

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH



No. OA 350/1439/2017

Date of order : 26.3.2018

Present: Hon'ble Ms. Manjula Das, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

SUBHASIS KOLEY
S/o Late D.P.Koley,
Working as Senior Station Manager
(Gazetted), S.E. Railway,
Howrah,
R/o Vill & PO - Diwan Maro Nimpura,
PS - Kharagpur Town Police Station,
Dist. - West Midnapur.

APPLICANT

VERSUS

1. Union of India, through
The General Manager,
South Eastern Railway,
Garden Reach Road,
Kolkata - 700043.
2. The Secretary,
Railway Board,
Rail Bhawan,
New Delhi - 1.
3. The Chief Operation Manager,
South Eastern Railway,
Garden Reach,
Kolkata - 700043.
4. The Chief Personnel Officer,
South Eastern Railway,
Garden Reach,
Kolkata - 700043.
5. Chief Commercial Manager,
South Eastern Railway,
14 Strand Road,
8th Floor,
Kolkata - 700001.
6. K.S.Anand,
Dy. Chief Safety Officer,
S.E.Railway,
Garden Reach Road,
Kolkata - 700043.
Presently working as
Sr.DCM, Adra Division,
S.E.Railway, Adra,
Purulia - 723101.

...RESPONDENTS.

For the applicant : Mr. A.Chakraborty, counsel
Ms.P.Mondal, counsel

For the respondents: Mr.B.L.Gangopadhyay, counsel

O R D E R

Per Ms. Manjula Das, Judicial Member

Mr.A.Chakraborty, ld. Counsel assisted by Ms.P.Mondal, ld counsel appeared for the applicant. Mr.B.L.Gangopadhyay, ld. Counsel appeared for the respondents.

2. By making this OA the applicant has approached this Tribunal under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs :

- a) Rejecting speaking order dated 16.10.2017 issued by Chief Operational Manager, South Eastern Railway, GRC on the ground that memorandum issued by the DOPT dated 2.11.2012 and 23.1.2014 were not followed.
- b) An order do issue directing the respondents to grant the applicant promotion against JAG vacancy on ad hoc basis in Traffic (OPTG) and COPMML Department w.e.f. the date private respondent was promoted and to grant him all consequential benefits.

3. The brief fact of the case as narrated by the applicant in the present OA is that the applicant was initially appointed as Commercial Clerk on 15.1.1988 and subsequently he passed departmental Commercial Apprentice Examination and was promoted to the post of Commercial Inspector (Gr.II) on September, 1994. The applicant qualified in the Departmental Competitive Examination for selection of Asst. Commercial Manager & Asst. Operation Manager and was selected for the post of Asst. Commercial Manager, Chakradharpur on 25.10.2005. The applicant was awarded Upgradation to Grade Pay Rs.5400 vide office order dated 8.5.2009. Thereafter he was promoted to the post of DCM (Grade Pay Rs.6600), Chakradharpur on 3.6.2003. The applicant was then transferred to the post of Sr. Commercial manager (CP), S.E. Railway, Kolkata on 2.2.2015 and again transferred and posted as Area manager, Shalimar on 7.10.2015. The applicant was then transferred and posted as Senior Station Manger (Gazetted) Howrah, S.E. Railway on 18.5.2017.

The applicant approached this Tribunal in OA 936/2017 challenging the order of promotion issued by CPO, S.E. Railway, Garden Reach, Kolkata vide office order dated 20.1.2017 by which the applicant was deprived of his legitimate promotion and his junior K.S.Anand (respondent No.6) was promoted to the post of Junior Administrative Grade (Grade Pay 7600/-) and posted as Dy. Chief Safety Officer, S.E. Railway, Garden Reach, Kolkata. The OA was disposed of on 19.7.2017 with certain directions. In compliance with that direction, a speaking order was issued by the concerned respondent authority on 16.10.2017 and the prayer of the applicant for grant of promotion against SAG was rejected. Being aggrieved with the said speaking order the instant application has been filed by the respondents.

