/original respondents encountered practical difficulties and, hence, issued a show cause notice to the original applicants for reversion to their earlier Group-D

posts as DSL Cleaner, which was challenged in OA Nos.1238/2008 and 1278/2008. It was submitted in the aforesaid OAs on behalf of the original respondents that while the original applicants were entitled to promotion, there was also an imperative to do justice to all similarly placed employees. The Tribunal heard these cases together and allowed the same by a common order dated 02.02.2009 in the following terms:-

11. While we may not have any difficulty to accept the respondents' concern for extending the benefits of restructuring scheme as stipulated under the 1998 Circular to all deserving employees, this has logically to be done without affecting the rights of the parties who have already been given promotional benefits in implementation of the judicial orders. By this yardstick, the impugned Show Cause Notice issued vide order dated 28.5.2008 does not stand to legal scrutiny. As is the settled law, the right to consideration for promotion being a fundamental right, no employee can be deprived of it in contravention of law. Non-inclusion of the applicants in the list of eligible candidates for test for promotion to Grade-II without any justifiable reason does not also seem to be tenable. As held by the Hon'ble Apex Court in All India SC & ST Employees' Association & Anr. v. A. Arthur Jeen & Ors, (2001) 6 SCC 380, while challenging a panel of selected candidates, impleadment of at least some of the successful candidates is a must. In the instant case through MAs No. 1920/2008 and 1465/2008 some among the candidates of the existing list were given an opportunity of hearing which would amount to a deemed impleadment.

12. To conclude, for the foregoing reasons, both the OAs are allowed and the impugned orders dated 28.5.2008 and 12.6.2008 are quashed and set aside. The Respondents, however, would be at liberty to take action for further promotion to the post of Tech.II/Mech as per law. There shall be no order as to costs."

8. The review applicants seeking review of the Tribunal's above order submits that 60% of the vacancies of Artisans

Diesel/Electric Loco/EMU maintenance trades, earmarked for direct recruitment accruing from 2.9.1998 to 31.8.2002 were required to be filled up from amongst the serving eligible employees on roll as on 1.9.1998, whereas the posts of Artisans in the grade of Rs.3050-4590 were required to be filled up amongst Diesel Cleaner only. Thus, DSL Cleaners on roll as on 1.9.1998 in Diesel/Electric Loco/EMU maintenance trades were to be considered for the post of Artisans/Technicians Grade-III. A total number of 296 posts (206 posts in Mech Wing and 90 in Elect. Wing) became available to be filled up under these orders. However, the available Diesel Cleaners, who were having their channel of promotion as Artisan as on 1.9.1998 were only 225 (139 + 86) and were to be duly filled up following the due process.

9. Following the merger of cadre of Technician Grade-D staff within the currency of the scheme of restructuring, a large number of cadres came to be merged together to create eligibility. However, before the benefit could be given to rightful persons as per their seniority, original applicants & Others filed OA No.39/2004 which was ultimately allowed by this Tribunal vide order dated 21.04.2007, referred to earlier, and was got implemented by the respondents vide their letter dated 31.10.2007. Since there were persons senior to the applicants, the original respondents tried to

rectify the above decision of the Tribunal by way of notice to the applicants therein. However, the same was challenged by the original applicants in OA Nos. 1238/2008 and 1278/2008, which had been decided by the Tribunal vide order dated 02.02.2009, referred to earlier. They have further submitted that this has disturbed the hornets' nest and the order of the Tribunal became impossible of implementation as without rectifying the error, future selections could not be held because of limited number of vacancies.

10. Shri VSR Krishna, learned counsel for the review applicants has particularly pointed out to the order dated 02.02.2009 passed in OA Nos. 1238/2008 and 1278/2008 whereby others left out from the process were to be given the benefit of restructuring scheme without affecting the rights of the parties, who had already been given promotional benefits in implementation of the judicial orders. While admitting that implementation of the Tribunal's decision vide order dated 31.10.2007 had been made in only partial condition of the situation in their anxiety to meet the deadline given by this Tribunal, a mistake had occurred. This decision cannot be rectified without rescinding the offensive order dated 31.10.2007. Learned counsel also cited instances of *Virender Kumar Yadav & Anr. vs. Union of India*

& Ors. [OA No.1642/2008 decided on 10.02.2009] wherein similar directions were issued on the basis of parity. Learned counsel further submitted that right to correct their own mistake is an inalienable right of the Government and the same cannot be taken away. He further submitted that the orders of the Court cannot be fully implemented with the order dated 31.10.2007 standing in the way.

