

**Central Administrative Tribunal
Principal Bench
New Delhi**

OA No.1436/2012

This the 9th day of September, 2016

Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. V. N. Gaur, Member (A)

Lal Singh Bainada,
Senior System Manager,
N.C. Railway, Allahabad.

... Applicant

(By Advocate: Mr. A. K. Behera)

Versus

1. Union of India through
Secretary, Railway Board,
Ministry of Railways,
Rail Bhawan, New Delhi.
2. General Manager,
Central Railway, CSTM.
3. Chief Personnel Officer,
Central Railway, CST,
Mumbai.
4. Chief Commercial Manager,
Central Railway, CST,
Mumbai.

... Respondents

(By Advocates: Mr. V.S.R. Krishna)

O R D E R

Justice Permod Kohli, Chairman :

This OA was decided by this Tribunal vide judgment dated
03.12.2014 with the following directions:

“6. We, therefore, direct the respondents to re-fix the pay of the applicant by notionally ante dating his promotion to the date on which his immediate junior was promoted as ACS through the 1989 examination. The applicant shall also be entitled to arrears arising out of re-fixation of pay as above. We, however, make it clear that the applicant need not be granted seniority in the APO cadre based on the date of notional promotion. These directions be implemented within a period of eight weeks from the date of receipt of a certified copy of this order. Accordingly, this O.A. is disposed of. No costs.”

The said order was challenged both by the applicant as also the Union of India before the Hon'ble High Court of Delhi in WP(C) Nos.10474/2015 and 11057/2015. The Hon'ble High Court, vide its judgment dated 15.07.2016 set aside the judgment of this Tribunal and remanded back the case to be heard afresh on the basis of pleadings already on record. Accordingly, the matter was taken up for hearing afresh.

2. The applicant was initially appointed as a Clerk in the Commercial Department of the Central Railway. He was promoted as Head Clerk in the grade of Rs.425-700 in the year 1984 against upgraded post as a result of restructuring of the cadre. The applicant belongs to the Scheduled Tribe (ST) category. The next promotion from the post of Head Clerk is to the post of Office Superintendent Grade-II, and then to Office Superintendent Grade-I and Assistant Commercial Manager. Posts from Head Clerk up to Office Superintendent Grade-I fall in Group 'C' non-gazetted, whereas the

post of Assistant Commercial Manager fall in Group 'B' gazetted. As per the laid down norms 70% of the posts of Group 'B' are to be filled up by selection from Office Superintendent Grade-I, and 30% by Limited Departmental Competitive Examination (LDCE) from Group 'C'. In the year 1984, there were eight posts of Office Superintendent Grade-II in Commercial Branch. It is stated that the vacancy falling at roster point No.4 was reserved for ST candidate, and the applicant was the only available ST category candidate eligible for promotion. Process for promotion to fill up the available vacancies started in the year 1985, and a panel was prepared on 19.07.1985 for promotion to Office Superintendent Grade-II, subject to being found fit by the DPC. As against eight available posts, only seven were filled up excluding the ST vacancy on the basis of allegedly incorrect information that no ST candidate was available. It is stated that the applicant, the only ST candidate was available, but he was not considered for promotion against the ST vacancy. The applicant made a representation which came to be rejected on 03.08.1989. The applicant filed OA No.2447/1989 before the Tribunal. This OA was decided vide judgment dated 13.03.1997. It is relevant to notice the point for consideration before the Tribunal, which was noticed at para 3 of the judgment. Para 3 is reproduced hereunder:

“3. The short question for determination is whether an employee, belonging to ST community, is entitled

for consideration of promotion against the point reserved for ST in the 40-Point roster when the vacancies are only eight in number and the employee is otherwise available and eligible for consideration for promotion.”