4. Mr.Gangopadhyay, Id. Counsel for the respondents on the other hand submitted that the applicant was appointed in Railway service on 15.1.1988 as Commercial Clerk. Thereafter he was promoted to Asst. Commercial manager on 25.10.2005 and to the post of Sr. Scale on 3.6.2013. On the occurrence of a vacancy in JA Grade the applicant was in the zone of consideration, but he could not be promoted since a SPE case was pending against the applicant. As such though DPC was held on 15.12.2016, his case has been kept under sealed cover as per Railway Board's circular Estt:Sl. No. 252/99 dated 21.1.1993. In the meantime the applicant has been issued with a major penalty charge sheet on 29.6.2017, and his junior Mr.K.S.Anand was promoted to JA Grade purely on ad hoc basis. Mr.Gangopadhyay also submitted that the sealed cover will be opened only on finalisation of his departmental proceeding and also on finalisation of SPE case and this will have no effect on the applicant if he is acquitted from the SPE case.

5. Mr.Chakraborty, Id. Counsel for the applicant has further submitted that Railway Board's circular at Sl. No. 253/2009 provides that at the time of consideration of the case of promotion of the Government servant, details of the eligible Government servant in respect of whom prosecution of criminal charge is pending, should be brought to the notice of the Departmental promotional Committee. Since no prosecution for criminal charge is pending against the

applicant till date, therefore the question of keeping the case of the applicant for promotion in a sealed cover does not arise. To substantiate his argument Mr.Chakraborty has relied upon the judgment of Hon'ble Apex Court in the case of **Union of India -vs- K.V.Jankiraman [AIR 1991 SCC 2010]**.

6. We have heard the ld. Counsels for both parties and perused the pleadings and materials placed before us.

7. The applicant is presently working as Sr.Station Manager, S.E.Railway, Howrah who was initially appointed as Commercial Clerk on 15.1.1988 and subsequently he passed departmental Commercial Apprentice Examination and was promoted to the post of Commercial Inspector (Gr.II) on September, 1994. The applicant qualified in the Departmental Competitive Examination for selection of Asst. Commercial Manager & Asst. Operation Manager and was selected for the post of Asst. Commercial Manager, Chakradharpur on 25.10.2005. The applicant was awarded Upgradation to Grade Pay Rs.5400 vide office order dated 8.5.2009. Thereafter he was promoted to the post of DCM (Grade Pay Rs.6600), Chakradharpur on 3.6.2003. The applicant was then transferred to the post of Sr. Commercial manager (CP), S.E. Railway, Kolkata on 2.2.2015 and again transferred and posted as Area manager, Shalimar on 7.10.2015. The applicant was then transferred and posted as Senior Station Manager, (Gazetted) Howrah, S.E. Railway on 18.5.2017 and continued as such.

8. The grievance arose when he was deprived of his promotion to the post of Junior Administrative Grade while his junior in the seniority list namely K.S.Anand was given promotion superseding the applicant. He then made representation before the respondent No.3 on 22.2.2017 with a request to consider his case. Thereafter he made several representations before the respondent authorities, however, no response yielded from the end of the department.

Being aggrieved the applicant approached this Tribunal in OA 936/2017 which was disposed of vide order dated 19.7.2017 with a direction to the respondent authorities to dispose of the representation made by the applicant

within a period of six weeks from the date of receipt of the certified copy of the order. In compliance of the order passed by the Tribunal the department issued the impugned order dated 16.10.2017 disposing of the representations made by the applicant, by stating inter alia that DPC meeting was held on 15.12.2016 for promotion to the post of JAG on ad hoc basis and result of the applicant has been kept in sealed cover. Hence this original application has been filed by challenging the impugned order dated 16.10.2017 and with a prayer for giving promotion against JAG vacancy.

9. Granting of promotion to JAG vacancy to the applicant was rejected only on the ground that SPE case was pending against the applicant. From the impugned order dated 16.10.2017 it is revealed that the applicant being a Sr. Scale Officer was coming within the zone of consideration for promotion in JAG. As per procedure, vigilance clearance was asked for from S.E. Railway Vigilance Department before holding DPC meeting for judging suitability of the eligible officer. The vigilance department remarked that one SPE case is pending against the applicant and sanction for prosecution has been issued by the Railway Board.

10. As per office memorandum dated 2.11.2012 issued by the Govt. of India. Ministry of Personnel, Public Grievances & Pensions, Govt. of India in view of ratio laid down by Hon'ble Apex Court decision in **Union of India -vs K.V.Jankiraman [AIR 1991 SC 2010]** issued instruction under what ground the vigilance clearance for promotion be denied -

- (i) Government servants under suspension;
- (ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and
- (iii) Government servants in respect of whom prosecution for a criminal charge is pending.

