

\$~9.

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+

**Date of Decision: 13.07.2017**

% **W.P.(C) 11055/2016 & C.M. No.43151/2016**

THE UNION OF INDIA & ANR ..... Petitioners

Through: Mr. V.S.R. Krishna, Advocate.

versus

RAJEEV KISHORE BHATNAGAR ..... Respondent

Through: Respondent in person.

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**HON'BLE MS. JUSTICE REKHA PALLI**

**VIPIN SANGHI, J. (ORAL)**

1. The Union of India through the Railway Board, Ministry of Railways has preferred the present petition to assail the order dated 25.5.2016 passed by the Central Administrative Tribunal in O.A. No.4058/2015 filed by the respondent. The Tribunal, by the impugned order, has allowed the said Original Application and directed that the respondent be promoted notionally to the post of Additional Member (Electrical), that is, in the grade of HAG+ with effect from 20.11.2013, when the said post had fallen vacant. The respondent has been granted arrears as well as revision of his pensionary benefits without interest on arrears.

2. The respondent preferred the aforesaid Original Application on the

premise that he had joined the Indian Railway Service of Electrical Engineers in the year 1977. During the course of his employment, he earned several promotions from time to time. His grievance was that he had been denied promotion to the post of Additional Member (Electrical) in the Railway Board, which is in the High Administrative Grade (HAG) and above. He claimed that he was eligible for the said promotion - being the senior most amongst the eligible candidates.

3. Even prior to preferring the said Original Application, he had earlier preferred an Original Application with the same grievance, which was disposed of by vide order dated 4.8.2015 passed in O.A. No.4505/2014 directing that the representation of the respondent be considered. Consequently, the petitioner had passed a detailed reasoned order dated 21.9.2015, communicating the reasons for denying promotion to the respondent to the post of Additional Member (Electrical) in the Railway Board.

4. There is no dispute between the parties with regard to criteria applicable for promotion to the post of Additional Member (Electrical) in the Railway Board. In this respect, the Government of India, Ministry of Railways framed a Resolution dated 11.10.2000. The relevant extract from this Resolution reads as follows :-

*“(i) Posts of Additional Members in Railway Board, except the posts of Secretary, Railway Board, Additional Member (Planning) and Additional Member (Projects), are discipline specific posts as shown in the annexure. For discipline specific posts, officers of the relevant discipline in Grade Rs.22400-24500 should be considered in the order of their seniority in the grade. For general posts of*

*Secretary, Railway Board, Additional Member (Planning) and Additional Member (Projects) however, officers of various Group 'A' Railway services (except IRMS and RPF) working in Grade Rs.22400-24500 would be eligible for consideration as per their inter-se seniority position.*

*(ii) Only such of the officers who would be having at least one year residual service before superannuation on the date of the occurrence of the vacancy falling in their turn, would be eligible for consideration.*

*(iii) Overall performance record of the officer should be Very Good plus (+) and he should have earned at least two 'Outstanding' and three 'Very Good' ratings in his ACRs of last five years with fitness for Additional Member and also for General Manager equivalent post in his last ACR. Relevant experience gained by an officer in different assignments, particularly in challenging positions, his technical and professional exposure and his potential for shouldering still higher challenging responsibilities should be given due weightage. Also, officers of absolute and proven integrity with clean record should only be recommended if otherwise suitable for appointment against the posts of Additional Members.*

*(iv) **For appointment to the posts of Additional Member (Traffic Transportation), Additional Member (Mechanical Engineering), Additional Member (Civil Engineering), Additional Member (Electrical) and Additional Member (Signal),, in addition to above requirements, the officer concerned to be considered suitable for these posts should also be clear for General Manager (Open Line) in his last ACR, because incumbents of these posts are directly involved in Railway operations.***

... ..  
... ..  
... ..

*2. On each occasion, well before the vacancy of Additional Member is likely to occur, Ministry of Railways after scrutinising*

*the service record of senior and eligible officers will short-list 2-3 officers and recommend the name of officer(s) considered suitable in all respects for appointment thereagainst. The specific appointment against the posts of Additional Members will require the approval of the Appointments Committee of the Cabinet.”*  
(emphasis supplied)

5. The case of the respondent was that he was the senior most officer in the HAG in the Electrical Department of the Railways, holding the post of Adviser (Electrical) and, he was the most eligible candidate for promotion to the post of Additional Member (Electrical) in the Railway Board.