The above point was finally adjudicated upon by the Tribunal with the following observations/directions:

“7. Having regard to the aforequoted decisions (cited supra), this OA deserves consideration on merits, and we allow the OA accordingly with the following orders:

- (i) The respondents shall consider the case of applicant for promotion to the post of OS Grade II subject to his being found fit by the DPC and promote him as such with effect from 10.2.95 i.e. the date of Hon’ble Supreme Court’s decision on the issue of Roster/Quota for reservation purposes. The applicant shall also be given consequential benefits, i.e. fixation of pay and seniority, from the above date;
- (ii) Subject to same condition aforesaid the applicant shall be paid back wages from 10.2.95. This is because he could have actually carried out the responsibilities of the upgraded post but for the denial of promotion;
- (iii) The above direction shall be carried out within a period of six months from the date of receipt of a copy of this order;
- (iv) In the circumstances, there shall be no order as to costs.”

The applicant, not satisfied with regard to the effective date of his consideration for promotion, i.e., 10.02.1995, filed a misc. Application being MA No.1052/1997. On consideration, the MA was allowed vide order dated 06.02.1998 and the concluding part of the judgment

dated 13.03.1997 passed in OA No.2447/1989 was substituted with the following:

“3. In para 7 of the said judgment, the direction No.1 shall be read as follows:

“(a) respondents shall consider the case of the applicant for promotion to the post of Office Superintendent, Grade II, subject to his found fit by the DPC and promote him as such w.e.f. 19.7.1985. The applicant shall also be given consequential benefits such as fixation of pay and seniority from the above date.”

4. With this, this MA is disposed of.”

Thus, it is found that the benefit of promotion was allowed to the applicant w.e.f. 19.07.1985 instead of 10.02.1995. Against the aforesaid judgment, the Union of India filed WP(C) No.376/1999 before the High Court of Delhi. During pendency of this writ petition, the judgment of the Tribunal remained under stay. The said writ petition was, however, finally dismissed vide judgment dated 17.04.2009.

3. While this litigation was pending, the applicant applied for another post of Assistant Personnel Officer (APO), not in the same line of promotion (*ex cadre*), against 30% LDCE quota. He was selected and appointed as APO. The judgment of the Tribunal 13.03.1997, finally upheld by the Hon'ble High Court on 17.04.2009, was implemented by the North Central Railway and the applicant has been promoted from Head Clerk to Office Superintendent Grade-

II and from Office Superintendent Grade-II to Office Superintendent Grade-I.

4. Since in the meantime persons junior to the applicant as Head Clerk had been promoted to the post of ACM, he made a representation dated 25.11.2010 seeking his consideration for promotion to the post of ACM and sought inclusion of his name in the panel of ACM/ACS/ACO of the year 1989. The applicant also referred to the directions issued by the Tribunal finally upheld by the Hon'ble High Court of Delhi whereby he was given seniority and back wages w.e.f. 19.07.1985. This representation of the applicant has been rejected by General Manager, Central Railway vide letter dated 15.03.2011 on the following grounds:

"You have not been called in the selection for the post of ACS/ACO/ACM (Gr. 'B') in the year 1989 as you were not eligible for the same, at that time, being in Gr. Rs.425-700(RS)/5000-8000(RSRP)."

"Since, you had already taken over the charge w.e.f. 25.06.02, on accepting the Gr. 'B' promotion as APO/SUR without exercising the option within stipulated time, you are deemed to have exercised the option as per para 6.5 of Master circular No.68/2007 read with instructions contained in Board's letter No.E(GP92/2/19 dated 21.03.92)."

The applicant preferred another representation dated 25.01.2012 to the Railway Board, which also came to be declined vide letter dated 03.04.2012 on the following grounds:

“With reference to your representation dated 25.01.2012 addressed to A.M. (Staff) regarding interpretation of your name in the 1988-89 Group ‘B’ panel of ACM/ACO of Central Railway, it is advised that the same has not been found tenable as you have been empanelled as APO through LDCE, and have not appeared for the selections for the Group ‘B’ post of ACM/ACO.”

