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**(2011) 10 DEL CK 0090**

**In the Delhi High Court**

**Case No : Writ Petition (C) No. 7300 of 2011**

Mirza Muzafer Beg

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision : 12-10-2011**

**Acts Referred:**

**Citation : (2011) 10 DEL CK 0090**

**Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J**

**Bench : Division Bench**

**Advocate : Javed Ahmed and Ms. Eram Khan, for the Appellant;**

**Final Decision : Dismissed**

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## **Judgement**

Anil Kumar, J.—The petitioner has challenged the order dated 3rd March, 2011, passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 2046/2005 titled as "Mirza Muzaffar Beg Vs. UOI through the General Manager Northern Railway & Ors." rejecting the plea of the petitioner to quash the upgradation order dated 11th August, 2004 upgrading the respondent Nos. 4 to 6 on the post of Master Craftsman and declining the plea of the petitioner to be upgraded to the said post and to place him at Sl. No. 26-A in the seniority list dated 8th October, 2003/18th October, 2003. The respondent Nos. 1 to 3, however, were directed to conduct an exercise to ascertain as to whether there has been creation of new posts in the cadre of Technicians to which the petitioner belongs, pursuant to the re-structuring, and if it had resulted in the creation of new posts, then to apply reservation, if it had not been applied already. The Tribunal by impugned order dated 3rd March, 2011, gave the following direction:-

(b) As far as reservation is concerned, the respondents shall conduct an exercise to ascertain as to whether there has been creation of new posts in the cadre of Technicians (to which the applicant belongs) and if so, apply reservation and if not reservation shall not be applied. In case reservation has not to be applied, then, against the general category the filling up of the vacancies would be as per

the existing practice (i.e. general category persons or those of the reserved category who had not enjoyed the benefits of such reservation in the past, either at the level of induction or promotion, notwithstanding the fact that such reserved candidates would be fairly senior.)

2. Relevant facts to comprehend the disputes for adjudication of the present petition are that the petitioner had been appointed as Apprentice Fitter on 22nd May, 1982. Thereafter, the petitioner was promoted as Fitter (Grade-III) in November, 1983 and as Fitter (Grade-II) on 1st March, 1993. The petitioner was also further promoted to the post of Fitter (Grade-I) on 20th March, 1995 in the pay scale of Rs. 4,500-7000/-.Whereas, respondent Nos. 4 to 6 were appointed as Khalasis on 12th June, 1982, 29th May, 1982 and 9th June, 1982 respectively. They were also promoted as Fitter (Grade-III) on 15th November, 1989, 15th November, 1989 and 27th February, 1990 respectively.

3. However, the respondent Nos. 4 to 6 were promoted as Fitter (Grade-II) and Fitter (Grade-I) on 22nd July, 1992 and 27th December, 1994 respectively, prior to promotion of the petitioner to the said post

4. The petitioner contended that he was promoted as Fitter (Grade-III) after qualifying the trade test. According to the petitioner, he was in the panel of Fitter (Grade-III), which was prepared in accordance with merit and seniority, and that his name was at Sl. No. 3 in the panel list of Fitter (Grade-III) dated 7th June, 1993. The petitioner asserted that with regard to the employees working in the Group-"C" post in the Electrical Multiple Unit, Car Shed, Ghaziabad, their seniority was not determined and published for a long period in spite of repeated requests made to respondent No.3. After a long time, the seniority was published for the first time on 16th October, 2002 and objections were invited in order to finalize the fixation of seniority. Disgruntled by the said seniority list certain staff members approached the Tribunal by way of OA No. 2618/1999 for quashing the same and directing the respondent Nos. 1 to 3 to determine the seniority of the Fitter (Grade-I) as per the relevant rules and publish the seniority list. Thereafter, another seniority list was made which was published on 8th October, 2003, pursuant to various litigations. According to the petitioner, the seniority list of 8th October, 2003/18th October, 2003 had not been prepared in terms of the provisions contained u/s 302/303 of the IREM and consequently, the petitioner was shown junior to respondent Nos. 4 to 6 entailing the filing of a detailed representation on 25th October, 2004. The petitioner had also asserted that he had been representing even prior to that repeatedly, for correctly determining his seniority. However, no action was taken by the concerned authorities pursuant to the representations of the petitioner.