11. Learned counsel for the review applicants had also referred to a recent decision of this Tribunal in *Union of India & Ors. vs. Harnam Singh & Ors.* [RA No.16/2013 in OA No.1725/2007 decided on 17.08.2016] wherein a similar prayer made by the same set of review applicants had been allowed by the Tribunal giving reference to the decision in OA No.39/2004 (supra). On the other hand, original applicants relied upon a decision of the Tribunal in *Union of India & Ors. vs. Balram Ojha & Anr.* [RA No.254/2011 in OA No.2083/2007 decided on 10.01.2012] stating that a similar prayer made therein had been disallowed on grounds of limitation. Likewise, RA No.77/2009 in OA No.1278/2008 [*Shri Biri Singh & Ors. vs. Union of India*] had also been disallowed vide order dated 08.05.2009 holding that RA was beyond the scope of review as contained in Order 47 Rule 1 of CPC.

12. Learned counsel for the review applicants submitted that he had come in the review application as a consequence to the liberty given by the Hon'ble High Court in WP(C) No.7995/2010 decided on 28.01.2011. For the sake of clarity, the relevant portion of the order is being extracted hereunder:-

"After some arguments, the learned counsel for the petitioners seeks to withdraw the petition with liberty to file the review petition before the Tribunal.

Dismissed as withdrawn with the liberty as prayed for."

13. Learned counsel for the respondents/original applicants vehemently opposed the prayer using the ground of limitation holding that the review applicants had earlier withdrawn RA 189/2011 on 02.02.2012 with liberty to file another one along with MA for condonation of delay and has filed the instant RA without any change. They have also not mentioned how much delay is there nor have they given any account of delay. Further, in the second place, the review applicants have not pointed out any patent error in the order under review. The original applicants submit that they do not know how this RA is maintainable. Moreover, the earlier RA has been dismissed against the same order and as such, there is no scope within the law as to how an order, once implemented, can be reviewed. The respondents/original applicants also submitted that the present RA had been filed

in July, 2012 on the basis of the liberty given by the Tribunal in RA No.189/2011 (*supra*) vide order dated 02.02.2012 i.e. after five months from withdrawing the earlier RA.

14. We have carefully considered the rival contentions of the parties, the documents so adduced on their side and the law so cited on both sides. We have also patiently heard the oral submissions made by the learned counsel on either side. The following issues are germane for determination of the controversy involved in these two cases:-

- (1) *Whether the RAs are barred by law of limitation?*
- (2) *Whether the RAs are hit by principle of res judicata?*
- (3) *Whether considering the practical difficulties being faced by the review applicants/original respondents, the instant RAs can be allowed in view of the Tribunal's order in Union of India & Ors. vs. Harnam Singh & Ors. (*supra*)?*

15. Insofar as first of the issues is concerned, admittedly the matter is so weighty and having far reaching consequences for the administration as a whole. Of course, the admitted position is this that if an order incapable of

implementation were to be passed, it would be the duty of the aggrieved party to get the same rectified in appeal. However, the affected party being the Government, which is Leviathan, must have implemented the Tribunal's order under review without consideration in their anxiety to beat the contempt of the Court. This is the crux of the problem. It is also an admitted position that the order of the Hon'ble High Court in WP(C) No.7995/2010 was passed on 28.01.2011 granting liberty to the original respondents to file RA before the Tribunal and accordingly the review applicants filed RA No.189/2011 which was dismissed as withdrawn vide order dated 02.02.2012 with further liberty to file another one along with MA for condonation of delay and the review applicants have filed the instant RA without any change. However, considering the implication of the order and the dilemma in which the respondents are, it would be grossly unfair to dismiss the instant RAs on the basis of limitation alone. It is not to be forgotten that the Hon'ble Supreme Court has vested the authority into the hands of the Courts to decide what would be the appropriate period of limitation. There have been instances where account of day to day delay has to be given and there have also been instances where the cases have been taken up and considered with years of delay. Therefore, it rests upon the discretion of courts. Therefore, we are not inclined to dismiss

these RAs as weighty as these on the ground of limitation alone as these need deep consideration. Hence, this issue is decided in favour of the review applicants.