5. This OA has been preferred challenging the aforesaid orders and other allied reliefs. The applicant has sought the following reliefs:

“8.1 That this Hon’ble Tribunal in the interest of justice may be graciously pleased to allow this application and quash the impugned orders 3.4.12.

8.2 That the Hon’ble Tribunal may also be pleased to consider the case of the applicant for interpolation of his name in the panel of ACM which was finalized in the year 1989 and promote him with all consequential benefits, if found fit.

8.3 That the cost of these proceedings may kindly be granted in favour of the Applicant.”

6. In the counter affidavit, the respondents have contended that the representation of the applicant has been carefully considered by the competent authority and rejected. The reasons indicated in the reply are the same as noticed hereinabove and communicated to the applicant vide the impugned orders. It is further pleaded that since the applicant did not come within the zone of consideration in the year 1989 at the time of selection of ACS, he was not called to appear in the selection process. The respondents have also relied upon the Board’s letter dated 21.03.1992 which *inter alia* provides that where an

employee is promoted against *ex cadre* post of APO, an opportunity has to be given to the employee to go back to his own cadre. The applicant has denied that any opportunity was given to him while he was appointed as APO on *ex cadre* post. The Tribunal vide order dated 19.05.2014 directed the applicant's counsel to file a copy of the appointment letter issued to the applicant as APO. The applicant accordingly filed an additional affidavit dated 09.07.2014 placing on record copy of the Board's letter dated 21.03.1992 along with other documents. In the additional affidavit, it is pleaded that no option was given to the applicant nor any opportunity was provided to him to go back to his promotional post. The applicant has also placed on record copy of the approved panel for the post of APO and appointment order dated 21.06.2002. This order does not contain any stipulation that the applicant has been provided any option. The Railway Board's circular dated 21.03.1992 reads as under:

“Sub: Promotion of Ministerial employees of TT & CD Stores, Statistical & Compilation Branch, Cash & Pay and Time Office to the post of APO.

Ref: Rly. Bds. Letter No. EC(GP 81/2/47 dt. 23.11.82.

Vide Board's letter quoted above, instructions were issued to the effect that Law Assistants/Chief Law Assistants who are eligible for promotion to the posts of ACSs or APOs in addition to their normal avenue of promotion against the posts of Asstt. Law Officer/Estate Officer etc. can exercise option for promotion as APO or ACS within 30 days of the result

of the Selection/LDCE and once the option is exercised, it should be treated as final.

Apart from the Law Assistants/Chief Law Assistants, the Ministerial employees of Traffic & Commercial Department, Stores, Department, Statistical and Compilation Branch, Cash and pay and time Office staff as also Ministerial employees in other departments who do not have adequate avenues of promotion to Group 'B' posts in their own departments have been provided an avenue to the post of APOs. The Board have now decided that such employees should also be given the opportunity to exercise option for promotion within one month of the result of the Selection/LDCE and the option once exercised, should be treated as final. The panel may be kept as provisional till the option is finally exercised within one month. It has also been decided that if an employee after getting empanelled opts out, the next, qualified candidate should be placed on the panel with the approval of the competent authority duly observing the rules and orders for reservation of vacancies for SC/ST candidates. The final panel should then be published."

7. The respondents have filed reply to the additional affidavit stating therein that since the applicant did not opt for promotion as ACS in his own cadre and joined as APO/SUR on 25.06.2002, he is deemed to have opted for promotion as APO. This is contrary to the circular dated 21.03.1992 whereunder an opportunity has to be given to the selectee to the post of APO to exercise option. Thus, admittedly no opportunity was ever allowed to the applicant to exercise option.

8. Mr. Behera, learned counsel appearing for the applicant has referred to the Railway Board circular MC No.68 dated

30.03.2007. This circular contains consolidated instructions governing promotion from Group 'C' to Group 'B'. Extracts of this circular relevant for purposes of the present OA are quoted hereunder:

"METHOD OF FILLING UP THE VACANCIES IN GROUP 'B'

1.1 The vacancies in Group 'B' posts are filled by promotion on the basis of Selection of eligible Group 'C' employees and also on the basis of Limited Departmental Competitive Examination (LDCE), where applicable. Where the scheme of LDCE is in force, selection is held to fill 70% of the vacancies and LDCE is held to fill the remaining 30% of the vacancies."