5. The petitioner also contended that subsequently an upgradation order dated 11th August, 2004 was issued in which respondent Nos. 4 to 6 were upgraded to the post of Master Craftsman providing them with the benefit of reservation under the re-structuring scheme dated 15th September, 2004 with effect from 1st November, 2003. The petitioner submitted a representation dated 15th

January, 2005 pointing out the illegalities and anomalies in the same. According to the petitioner, the respondent Nos. 4 to 6 were upgraded to the post of Master Craftsman in the pay scale of Rs. 5000-8000/- in violation of the clarification letter dated 25th April, 2005 issued by respondent No. 2 to respondent No. 1 providing the benefit of reservation to respondent Nos. 4 to 6 despite specific instructions of the DOPT dated 25th October, 2004 which categorically stipulated not to apply the policy of reservation on the upgraded post arising out of the restructuring.

6. The petitioner, therefore, contended that since the restructuring resulted in upgrading the post, the order dated 11th August, 2004, was liable to be struck down. In the circumstances, the petitioner filed an original application bearing O.A. No. 2046/2005 before the Central Administrative Tribunal praying, inter-alia, for the quashing of the upgradation order dated 11th August, 2004, and the seniority list dated 8th October, 2003/18th October, 2003 on the ground that the up-gradation order dated 11th August, 2004 and the above noted seniority list were contrary to the law settled by the Supreme Court. The petitioner also sought a direction to the respondent Nos. 1 to 3 to consider the up gradation of the petitioner to the post of Master Craftsman in the pay scale of Rs. 5000-8000/- and to correctly determine his seniority and place his name at Sl. No. 26-A in the seniority list dated 8th October, 2003/18th October, 2003, thereby placing him above the other respondents.

7. The application was contested by respondent Nos.1 to 3 who filed the reply dated 21st April, 2006 of Sh.J.B.Singh contending, inter-alia, that the rule for up-gradation after restructuring continues to apply to Railway employees till date since the Hon"ble Supreme Court had granted the stay against the order of the Full Bench of Chandigarh High Court regarding para 14 of the reservation policy in the upgradation issued by the Railway Board in November, 2003. The Respondent Nos.1 to 3 pointed out that the matter at present is pending before the Supreme Court for final disposal after admitting the SLP against the judgment dated 3rd March, 2005 passed in CWP No. 3182/2005 of the High Court of Punjab and Haryana at Chandigarh on 18th July, 2005, alongwith the SLP No. 13125-13137/25 and the SLP Civil No.13209/205. Therefore, it was contended that since the matter is subjudice, the original application of the petitioner ought to be kept pending till the orders are passed by the Supreme Court. The said respondents contended that the pleas raised by the petitioner regarding the continuous benefit of reservation on account of up-gradation is not correct. Regarding the petitioner, it was asserted that he was appointed as Apprentice Fitter on 22nd May, 1982 and was regularized on 22nd February, 1983. On account of several punishments awarded under D&AR, the petitioner was not promoted for a long period and was ultimately promoted to the post of Technician Grade-II on 1st March, 1995 and subsequently to the post of Technician Grade-I in the pay scale of Rs. 4500-7000 on 20th March, 1995. Regarding respondent Nos.4 to 6, it was averred that on 15th November, 1989 and 27th February, 1990 due to short falls of SC/ST in the Technician Grade-III,

they were promoted to Technician Grade-III on the said dates. Thereafter, respondent Nos.4 to 6 were promoted to the post of Technician Grade-II on 22nd July, 1992 and to the post of Technician Grade-I on 27th April, 1992 and thus, since they are senior to the petitioner, consequently, they are shown senior to the petitioner in the seniority list and hence, the petitioner cannot make a grievance to it.

