

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA



MA. 74 of 2012
OA. 1187 of 2011

Date of Order: 8.8.16.

Present

Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Mr. P.K.Pradhan, Administrative Member

Shri Kedar Chandra Shit, son of late Amulya Ratan Shit, aged about 58 years, working as a Head Clerk under S.S.E., S.E. Rly., Kharagpur, Workshop No. 24, residing at Inda Ananda Nagar, P.O. Inda, Dist- Paschim Medinipore.

.....Applicant

-versus-

1. Union of India through the General Manager, S.E. Rly., Garden Reach, Kolkata- 700 043.
2. The Chief Works Manager, S.E. Rly., Kharagpur, P.O. Kharagpur, Dist- Paschim Medinipore, 721301.
3. The Dy. Chief Mechanical Engineer (CW), S.E. Rly., Kharagpur, P.O. Kharagpur, Dist- Paschim Medinipore, 721301.
4. The Workshop Personnel Officer, S.E. Rly. Kharagpur, P.O. Kharagpur, Dist- Paschim Medinipore, 721301.

.....Respondents.

For the Applicant : Mr. A. Chakraborty, Counsel

For the Respondents : Mr. S. Bhattacharyya, Counsel

ORDER (Oral)

Per Mr. P.K. Pradhan, AM:-

This is a second round of litigation and the applicant has challenged the Office order dated 17.03.2010 which was issued pursuant to the representation filed by the applicant in accordance with an order passed by this Tribunal in OA.900/04. The relief sought by the applicant in the present OA are as follows:

"8(a) Office order dated 17.03.2010 issued by the AWM/Carriage/KGP (W), S.E. Rly., Kharagpur, is bad in law and therefore the same may be quashed.

(b) An order to issue directing the respondents expunge the adverse remarks from the ACR of the applicant for the year ending 2000-2001 and to grant all the consequential benefits."

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2. According to the applicant, while he was working as Head Clerk of Shop No. 24 under the respondents, he was called to appear in the written test for promotion to the post of Office Superintendent Grade-II. He appeared in the written test and was declared suitable and was called for viva-voce test thereafter. In the meanwhile the Railway Board decided that certain Group 'C' and Group 'D' categories should be restructured in accordance with revised percentage/cadre/structure and the benefit in restructuring will be restored to persons working in a particular cadre on the cut off date. Further in respect of selection it will be done on the basis of scrutiny or service records as one time exception. Thereafter a panel was prepared for promotion to the post of Office Superintendent Grade-II against restructured cadre and his name did not figure in the said panel. Thereafter, the applicant made a representation requesting for granting him benefit of promotion. Thereafter the applicant was informed vide letter dated 29.08.2004 (Annexure A-2) that his promotion to the post of Office Superintendent Grade -II in the scale of Rs. 5500-9000/- could not be considered since the grading in his ACR for the year ending 2000-01 was "below average" with adverse remarks which was communicated to him.

3. According to the applicant, he had received an order dated 14.06.2001 issued by the A.W.M (Carriage) regarding entry of adverse remarks of A.C.R but he was not given an opportunity to make a representation against the same. In the said letter it was recorded that he was given six months time to improve ~~year~~ performance in all respects, failing which, suitable action will be taken against him. Since no action was taken, thereafter, he presumed that the performance of the applicant in all respects was good. When the applicant was not granted promotion due to adverse entry in the A.C.R, he approached this Tribunal in OA. 900/04 wherein by an order dated 17.12.2009, this Tribunal directed the applicant to approach the reviewing authority against the order dated 14.06.2001. It was also mentioned in the order that once such representation is received by the competent authority should decide the representation and grant the benefit in accordance with the judgment and observation in the said judgment within a period of three months from the date of receipt of such representation. Accordingly, the applicant submitted a representation on 16.01.2010. The respondents then had passed

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an order dated 17.03.2010 rejecting his case and the said order is now under challenge.

The applicant prays for granting the reliefs as sought for.