"6.2 Selection for 70% of vacancies

6.2.1 For the selection Group 'C' employees working in grade the minimum of which is Rs.5000/- and in higher Group 'C' grades will be eligible for consideration provided they have rendered not less than three years of non-fortuitous service in the grade."

"6.2.4 If a junior employee is considered for 70% selection by virtue of his satisfying the relevant minimum service conditions, all persons senior to him shall be held to be eligible, notwithstanding the position that they do not fulfil the requisite minimum service condition. This provision is not applicable to LDCE.

6.3 LDCE

6.3.1 For LDCE, all Group 'C' employees working in grade the minimum of which is Rs.5000/- and in higher Group 'C' grades will be eligible for consideration provided that they have rendered not less than five years of non fortuitous service in the grade.

6.4 Las Assistants/Chief Law Assistants are eligible for promotion to the post of APO or ACM in addition to their normal avenue of promotion to the post of ALO/Estate Officer etc. depending upon the option they exercise. The option can be exercised after an employee gets selected to any of the gazetted cadre. Such an option should be exercised within 30 days of the result of the selection/LDCE by the employee in writing and option once exercised should be treated as final.

6.5 The Ministerial employees of Traffic & Commercial department, stores Department, Statistical and Compilation branch, Cash & Pay Time office staff, Stenographers as also Ministerial employees in other departments who do not have an avenue of promotion to Group 'B' posts in their own departments have been provided an avenue to the post of APO. Such employee should be given the opportunity to exercise option for promotion within one month of the result of the Selection/LDCE and the option once exercised should be treated as final. The panel may be kept as provisional till the option is finally exercised within one month. However, if employee after getting empanelled opts out, the next qualified candidate should be placed on the panel with the approval of the competent authority duly observing the rules and orders for reservation of vacancies for SC/ST candidates and thereafter final panel should be published."

"8.6 Selection for post of APO

8.6.1 In regard to selection for promotion to Group 'B' posts in the Personnel Department all employees who are eligible and who volunteer for selection should be considered, without any limitation of number."

"10. Selection procedure

10.1 Selection of candidates for empanelment is based on a written test to adjudge the professional ability, viva-voce and assessment of records by the Selection Committee."

9. From the above instructions, it appears that promotion from Group 'C' to Group 'B' is by two modes - 70% by selection and 30% by LDCE. The applicant claimed his promotion against the 70% quota. In the light of the judgment of the Tribunal dated 13.03.1997 and that of the High Court dated 17.04.2009, claim of the applicant for promotion up to Office Superintendent Grade-I has already been considered and relief granted. The only claim of the applicant is now for his consideration for further promotion to the post of ACM, which is a Group 'B' gazetted post. It is not in dispute that the applicant was denied promotion to the post of Office Superintendent Grade-II and thereafter to Office Superintendent Grade-I, maintaining his seniority over his juniors. The respondents have, however, denied promotion to the applicant on two counts - (i) that his name could not be interpolated in the 1989 panel as he was not eligible at that time; and (ii) that the applicant had opted for promotion to the post of APO against the 30% LDCE quota without opting for promotion to his parent cadre in the line of promotion. Insofar as the first ground is concerned, obviously in the year 1989 when a panel was prepared for consideration for promotion from the post of Office Superintendent Grade-I to that of ACM, the applicant had not even earned promotion up to the post of Office Superintendent Grade-I, having been denied initial promotion to the post of Office Superintendent Grade-II Group 'C' on account of his