8. Respondent Nos.1 to 3 also emphasized that by letter No.232-VI/EMU/9/Part-II dated 29th November, 2004, the petitioner was directed to represent against the seniority if there was any objection, however, no objection was received from the petitioner. Reliance was also placed by respondent Nos.1 to 3 on the case of K. Manickaraj Vs. Union of India (UOI),

9. The Tribunal, after considering the pleas and contentions of the parties, relied on the order passed in the W.P.(C) No.3217/2007 where the High Court had remanded the matter to the Tribunal on account of the decision rendered by the Supreme Court in case of Union of India (UOI) Vs. Pushpa Rani and Others, for fresh consideration on merit, as it was observed that in view of the judgment of Pushpa Rani (supra) the judgment of the Tribunal stood over-ruled, and therefore it was directed that the observations contained therein may be considered by the Tribunal while it passed an order on merits. The Tribunal, therefore, considered the question- a) Whether the seniority afforded to the petitioner is wrong as has been alleged by him and, b) Whether the reservation applied in the upgraded post consequent upon restructuring, is illegal as has been contended by the petitioner.

10. Regarding the seniority list being not prepared in terms of IREM 302/303 and the decisions cited by the petitioner, the Tribunal held that the said Rules 302/303 of IREM pertains to seniority at the initial stage of recruitment and that the petitioner has not challenged his seniority at the stage of recruitment i.e. of Khalassi, and even if the next post of Technician Grade-III is taken into consideration, the same would be irrelevant since the seniority which is challenged in the original application is regarding the post of Technician Grade-I and therefore, the Rules of 302/303 IREM do not apply and support the pleas and contentions of the petitioner. Referring to Rule 309 read with Rule 306 of IREM, it has been held by the Tribunal that the petitioner's date of promotion to the post of Technician Grade-I which is 20th March, 1995 is latter to the date of promotion of the respondent Nos.4 to 6 to the post of Technician Grade-I and therefore the said Rules have not been violated. Regarding the seniority, at the level of Technician Grade-II, the Tribunal held that the same had not been challenged by the petitioner at the relevant stage and so it could not be agitated by him now. The Tribunal in paras Nos.11 to 14 had held as under:-

11. A perusal of the above would go to show that the seniority which the above rules talks of is that of "initial recruitment". In the case of the applicant, the initial recruitment is of Khalassi and even if the next post is taken, it is Technician Grade III, whereas, the impugned seniority is one of Technician Gr. I,

two more posts higher than that of Technician Gr. III. As such, the said rules do not apply.

12. Of course, a separate Rule 309 read with 306 of IREM does exist in respect of seniority on promotion to the higher grade. The said Rules read as under:-

306. Candidates selected for appointment at an earlier selection shall be senior to those selected later irrespective of the dates of posting except in the case by paragraph 305 above.

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309. SENIORITY ON PROMOTION. -Paragraph 306 above applies equally to seniority in promotion vacancies in one and the same category due allowance being made for delay, if any, in joining the new posts in the exigencies of service.

13. If the above rule is applied to the case of the applicant, the applicant's date of promotion to the post of Technician Gr. I is 20-03-1995, while the other two i.e. private respondents' promotion is anterior to that of the applicant. The challenge of seniority in Grade I is on the ground that the applicant's initial date of joining in the post of Khallasi or for that matter as Technician Gr. III is anterior to those of the private respondents and it is on account of "jack up" at every stage of promotion that the private respondents had stolen a march over the applicant, which is illegal in view of the decision of the Apex Court in *Ajit Singh and Others Vs. The State of Punjab and Others*, The promotion of private respondents to the level of grade II is guided by the then prevailing rule position and we do not find any illegality in the seniority afforded to the private respondents ahead of the applicant. Apart from the same, the applicant had not challenged the seniority of Grade II at the relevant point of time.