In K.V.Jankiraman (supra) Hon'ble Apex Court has held as hereunder :

"An employee has no right to promotion. He has only a right to be considered for promotion, the promotion to a post and more so, to a selection post, depends upon several circumstances, to qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An

employee found guilty of misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is therefore, no discrimination when in the matter of promotion, he is treated differently."

It was further held as hereunder :

"The promotion etc, cannot be withheld merely because some disciplinary/criminal proceeding are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge sheet has already been issued to the employee."

11. In **Delhi Development Authority -vs- JH.C.Khurana** [(1993) 3 SCC 196] Hon'ble Apex Court has held as hereunder :

"13. It will be seen that in Jankiraman also, emphasis is on the stage when a decision has been taken to initiate the disciplinary proceedings and it was further said that 'to deny the said benefit (of promotion), they must be at the relevant time pending at the stage when charge memo/charge sheet has already been issued to the employee. The word 'issued' used in this context in Jankiraman it is urged by learned counsel for the respondent, means service on the employee. We are unable to read Jankiraman in this manner. The context in which the word 'issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch of the charge sheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision. Obviously, the contrary view cannot be taken."

Most interesting, although relied upon by the respondents to support their case the ratio of the Apex Court in **DDA -vs- H.C.Khurana** (supra) further confirms the view that the point of time when the decision to initiate disciplinary proceedings is taken and translated into action by dispatch of the charge sheet will be the deciding factor as to when the decision has been taken to initiate the disciplinary proceedings.

This confirms the ratio that it is only when the decision to initiate disciplinary proceedings is translated into action by dispatch of charge sheet can it be said that the disciplinary proceeding has been initiated against a public service.

In **Harsh Kr. Sharma IFS -vs- State of Punjab & Anr.** [2017 (3) SLR 24

(SC) it is held as under :

"16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge memo in a disciplinary proceedings or a charge sheet

in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge memo/charge sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge memo/charge sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been experienced so far the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately."

12. The office memorandum dated 23.1.2014 issued by Ministry of Personnel, Public Grievances & Pensions (DOPT) speaks as hereunder :

"For the purpose of vigilance clearance for Review DPC, instructions exist in OM No. 22011/2/99-Estt(A) dated 21.11.2002 that review DPC will take into consideration the circumstances obtaining at the time of original DPC and any subsequent situation arising thereafter will not stand in the way of vigilance clearance for review DPC. However, before the officer is actually promoted it needs to be ensured that he/she is clear from vigilance angle and the provision of para 7 of OM No. 22011/4/91-Estt(A) dated 14.9.1992 are not attracted."

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3. The matter has been examined in consultation with the Department of Legal Affairs and it is further clarified that, in the case of a review DPC, where a junior has been promoted on the recommendations of the original DPC, the official would be considered for promotion if, he/she is clear from vigilance angle on the date of promotion of the junior, even if the provisions of para 21 of DOPT OM dated 14.9.92 get attracted on the date the actual promotion is considered, as provided in DOPT-OM No. 22011/2/99-Estt (A) dated 21.11.2002."

13. Admitted fact that appears from the speaking order issued by the respondent authorities is that DPC meeting was held on 15.12.2016 for promotion to the post of JAG and one major penalty charge sheet was issued to the applicant on 29.6.2017 and handed over to him on 5.7.2017. Thus it is abundantly clear that during the DPC meeting for promotion to the post of JAG held on 15.12.2016 the applicant was neither placed under suspension, nor was a charge sheet issued to him nor any criminal case was pending against him. The sealed cover will hence not apply to the applicant in this case on

15.12.2016 as far as the major penalty charge sheet was issued on 29.6.2017 after long six months.

14. By taking into consideration the entire conspectus of the case and as per law laid down in K.V.Jankiraman (supra) as well as the office memorandum dated 14.9.1992 and 23.1.2014 issued by DOPT, we are of the view that the department ought not to have kept the matter of the applicant for promotion to the post of JAG under sealed cover in view of the discussions made in the foregoing paragraphs.

15. Hence we have no hesitation to set aside the speaking order dated 16.10.2017 and direct the respondent authorities to open the sealed cover and give promotion to the applicant to the post of JAG from the date his junior got the promotion, if he is found suitable by the committee of the DPC.

16. The OA stands allowed. No order as to costs.

(DR. NANDITA CHATTERJEE)
ADMINISTRATIVE MEMBER

(MANJULA DAS)
JUDICIAL MEMBER

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