

CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH

OA No.290/00267/2012

Pronounced on : 05.08.2019
(Reserved on : 22.07.2019

CORAM: HON'BLE SMT. HINA P. SHAH, MEMBER (J)
HON'BLE SMT. ARCHANA NIGAM, MEMBER (A)

Rafiq Beg son of Shri Hasan Beg, aged 54 years, CMD in the office of Garrison Engineer Air Force, MES, Suratgarh, District Sri Ganganagar, r/o Ward No.22, Near Dargah, Suratgarh, District Sri Ganganagar.

...APPLICANT

BY ADVOCATE : Mr. Vijay Mehta

VERSUS

1. Union of India through the Secretary to the Government, Ministry of Defence, Raksha Bhawan, New Delhi.
2. Commander Works Engineer, MES, (Air Force), Bikaner.

RESPONDENTS

BY ADVOCATE: Mr. B.L. Bishnoi for R1 & R2

ORDER

Hon'ble Smt. Archana Nigam, Member (A):-

1. The present Original Application (O.A.) has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985, wherein the applicant is seeking the following reliefs:

"The applicant prays that order Annexure A1 may kindly be quashed and the respondents may kindly be directed to grant promotions to the applicant on the posts of CMD-II and CMD-I from 26.01.1999 to 26.01.2005 respectively with all consequential benefits including due salary. They may further be directed to grant Special Grade from 26.01.2008 to the applicant. The applicant also prays that

consequently the respondents may kindly be directed to assign due seniority to the applicant on the said promoted posts. Interest at the rate of 12% on due amount may also be granted to the applicant. Any other order, as deemed fit, giving relief to the applicant may also be passed. Costs may also be awarded to the applicant."

2. This OA has been made against the order No.C/10228/RB/117/E1C, dated 07.05.2012 passed by respondent no.2.

3. The brief facts of the present case as narrated by the applicant are that the applicant was appointed as Chowkidar on 19.01.1978 in the office of Garrison Engineer, Air Force, Suratgarh. On re-clarification he was appointed as MPA on 21.01.1984 in the same pay scale. Thereafter, he was appointed as MT Driver Grade-II vide order dated 27.01.1990 (Annexure A3). The respondents introduced Promotional Scheme for Civilian Motor Drivers (CMD), vide order dated 05.12.1996. The applicant appeared in the trade test for MT Driver Grade-I and was declared successful vide PTO dated 26.10.1998. One Som Nath, who also appeared in the trade test was declared fail vide PTO dated 26.10.1998. The applicant's name was mentioned at Sr.No.5 while that of Som Nath appeared at Sr.No.9 vide PTO dated 26.10.1998 (Annexure A5). Thereafter, the respondents again clarified that those who have passed trade test for the post of MTD Gr-I are not required to pass trade test for promotion to CMD Gr-II vide order dated 25.07.2003 (Annexure A6). The applicant was thereafter promoted to the post of CMD-I w.e.f. 10.10.2007 in the pay scale of Rs.4500-7000 vide order dated 17.10.2007 (Annexure A7).

4. It is further stated that once again Som Nath had failed in trade test vide order (Annexure A5) while the applicant has passed the trade test. Thus, a person who failed has been granted promotion superseding the applicant who had passed trade test. Shri Som Nath has since retired long back and therefore he is not being impleaded respondent. It is obligatory

for the respondents to promote the applicant after passing the trade test since the sole object of conducting trade test was to enable the applicant and candidates who had passed trade test to grant promotion. The conducting of trade test was required to be brought to its logical end by granting promotion to the applicant. The Tribunal vide its order dated 05.09.2011 while observing that whether or not the applicant ought to have been given priority above Som Nath could be decided by the respondents. This Tribunal while allowing the OA allowed the applicant to file a representation. The respondents were directed to decide the representation within a period of six months. It was also observed in the order that the respondents have submitted that they have to fill up appropriate number of people in accordance with Annexure A10 dated 24.03.1999. Annexure A10 in this OA, the number of posts of CMD-II in Western Command has been mentioned as 319, the respondents had to fill in these 319 posts vide order dated 05.09.2011 (Annexure A12). The applicant has submitted a representation on 01.10.2011 (Annexure A13). The respondent no.2 vide his order dated 07.05.2012 (Annexure A1) rejected the representation of the applicant. A perusal of order Annexure A1 shall reveal that the same has been passed on the basis of totally incorrect facts and grounds contrary to the observations made in order Annexure A12 passed by this Tribunal. Hence this OA.