14. Coming to the seniority list of Grade I Technician, the reason why the private respondents were promoted ahead of the applicant is not far from comprehension. They are senior in Grade II and further, the applicant was undergoing currency of penalty of withholding of increments. It is to be noted here that promotion granted at the level of Technician Gr. II was not on the basis of any restructuring but in the normal course. This had occurred in 1992, when the applicant was not promoted to the said grade, which he got only in 1995 (consequent upon the applicant undergoing currency of penalty at the material point of time). Such a deferment of promotion till the expiry of the currency of penalty has been held valid in the case of *Union of India and others Vs. K. Krishnan*, wherein the Apex court has held, the denial of promotion during the currency of the penalty is merely a consequential result thereof. The view that a government servant for the reason that he is suffering a penalty or a disciplinary proceeding cannot at the same time be promoted to a higher cadre is a logical one (This has also been referred to in a later judgment vide *Union of India v. B. Radhakrishna*, (1997) 11 SCC 698 Thus, challenge to the seniority in the post of Technician Gr. I is not legally sustainable.

11. Regarding the reservation, the Tribunal considered the Full Bench decision in O.A. No. 2211/2008 decided on 2nd December, 2010 and the decision rendered by the Supreme Court in the case of Pushpa Rani (supra), in detail, and held that reservation shall be available since the Restructuring Scheme of 2003 provided for certain newly created posts. However, it was also observed that the reservation shall be applicable only in respect of those cadres where there has been an increase in the complement and not in case of entire restructuring. The Tribunal categorically held by relying on the judgment of the Supreme Court in Union of India Vs.V.K.Sirothia (Civil Appeal No.3622/95) (1999) SCC L&S 938 that where there is no increase in the complement of a cadre then reservation would not be applicable, therefore, the Tribunal also observed that the ratio of Sirothia (supra) had not been overruled by the Supreme Court in the case of Pushpa Rani (supra). The Tribunal thus, held that for promotion to the post of MCM, the seniority position is based on the seniority in Grade-I and reservation if any in the restructuring and therefore, the same could not be impugned by the petitioner and regarding reservation the Tribunal directed respondent Nos.1 to 3 to conduct an exercise to ascertain as to whether there has been creation of any new posts in the cadre of Technician, in order to decide whether or not the reservation is to apply in accordance with the decision of the Supreme Court in the case of Pushpa Rani (supra).

12. The decision of the Tribunal is challenged by the petitioner contending, inter-alia, that it had been admitted by the respondents in the letter dated 25th April, 2005 that the seniority list prepared was not conclusive and advice was received by the Divisional Railway Manager (Northern) Railways from the General Manager (Northern) Railways regarding the finalization of the seniority list. The petitioner contended that the Tribunal has overlooked certain material facts and that the order has been passed without application of mind and in violation of the ratio of the judgment of the Supreme Court in the case of Pushpa Rani (supra). Referring to the case of Pushpa Rani (supra), it has been contended on behalf of the petitioner that if during the course of the restructuring some additional posts are created then promotion can be made to these additional posts, however, respondent Nos.1 to 3 have failed to disclose that as a result of restructuring additional posts had been created. According to the petitioner, no record of creation of additional posts during restructuring had been produced and the order has been passed illegally by the Tribunal. The petitioner also contended that respondent Nos.1 to 3 had admitted that respondent Nos.4 to 6 had been promoted to the post of Fitter Grade-III, Fitter Grade-II and Fitter Grade-I, as a result of reservation. Thus, these respondents Nos. 4 to 6 had got their promotion accelerated through the benefit of reservation, which is why, respondent Nos.4 to 6 have been put above the petitioner in the seniority list. The petitioner also contended that he had filed the objections to the seniority list and that during the period 1992-2003, no seniority list was ever issued by respondent Nos.1 to 3 inviting objections from the employees. In the circumstances, the petitioner has prayed for quashing the order dated 3rd March,

2011 passed by the Tribunal in OA No.2046 of 2005 and also sought directions to respondent Nos.1 to 3 to fix the seniority of the petitioner in the list of Fitter Grade-I at the correct position.