4. The respondents in their reply statement submitted that the below average grading of A.C.R. for the year 2000-01 was duly communicated to the applicant vide letter dated 14.06.2001 (Annexure R-1). However, the applicant did not make any appeal before the Reviewing Authority which indicates that he accepted this assessment following the restructuring of the cadre, the Railway Board issued a communication dated 09.10.2003 instructing that the selection to the post of Office Superintendent Grade-II shall be based on scrutiny of service records and confidential reports as one time exception. Accordingly, the case of the applicant along with others were considered. The applicant could not be placed in panel because of the below average grading adverse entry in the A.C.R. for the year 2000-01. In terms of the direction of the Tribunal in OA. 900/04, the applicant submitted a representation wherein he requested to expunge adverse remarks from his ACR and grant the benefit of promotion to the post of Office Superintendent Grade-II from the date his juniors were promoted. However, going through the representation and the entire case records, the Reviewing Authority i.e. A.W.M vide letter dated 17.03.2010 informed the applicant that his case could not be considered as per the extent rules and he is not in a position to act beyond the rules, as this will set a bad precedence.

5. The respondents further submitted that at the material time i.e. in the year 2000-01 the applicant's performance was not good. Moreover, he did not submit any representation thereby accepting the observation made in the A.C.R. The applicant's performance for the year 2001-02 and 2002-03 improved for which he was given the grading of "good" for the years 2002 and 2003 respectively. Since the selection was made beyond on last three year's A.C.Rs and service records in view of the below average grading in the year 2000-01, the case of the applicant for promotion could not be considered.

6. The applicant has filed MA. 74/2012 seeking condonation of delay of nine month, in filing the OA stating that his wife was under the treatment and as such he was not in a position to file the OA in time. The respondents have submitted that no sufficient cause has been advance and the delay in filing the OA is willful. On detail

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consideration, we are inclined to consider the reasons cited for the delay in filing the OA and hence the delay is condoned and the matter is taken up merit.

7. Heard learned counsel for both the parties. The learned counsel for applicant submitted that in pursuance to the order of this Tribunal in OA. 900/04, the applicant submitted a representation to the respondents' authorities on 16.01.2010 but the same has not been considered in the ground that it was not submitted within 6 months of communication the adverse ACR. Therefore, according to him the respondents did not consider the representation in terms of the direction of this Tribunal and hence such an order cannot be sustained. He submitted that no doubt the applicant was informed the below average grading but before forming such an opinion he was not advised or communicated anything to that effect by the respondents. Further, the applicant had subsequently improved his performance for which the grading of subsequent two years have been good. Therefore, depriving him for promotion an adverse entries in 2000-01 was not justified and direction be issued to the respondents to grant him the benefit of promotion as has been allowed to other officials at that point of time.

8. Learned counsel for respondents submitted that the representation submitted pursuant to the order of this Tribunal was considered by the respondent authorities and they have passed necessary orders. He referred to RBE. No. 172/2001 dated 08.10.2001 relating to preparation and maintenance of confidential reports of non-gazetted Railway servants. Para 8 of the said order clearly says that the railway servant who has received a communication of an adverse of critical remark entered in his confidential report may represent to the Accepting Authority against the remark communicated to him within one month of the receipt of the communication by him. Such a representation can be entertained up to a period of 6 months if it is satisfied that the railway servant had sufficient cause for not submitting the representation in time. However, in this case, the applicant did not make any representation at that point of time. He has submitted that when the applicant had approached the Tribunal earlier in OA. 900/04 seeking exactly similar relief, the Tribunal did not grant the applicant any relief but only advised him to submit representation to the Reviewing Authority against the order dated 14.06.2001. The applicant had submitted a representation but the same could not be considered in terms of the relevant circular of the Railway Authority.

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Since the promotion at that point of time was continued on the basis of ACR for 3 years and there was an adverse entry in respect of the applicant, his case could not be considered.

9. We have carefully considered the facts and the submission made by either side. It has been accepted by both the sides that the applicant had received the communication dated 14.06.2001 intimating him the below average grading and adverse remarks but did not make any representation which practically amounts to his acceptance of the observation. Learned counsel for applicant contended that it was mentioned in the said communication that the applicant is given 6 months time to improve, failing which suitable action will be taken against him. He indeed improved his performance and in next 2 years ACRs he was rated as 'good'. Accordingly his earlier grading should have been reviewed. We are not inclined to agree to this submission. Just because the applicant improves his performance later and earned good entries in the subsequent years, it cannot be a ground to erase earlier remarks recorded against him since it was based as performance in the relevant years only.