5. In the written statement filed on behalf of the respondents, wherein it has been stated that promotion scheme only lays down the criteria for eligibility and entitlement for promotion. But promotions can always be made subject to availability of post and satisfaction of criteria like seniority etc. The placement in new scales and promotions are to be made to the extent of availability of vacancies in that grade subject to incumbent being found fit by DPC on the basis of seniority-cum-fitness and passing of trade test and not that promotion/promotions were required to be given on

completion of specified regular service only, prescribed for eligibility in the scheme as stated by the applicant in the OA. It is also stated that the applicant appeared in the trade test of MTD-I and passed the same, whereas Somnath appeared but failed during that year. However, the PTO is mere as publication of important events which occurs, during service of an employee by the department. The seniority of a person in a grade is determined by only the seniority list of all the individuals in a particular grade. So applicant's referring that name of Somnath appears at Sr.No.9 i.e. below him in the PTO does not make Somnath junior to the applicant. Somnath is five years senior to the applicant in the grade MTD-II. The errors only which were fulfilling the condition as laid down in para 5 (b) of letter dated 25.07.2003 were not required to pass the trade test of CMD-II again. The eligibility criterion an individual cannot be promoted because promotions are made as per availability of number of vacancies, subject to individual's being found fit by the Departmental Promotion Committee (DPC) on the basis of seniority-cum-fitness. The applicant though eligible but could not be promoted earlier on 26.12.2005 due to non-availability of vacancies and being low seniority and correctly promoted as CMD-II on 26.12.2005.

6. It is further stated that promotions are being made to the extent of availability of number of vacancies. The applicant passed the trade test of CMD-I on 18.12.2006 and became eligible for considerations during the year 2007-2008 only and rightly was considered for and promoted as CMD-I w.e.f. 10.10.2007. There were 319 posts of CMD-II as per order dated 24.03.1999 which was based on sanction received vide E-in-C's Branch letter dated 03.08.1998, but the E-in-C's letter dated 03.08.1998 was superseded vide letter dated 05.08.1998 whereby it was informed that the actual number of available vacancies are 178 and not 319. In compliance of the order dated 05.09.2011 passed by this Tribunal a

speaking order dated 07.05.2012 has been passed by respondent no.2 wherein change in number of vacancies has also been clarified to the applicant. It is also submitted that Som Nath, CMD passed the trade test of MTD-I (now CMD-II) on 28.05.2003 and trade test for CMD-I on 18.12.2006 and accordingly promoted as CMD-II on 27.10.2004 and CMD-I on 10.10.2007. It is wrong to say that simply on passing for trade test an individual becomes entitled for promotion is incorrect. Promotions are made from eligible candidates to the extent vacancies available and subject to individual being found fit by the DPC on the basis of seniority-cum-fitness and passing of trade test. In compliance of the order of this Tribunal vide order dated 05.09.2011 a speaking order has already been issued to the applicant by respondent no.2.

7. In the rejoinder filed on behalf of the applicant wherein it has been stated that the applicant ought to have been promoted to CMD-II and CMD-I on 26.01.1999 and 26.01.2005 and thereafter to the special grade on 26.01.2008. The respondents have admitted that the applicant was due to be promoted as CMD-II and CMD-I in the years 1999 and 2005. The respondents have failed to submit the seniority position and related documents. Annexure A1 does not mention seniority as the reason for not granting the promotion from due dates. It has been clearly mentioned in Annexure A1 that the applicant was fulfilling the service criteria but was not considered due to non-availability of vacancies. The order dated 24.03.1999 (Annexure A10) has given figures of the available posts of CMD for all Commands including the Western Command. These figures have been mentioned with reference to order dated 17.07.1998. suffice it to say that the respondents are required to satisfy this Tribunal that from 1999 to 26.12.2005, all the 310 posts of CMD-II and upto 26.01.2005 all posts of CMD-I were duly filled in and there were no vacancies during this period. The respondents have utterly failed to show that there were no

vacancies were available by filing documentary evidence. The applicant submits that one Som Nath had failed in trade test held for CMD-I on 12.02.1998 while in the same trade test the applicant had passed. This shall be clear from the order dated 26.10.1998 wherein Shri Som Nath has been shown as failed in the trade test. However, respondents have promoted Shri Som Nath on the post of CMD-I w.e.f. 18.12.2006 though the applicant who had cleared trade test vide order dated 26.10.1998.