13. This Court has heard the learned counsel for the petitioner at length and has also perused the copies of the record of the Tribunal produced along with the writ petition. The learned counsel for the petitioner has not disputed that the punishment was awarded to the petitioner in the departmental proceedings and that during the pendency of the punishment, the petitioner was not promoted to the post of Technician Grade-II. On account of the promotion being delayed to the post of Technician Grade-II, the petitioner was promoted on 1st March, 1993 whereas respondent Nos.4 to 6 were promoted to Grade-II prior to the petitioner. The learned counsel for the petitioner has also not been able to give any satisfactory reply as to why the petitioner, though promoted to Technician Grade-II later in comparison with respondent Nos.4 to 6, still has to be treated as senior in Technician Grade-II to that of respondent Nos.4 to 6. Perusal of Rules 302/303 of IREM also shows unequivocally that they pertain to initial recruitment and on the basis of the said rule, the seniority of the petitioner and respondent Nos.4 to 6 cannot be changed, nor can the petitioner be held to be senior to respondent Nos.4 to 6. In any case, the petitioner was promoted to Technician Grade-II in 1993 whereas respondent Nos.4 to 6 had been promoted prior to him and thereafter seniority list was issued, which however, was not challenged by the petitioner. No cogent reason has been given by learned counsel for not challenging the seniority of the petitioner vis-a-vis respondent Nos.4 to 6 on the post of Technician Grade-II.

14. If the petitioner was junior to respondent Nos.4 to 6 on the post of Technician Grade-II, and later on, the petitioner was promoted to Grade-I after respondent Nos.4 to 6 had already been promoted to Grade-I, the seniority in Grade-I also cannot be challenged by the petitioner on the ground that he was senior to respondent Nos.4 to 6 at the time of initial appointment as Khalassi or on the basis of the appointment of petitioner in Technician Grade-III prior to that of the said respondents. Respondent Nos.1 to 3 had categorically contended in reply to the averments made in the Original Application before the Tribunal that the petitioner was issued letter No.232-VI/EMU/9/Part-II dated 29th November, 2004 directing the petitioner to make representation, if any, regarding the objection against the seniority, but nothing was received from the petitioner. The said plea of respondent Nos.1 to 3 was, though denied, however, no copy of the representation has been produced by the petitioner to show that any such representation was made by the petitioner pursuant to letter dated 29th November, 2004. In any case, if the petitioner was junior to respondent Nos.4 to 6 on the post of Technician Grade-I and Grade-II, he cannot claim seniority over respondent Nos.4 to 6, nor can the seniority list dated 8th October, 2003/18th October, 2003 be set aside, nor is the petitioner entitled to be placed over respondent Nos.4 to 6 in the seniority list and to that extent the order of the Tribunal cannot be faulted. The petitioner has failed to show any illegality or

irregularity in the order of the Tribunal holding that the petitioner cannot claim seniority over respondent Nos.4 to 6 as he was junior to respondent Nos.4 to 6 in Grade-II and Grade-I.

15. The petitioner had become junior to respondent Nos.4 to 6 as during the pendency of the penalty he could not be promoted. In *Union of India v. B. Radhakrishna*, (1997) 11 SCC 698 the Supreme Court had held that a Government servant for the reason that he is suffering a penalty cannot at the same time be promoted to a higher cadre, is a logical one and no exception is to be made to that rule unless provided specifically to the contrary under any rule or regulation.