16. Insofar as the second issue is concerned, we need not discuss the matter much. These RAs have been taken up under the authority of Hon'ble High Court in exercise of powers of Article 226 of the Constitution which cannot be questioned before this Tribunal but only before the Hon'ble Supreme Court which the respondents/review applicants have not done in the instant RAs. Therefore, without using more words, we reject this argument of the original respondents/review applicants.

17. Now we come to the third and the last issue. We must fairly admit that these RAs have put us to dilemma. The scope of review application is a limited one and has been decided in a landmark decision in **State of West Bengal & Ors Vs. Kamalsengupta & Anr.** [2008(8) SCC 612] in the following manner:-

“35. The principles which can be culled out from the above noted judgments are :

(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a Civil Court under Section 114 read with Order 47 Rule 1 of CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger bench of the Tribunal or of a superior Court.

(vii) While considering an application for review, the Tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/Tribunal earlier."

18. Strongly speaking, the relief sought by the review applicants in these two RAs does not fall within the precise scope of review as it has been rightly mentioned by the respondents/original applicants. In ordinary course, we would like to dismiss it off hand. However, the dilemma begins here. We take note of the fact that a coordinate Bench has already approved a similar application in case of *Union of India & Ors. vs. Harnam Singh & Ors.* (supra) considering the decision of the Tribunal in OA No.39/2004 (supra). There can be no quarrel on the fact that OA No.39/2004 takes lead from OA Nos. 143/2001 and 144/2001 in a way the mother of the present stream of

litigation. In this regard, the coordinate Bench, after having noted the fact, held as follows:-

"4. It is argued that in case implementation of the order passed in OA No.39/2004 is implemented without taking into account the seniority and availability of posts, it would not be just and fair action.

5. Learned counsel for the respondents in RA/applicants in OA states that once the Tribunal has passed order dated 11.03.2008 the respondents/ applicants in RA have to implement that order and since there is no error apparent on the face of the record, the RA be dismissed.

6. We have heard and considered the arguments of both sides, we are of the view that the implementation of the order of OA no.39/2004 and OA No.1725/2007 will automatically involve the vacancy and seniority position. We, therefore, allow the RA and dispose of the matter with a direction to the respondents that they will strictly go by the seniority list and vacancy position while granting the promotion as has been directed in OA No. 2864/2011. Order dated 11.03.2008 stands modified accordingly. No costs."

19. In view of the above, we are in full agreement with the decision of the coordinate Bench in *Union of India & Ors. vs. Harnam Singh & Ors.* (supra) that vacancies and seniority are the basic postulate for all promotions and cannot be disregarded as lightly as in the instant RAs. Admittedly, the review applicants have taken the decision only in partial consideration of the facts in their anxiety to fall on the right side of the contempt. It is also an admitted fact that right to correct the incorrect decision lies with the Government as it is its inalienable right. Hence, we do not think that much survives in these RAs after the decision of the coordinate Bench in *Union of India & Ors. vs. Harnam Singh & Ors.* (supra) and we are bound to follow the suit, otherwise a

situation will be created where a part of the people will be governed by the decision in *Union of India & Ors. vs. Harnam Singh & Ors.* (supra) and the other part will stand opposed to.

20. In view of the above observations, these two RAs stand allowed in the same terms as in the case of *Union of India & Ors. vs. Harnam Singh & Ors.* (supra). There shall be no order as to costs.

(Dr. B.K. Sinha)
Member (A)

(V. Ajay Kumar)
Member (J)

/AhujA/