8. It is further stated that the applicant appeared in trade test and passed the same as and when he was called to sit in the trade test. It is the duty of the respondents to arrange trade test in time. Failure to arrange trade test in time cannot deprive the applicant from promotion. It is denied that the applicant is not entitled to be promoted as CMD-I w.e.f. 26.01.2005 and CMD (SG) w.e.f. 26.01.2008. It is also denied that 319 sanctioned vide 03.08.1998 were superseded vide order dated 05.08.1998. The respondents have a heavy burden to discharge to explain as to why the posts superseded vide order dated 05.08.1998 were circulated vide order dated 24.03.1999. It has clearly been mentioned in order Annexure A10 dated 24.03.1999 that the revised structure of CMD posts as mentioned in this order is to be strictly implemented. The revised posts of CMD Gr-II have been mentioned as 319. The respondents have failed to explain as to why they submitted before this Tribunal on 05.09.2011 that there were 319 sanctioned posts. The respondents cannot be permitted to take U turn and say that 319 posts did not exist on 24.03.1999, 05.09.2011. Therefore, the present applicant in the Original Application prays that the reliefs prayed by him may be granted and the OA be allowed with exemplary costs.

9. Heard Shri Vijay Mehta, learned counsel for the applicant and Shri B.L. Bishnoi, learned counsel for respondents no.1 & 2 and perused the material available on record.

10. The learned counsel for the applicant Shri Vijay Mehta drew our attention to Para 4 of Annexure A1 wherein it has been clearly mentioned in the Headquarters Commander Works Engineer letter dated 07.05.2012 that:

"4. There were 319 post of CMD Gde-II as per order 24 Mar 1999 which was based on sanction recd vide E-in-C's Branch letter No.A/2001/1/E1C (V) dated 03.08.1998 but the E-in-C's Branch letter was superceded vide its letter No.A/20001/1/E1C (V) dt 05 Aug 98 (copy enclosed). Hence, correct No of post for CMD-II under CE WC were 178 instead of 319."

11. It is this which has been challenged by the learned counsel for the applicant who has highlighted that in the earlier OA No.61/2009 as the submission had been made by the counsel for the respondents that the total number of sanctioned posts is 319 in the Western Command as recorded in the order dated 05.09.2011. The relevant paragraph is as below:-

"2. The applicant would submit that he was not granted equality under Article 14 of the Constitution of India even though by passing the trade test before Shri Somnath, and while the said Somnath was promoted, he was not promoted, and that this fact could be clear from the order dated 26.10.1998 (Annexure A11). The respondents would submit that on the basis of vacancies under roster, they have to fill-up appropriate number of people in accordance with Annexure A10 dated 24.03.1999, wherein altogether 4639 posts of Civilian Motor Drivers for CEs command under the revised three grade structure for MT Drivers were there, these vacancies are inclusive of both basic and non basis held by the CEs command, and vide MOD letter No.F.6(1)/91/358/92/D(W-II) dated 28 Feb., 1992, the vacancies under the establishment are fixed, and cannot be exceeding beyond the ceiling of 2864. Therefore, the total number of sanctioned posts shall be, according to the respondents, is 319 in the Western Command."

12. The other issue raised by the applicant is that the applicant has not been granted promotion despite having passed the trade test 1998. As

recorded in the order dated 26.10.1998 placed at Annexure A5 wherein it has been stated that:

5.	MES-312960 Shri Rafiq Beg	MT Dvr Gde-II	11.2.98	Appeared in the Trade Test of MT Driver Gde-I held on 11.2.98 and 13.2.98 and declared "PASS".
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13. To be able to come to decision on the above two grounds that has been raised for adjudication, it would be worthwhile to refer to the Full Bench Judgment of the Central Administrative Tribunal, Jodhpur Bench in OA No.02/2008 in the case of **Gopal Singh & Ors. Vs. UOI & Ors.**, decided on 27.03.2012. The judgment dated 27.03.2012 deliberates at great length on the matter regarding promotions of individuals by way of passing trade test. The relevant paragraph is hereby reproduced as under:-