16. Regarding the plea of restructuring, that on restructuring additional posts had been created and reservation would be applicable and that the respondent Nos.1 to 3 have failed to disclose that as a result of restructuring, additional posts had been created and no record of creation of additional posts during the restructuring had been produced by respondent Nos.1 to 3 and its consequences thereof, it is apparent that the Tribunal had directed the respondents to conduct an exercise to ascertain as to whether there has been creation of new posts in the cadre of Technical (to which the petitioner belongs) and in case the posts have been created then to apply reservation. In *Pushpa Rani (supra)*, the Supreme Court has held that in legal parlance, up-gradation of post involved the transfer of post from lower to higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection, and consequently, on restructuring or such up-gradation no reservation would apply, however, if on account of restructuring additional posts become available which are required to be filled by promotion from amongst candidates who satisfy the conditions of eligibility and are adjudged suitably, there can be no rational justification to exclude applicability of reservation while effecting promotion. While dealing with the two policies of reservation dated 25th June, 1985 and 19th October, 2003, the Supreme Court had held as under:-

30. From what we have noted above, it is clear that the policies contained in Letters dated 25-6-1985 and 9-10-2003 are substantially dissimilar. The exercise of restructuring envisaged in the first policy was in the nature of upgradation of substantial number of posts in different cadres and the upgraded posts were to be filled simply by scrutinising the service records of the employees without holding any written and/or viva voce test and there was no merit-based selection. In contrast, the restructuring exercise envisaged in Letter dated 9-10-2003 resulted in creation of additional posts in some cadres with duties and responsibilities of greater importance and which could be filled by promotion from amongst the persons fulfilling the conditions of eligibility and satisfying the criteria of suitability and/or merit. Para 13 of Letter dated 9-10-2003 is, in itself, demonstrative of the difference between simple upgradation of posts in the cadre of Supervisors which are required to be filled without subjecting the incumbents of the posts to normal selection procedure whereas the additional posts

becoming available in other cadres are required to be filled by promotion.

31. In legal parlance, upgradation of a post involves the transfer of a post from the lower to the higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment - *D.P. Upadhyay v. N.R. Baroda House*<sup>12</sup>.

32. The word "promotion" means "advancement or preferment in honour, dignity, rank or grade". "Promotion" thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law the expression "promotion" has been understood in the wider sense and it has been held that "promotion can be either to a higher pay scale or to a higher post" - *State of Rajasthan v. Fateh Chand Soni*<sup>13</sup>.

33. Once it is recognised that the additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from amongst the employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude the applicability of the policy of reservation while effecting promotions, more so because it has not been shown that the procedure for making appointment by promotion against such additional posts is different than the one prescribed for normal promotion. In *Fateh Chand Soni case*<sup>13</sup> this Court interpreted the provisions contained in the Rajasthan Police Service Rules, 1954, which regulate appointment to the selection scale in the service and held that such appointment constitutes promotion. The Court then considered two earlier judgments in *Lalit Mohan Deb v. Union of India*<sup>14</sup> and *Union of India v. S.S. Ranade*<sup>15</sup> and declared that the High Court was in error in holding that appointment to the selection scale does not constitute promotion.

17. The Tribunal has also applied the ratio of the Supreme Court in the case of *Pushpa Rani (supra)* and has also held that *Pushpa Rani's* case does not upset the ratio of *Sirothia (supra)* and thus, has given the directions to the respondents to conduct an exercise to ascertain whether there has been creation of new posts in the cadre of Technician on restructuring or not. The learned counsel for the petitioner has not been able to raise any cogent ground which would show any illegality or irregularity in the directions given by the Tribunal in the facts and circumstances. In the circumstances, the order of the Tribunal cannot be faulted on any of the grounds raised by the petitioner.

18. In the totality of the facts and circumstances, there are no grounds to interfere with the order of the Tribunal dated 3rd March, 2011 impugned by the petitioner before this Court and the writ petition is, therefore, dismissed.