In the case of **Vinod Kumar v. State of Haryana & Ors.**, Civil Appeal No.392 of 2008, AISLJ II 2014(1), the Hon'ble Apex Court in para 22 of its order observed that,

"22. Thus, in this case also not only second representation was made after more than 7 years, but there was no new material or facts as well which were given in the second representation. Furthermore, the reasons given for expunging the remarks on "corruption" and substituting the same by "good remarks" is shocking and untenable to say the least. Simply because the appellant allegedly showed improvement and earned good entries in the subsequent years cannot be a ground to erase the earlier remarks recorded 7 years ago thereby treating him as a good officer even for the earlier period i.e. 25.4.1994 to 31.3.1995. The petition of the appellant was thus, rightly dismissed by the High Court. Present appeal is totally bereft of any merits and is accordingly dismissed."

10. When the matter earlier agitated before this Tribunal in OA. 900/04, the Tribunal after detail consideration, directed vide order dated 17.12.2009 as follows:

"15. The applicant is directed to approach to reviewing authority against order dated 14.6.2001. If such a representation is received by the competent authority, he is directed to decide the representation and grant the relief to the applicant, in accordance with the Judgments and our observation referred above, within a period of three months from the date of receipt of such representation."

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Pursuant to the said order, the applicant had filed a representation on 16.01.2010 before the authority. However, the authority vide order dated 17.03.2010 rejected the prayer on the ground of delay in filing the same. The said order made observations as follows:

"In your representation dtd. 16.01.2010, you have stated that "below average" recorded in the ACR vide office order dated 14.06.2008 is not correct. In fact, the then AWM (Carriage) issued the letter on 14.06.2001. As such the allegation is after thought. However, it has already been intimated through WPO/KGP's letter No. SB/131/11/Restr/OS-II (NP)/CON/877, dtd. 29.08.2004 and the Hon'ble court directed you to file an appropriate representation to the competent authority to expunge the adverse remarks.

In this regard it is to inform you, that the officer entrusted the ACR as a mirror of subordinate officer to write the report objectively in terms of S.E. Railway Estt. Srl. 119 of 2001, any representation against the adverse remarks which is to be allowed within one month of their communication. In the said Estt. Srl. at Paragraph 8 it has been clearly mentioned that the Accepting authority may entertain the representation received upto a period of six months from the date of receipt of the communication by the railway servant if he is satisfied that the railway servant had sufficient cause for not submitting the representation in time. You have failed to submit the representation against the same within the stipulated period to the Accepting Authority explaining the sufficient cause for delay. Moreover the cause of action arose in the year 2001 and the OA was filed in 2004 which is time barred. Delay loses its right which ever is available in law.

Further the Hon'ble CAT/KOL bench in OA No. 1089 of 2004 in similar matter had been pleased to dismiss the OA vide order dated 16.9.2009 as the OA has no merit. In another OA No. 285 of 2005 disposed on 12.01.07 the Hon'ble CAT/KOL have been pleased to dismiss the OA on the ground of limitation as the pre-requisite condition for communication of adverse remarks was already been communicated."

11. It would be clearly evident from the aforesaid order that the respondents did not consider the representation of the applicant on its merit but simply rejected the same on the ground that the representation against the below average grading in the ACR have not been filed in the stipulated time. The issue of non-filing of representation against the adverse entries by the applicant on receipt of the communication of 14.06.2001 was highlighted in the OA. 900/04. However, after considering the matter in its entirety the Tribunal vide its order dated 17.12.2009 directed the applicant to submit a representation to the Reviewing Authority who was directed to consider the representation in accordance with the judgment cited and the observation of the Tribunal in the aforesaid order. Therefore, the representation of the applicant ought to have been considered by the Reviewing Authority on its merit rather than rejecting the same on the ground of delay. Therefore, the order dated 17.03.2010 by the

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respondents clearly appears to have ignored the direction of the Tribunal and hence cannot be sustained.

Therefore, on detail consideration of the fact and circumstances of the case we hold that the order dated 17.03.2010 passed by the respondents is not in accordance with the earlier observation on this Tribunal and hence the same is quashed. The respondents are directed to consider the representation of the applicant afresh after giving him the opportunity of a personal hearing within 2 months from the date of receipt of a copy of this order and pass a reasoned and speaking order on its merit.

12. The OA is accordingly disposed of in terms of the aforesaid direction. No order as to costs.

(P.K.Pradhan)
Member (A)

(Bidisha Banerjee)
Member (J)

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