"2. The genesis of the controversy was that through its letter No.11(1)/2002-D(Civil-I) dated 20th May, 2003, the Ministry of Defence, Government of India, had ordered a restructuring of the cadre of Artisans staff in Defence Civilian Establishments, in different formations, in modification of the recommendations of the Fifth Central Pay Commission. The Ministry had first accepted the recommendations of the Fifth Central Pay Commission, made in paragraphs 54.16 to 54.18 and para 54.29 of its report. Thereafter, the matter regarding restructuring of all the civilian cadres of Artisans staff in its different formations was considered by the Government of India for quite some time. After such consideration, through the order dated 20th May, 2003, ante dated modification giving effect to the modification w.e.f. 01.01.1996 was ordered in the relevant pay scales, and highly skilled artisans, which earlier were placed in two categories HS-I and HS-II, were ordered to be merged into a single cadre of a Highly Skilled (HS) with the higher pay scale of Rs.4000-6000. Para 3 (c) & (d) of the said order stated as follows:-

3 (c). The selection from Highly Skilled grade to the grade of the Master Craftsman shall be 10% of Highly Skilled Cadre (i.e. 10% of 35% of the total) and the placement in this grade shall be w.e.f.01.01.1996 and upto the date of the issue of these orders.

(d)The placement of the individuals in the posts resulting from the restructuring and rate revision,

shall be made w.e.f. 01.01.1996, in relaxation of the conditions, if any, i.e. trade test etc., as one time measures."

14. The modality of placement in such cases also came to be examined by the Central Administrative Tribunal, Ernakulam Bench in OA No.882/2003 in the case of **C.K. Kuriakose Vs. UOI & Ors.**. That Bench in their judgment stated as follows:-

"8. In the light of the forgoing discussion, we hold that while the whole of Annexure-A3 may not be bad in law, its application by the respondents, particularly para 3 (d) in the absence of adequate guidelines from the Ministry could lead to disparate readings producing highly dissimilar and discordant effects. We are also of the view that it would be wrong to deprive an employee of the benefit of seniority enjoyed by virtue of regular promotion, by an act of retrospective revision of cadre-structure entailing forfeiture of promotional seniority already availed. Accordingly, we set aside Para 3 (d) of MOD letter No.11(1)2002/D(Civil) dated 20.05.2003 extracted in Annexure A3 and direct the respondents to issue necessary procedural guidelines for uniform compliance by Defence Establishments within a period of three months from the date of issue of these orders and consider the applicants representation denovo in that light for appropriate speaking orders to be issued within a month of circulation of the guidelines. No order as to costs."

15. In another case of **Samander Singh Vs. Union of India & Ors.** in OA No.275/2009, had also been decided by a Division Bench on 30.03.2011, and it had been ordered in Para 6 & 7 that order as follows:-

"6. It is hereby declared that the applicant is entitled to be considered for promotion in the light of his passing the trade test in 2002 and review DPC is to be held to consider his fitment into it and if he is considered to be fit then he would be considered as promoted to H.S.-I as on the appropriate date and thus obtaining ante-date promotion and in accordance with letter dated 27.03.2006 he shall also be considered as senior to those who were subsequently promotion in relaxation of the conditions.

7. Respondents Nos.6 and 7 have not filed their counter affidavit even though served with notice. But if it becomes necessary that they must be reverted then they may be allowed an opportunity of being heard. But whether they are reverted or not it shall not mar applicants chance of promotion as Master Craftsman as if senior to Respondents 6 & 7."

16. The Hon'ble Rajasthan High Court in the same case of **Union of India & Ors. Vs. Samander Singh & Ors.** in D.B. Civil Writ Petition No.8877/2011, wherein it has been stated as follows:-

".....The respondent No.1, 2 and 3 are working in the defence services of the Government of India (Defence Ministry) and are working with Garrison Engineer Air Force, Jodhpur. The respondent No.1 filed an Original Application out of which this writ petition arises against the writ petitioner (employer) and respondent No.2 and 3 claiming for his case to be considered for the promotion to a next grade as what is called "H.S.-I" in their service cadre. According to him (respondent No.1) he having successfully passed the eligibility test known as "trade test" way-back in 2002, which was for becoming an eligible candidate for the next promotion, but despite he clearing the examination, his case is not being considered for promotion during all these years for the reason, best known to the writ petitioner (non-applicant before the Tribunal) and hence, the Original Application was filed before the Tribunal for a direction to consider his case qua respondent No.2 and 3.