non-consideration. This ground is thus totally meaningless insofar as the case of the applicant is concerned. First, the applicant having earned promotion up to the post of Office Superintendent Grade-I by virtue of implementation of the judgment of the Tribunal/High Court, his claim for further promotion gets revived. As regards the other ground regarding the applicant having been promoted to the post of APO against the 30% LDCE quota without opting for promotion in his own cadre, the ground is again totally irrelevant. In the year 2002, the applicant opted for LDCE for the post of APO, which is governed by para 8.6 of the consolidated instructions governing promotion from Group 'C' to Group 'B' referred to hereinabove. This promotional avenue is available to all employees who are eligible and who volunteer for selection. It is an *ex cadre* post. On selection to such post, the applicant was to be provided an opportunity to exercise option in terms of the Board's circular dated 21.03.1992. The applicant has placed on record the selection panel of APO as also his appointment letter. None of these documents indicate that he was provided any opportunity to exercise option. In any case, in the year 2002, there was no occasion for him to exercise option as his case for regular promotion in his own line of promotion was pending before the Delhi High Court. The plea of deemed exercise of option cannot be pressed into service as the applicant was not in a position to exercise option, firstly having not been provided

any opportunity, and secondly the case of his promotion in his own line of promotion was *sub judice* and judgment containing direction for his promotion passed by the Tribunal had been stayed by the High Court of Delhi. Thus, the grounds of rejection in the impugned orders are not sustainable in law.

10. It is not in dispute that in the year 1989, a panel was prepared for granting consideration for promotion to the post of ACM. The applicant was not included in the said panel as till then he had not even earned promotion as Office Superintendent Grade-I. His juniors were accorded consideration and promoted. Of course, they were required to undergo the selection procedure as prescribed in para 10.1 of the consolidated instructions referred to above, which comprise written test and *viva voce*. Since the applicant's name was not included in the panel, and rather could not have been included, his juniors were considered. After having succeeded in earning promotion as Office Superintendent Grade-I, that too retrospectively on account of clear and categorical directions of the Tribunal/High Court, the applicant is entitled to be empanelled in the 1989 panel on the basis of his seniority, and thereafter after undertaking the rigor of selection if he qualifies, he could be considered for promotion as ACM/ACO.

11. Mr. V. S. R. Krishna, learned counsel appearing for the respondents, submits that the applicant has not pleaded in his OA as to under which category he needs his consideration, i.e., against the 70% quota or the 30% quota. His further contention is that mere empanelment in the 1989 panel does not *per se* entitle the applicant for consideration for promotion as the promotion to the post of ACM is by selection, which *inter alia* includes written examination and *viva voce*. Insofar as his first contention is concerned, it goes without saying that the applicant is seeking consideration against the 70% promotional quota. That is his case all along. For the 30% LDCE quota, one has to apply to seek consideration under the said quota. The applicant never opted for that. He is simply seeking promotion under the 70% quota. The second contention of Mr. Krishna has substance. By simply interpolating the name of the applicant in the 1989 panel does not confer any right upon him for promotion. He has to undergo the rigor of selection as prescribed under para 10 of the consolidated guidelines. In totality of the circumstances, the applicant cannot be denied the right of consideration for promotion to the post of ACM/ACO.

12. This OA is accordingly allowed with the following directions:

- (1) The respondents are directed to interpolate the name of the applicant in the panel dated 16.10.1989 on the basis of his seniority allotted to him in terms of the judgment of the Tribunal dated 13.03.1997.
- (2) The applicant be provided an opportunity of appearing in the written test and *viva voce* in accordance with the mandate of the consolidated guidelines referred to hereinabove. In the event he emerges successful in the selection process, he may be promoted as ACM/ACO w.e.f. the date his juniors were promoted. He will also be placed above his juniors in the seniority list in the event of his promotion. Such promotion of the applicant shall, however, be notional till the actual promotion, but he will be entitled to benefit of increments and pay revision etc. His pay shall be fixed by taking into consideration all such financial benefits as have been allowed to his juniors. Actual financial benefits would accrue from the date of actual promotion.

(V. N. Gaur)
Member (A)

(Justice Permod Kohli)
Chairman

/as/