The writ petitioners contested the case. Their main case was based upon one circular/letter issued on 27.03.2006, in which it was mentioned, as to how the cases of the eligible candidates, who appeared in the trade examination or who were not considered for their respective promotion after the restructuring of the several posts.

The Tribunal went into this issue and explaining the real import of the circular/letter referred above, gave following directions contained in para 6 & 7, which have been reproduced hereinabove.

It is this order, which is impugned in this writ petition by the employer.

Having heard the learned counsel for the parties and on perusal of the record of the case, we find no good ground to interfere in the impugned directions quoted supra, as in our opinion; they are in conformity with the scheme of the letter/circular referred supra.

It is not in dispute that respondent No.1 has successfully passed the trade test 2002. If that is so, then he is entitled to be considered for the promotion and this right of the respondent No.1 cannot be taken away due to making of any new policy, which resulted in introducing some changes in the cadre. If the sole objective for conducting the test was to enable the candidate to become eligible for consideration to promotion, then it has to be brought to its logical end within the framework of the scheme, which governs the cases of promotion of the employees so far as such eligible candidates are concerned. It is for this reason, we are of the view that directions given by the Tribunal cannot be faulted with, because it only directs the writ petitioner, being an employer to consider the case of the respondent No.1. Since the rights of the respondent No.2 and 3 are likely to be affected while considering the case of the respondent No.1 and hence, it may be necessary to

follow the principle of natural justice qua respondent No.2 and 3 before passing any final orders.

We are not impressed by the submission of the learned counsel for the writ petitioner when he contended that due to restructuring of the parties it might not be possible for the writ petitioner to promote the respondent No.1. To say the least, the submission has no merit. The so-called restructuring even if done by the writ petitioner, the same was not done with the consent of the respondent No.1 and secondly such restructuring cannot be considered as taken away of the right of any employee to consider his case for promotion if otherwise he is held eligible.

In the light of forgoing discussion, we do not find any merit in this writ petition, which fails and is accordingly dismissed."

17. As recorded in the judgment in the Full Bench judgment in the case of **Gopal Singh & Ors. Vs. UOI & Ors**, the operative portion of the judgment of the Hon'ble Rajasthan High Court is reproduced hereunder:-

"...If the sole objective for conducting the test was to enable the candidate to become eligible for consideration to promotion, then it has to be brought to its logical end within the framework of the scheme, which governs the cases of promotion of the employees so far as such eligible candidates are concerned."

18. This finding of the Hon'ble Rajasthan High Court is also in consonance with the finding of the Ernakulam Bench in para 8 of its judgment which is reproduced here again:-

"We are also of the view that it would be wrong to deprive an employee of the benefit of seniority enjoyed by virtue of regular promotion, by an act of retrospective revision of cadre-structure entailing forfeiture of promotional seniority already availed."

19. It is, therefore, clear that the law has laid down by the Ernakulam Bench of this Tribunal of 17.05.2005 which has since been upheld by the Hon'ble Rajasthan High Court on 06.01.2012 in the Division Bench Civil Writ Petition No.8877/2011 Union of India & Ors. Vs. Samander Singh & Ors., is good law.

20. In view of the above, we are of the opinion that the prayer of the applicant for granting the promotions to the applicant on the posts of CMD-II and CMD-I from 26.01.1999 to 26.01.2005 respectively. The reliefs sought for by the applicant is maintainable. More so, since it would

be improper for the department to change their stand of available posts from 319 to 178 having been once submitted in the Tribunal that the correct number of vacancies was 319. Accordingly, the order dated 07.05.2012 (Annexure A1) is quashed and set aside and the respondents are directed to grant promotions to the applicant on the posts of CMD-II and CMD-I from 26.01.1999 to 26.01.2005 respectively with all consequential benefits within a period of three months from the date of receipt of a certified copy of this order.

21. The OA is accordingly allowed. No order as to costs.

(ARCHANA NIGAM)
MEMBER (A)

(HINA P. SHAH)
MEMBER (J)

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