6. The primary reason given by the petitioner for his being denied the post of Additional Member (Electrical), which fell vacant on 20.11.2013, was that he was not clear for General Manager (Open Line) in his last ACR. While replying to the respondents representation, the petitioner, inter alia, stated:

*“4. The senior most eligible officer for appointment to the post of Additional Member (Electrical) was Shri AK Rawal. However since Ministry of Railways had already recommended the name of Shri AK Rawal for appointment to the post of Additional Member (Planning) his claims for the post of Additional Member (Electrical) was not considered by the Ministry.*

*5. The next senior eligible HAG/IRSEE officer under consideration was Shri RK Batnagar. He had ‘Outstanding’ grindings in the last five APARs but he did not have fitness for General Manager (Open Line) in any of the APARs which is one of the pre-requisites for the post of Additional Member (Electrical). Since, he did not fulfil all the norms for appointment as Additional Member (Electrical), as laid down in the resolutions dated 11.10.2000 and 07.03.2002, his name was also not recommended.*

6. Ministry of Railways recommended Shri Man Singh the next officer who fulfilled all the norms as for appointment as Additional Member (Electrical), Railway Board.

7. Specific appointment to the post of Additional Members requires the approval of the Appointments Committee of the Cabinet and Shri Man Singh was appointed as Additional Member (Electrical) with the approval of Appointments Committee of the Cabinet.

8. As regards his contention that he was denied promotion to the post of Additional Member on the ground that he had not worked as DRM, it is mentioned that for appointment to the post of Additional Member (Electrical), the officer to be considered suitable should also have clearance for General Manager (Open Line) in 2 ACRs at least during the last 5 years, including one out of the latest 2 ACRs. An officer who has worked as DRM will only be eligible for getting for General Manager (Open Line) in the ACR/APAR. Shri Bhatnagar was posted as DRM/ Palghat vide order No.E(O) III-2006/TR/166 dated 17.04.2006 but he declined the said posting on personal account vide his letter dated 31.05.2006. As Shrit Bhatnagar did not work as DRM, he could not be given the fitness for General Manager (Open Line) in his APARs.

8.1 As regard his contention that he has fitness for GM/Metro which is also GM Open Line post, it is mentioned that fitness for GM/Metro should not be construed as Open Line fitness as the ACR/APAR forms for the years 2009-10 to 2011-12 (which were also taken into account in the AM/ Electrical panel) have separate columns for GM (Open Line) and GM/Metro. Subsequently, it has also been clarified that fitness given for GM/Metro in the APAR from 2010-11 onwards in respect of officers who have not worked as DRM shall in no way be taken as fitness as GM (Open Line). An officer to be considered suitable for the post of Additional Member (Electrical) should have clearance for GM (Open Line) and not for GM/Metro”.

7. The Tribunal, however, while accepting the fact that the respondent was not clear in his ACR for General Manager (Open Line), allowed the application by holding as follows :-

*“6. We have considered the arguments put-forth by the applicant in person and by the learned counsel for the respondents and have also perused the pleadings. Annexure A-6 Resolution of the Ministry of Railways is dated 11.10.2000, prescribes criteria for promotion of eligible officers to the post of Additional Member in the Railway Board. But then Ministry of Railways have granted special dispensation in few cases, two of them have been cited by the applicant. In the impugned Annexure A-1 order, the Chairman, Railway Board, in the context of Shri S.S. Bhandari and Shri Girish Chandra, has stated that their selection was as per the recommendations of the Selection Committee but has failed to elaborate the rules or standing instructions under which such a Selection Committee could be constituted nor has he spelt out the composition of the said Selection Committee. Even the Annexure A-6 Resolution of the Railways does not stipulate any such Selection Committee. Be that as it may, if a Special Selection Committee was constituted in the case of Shri S.S. Bhandari and Shri Girish Chandra, the same would have been done even in the case of the applicant as well. Hence, we hold that the respondents have not observed the principles of equality as enshrined in Articles 14 and 16 of the Constitution of India. The Hon’ble Supreme Court in E.P. Rayappa (supra) has also observed that the action must be based on relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations.*

*7. No doubt, Annexure A-6 Resolution of the Ministry of Railways lays down criteria for promotion to the post of Additional Member in the Railway Board but efficacy of the requirement that the officer eligible for such promotion ought to have been cleared for GM (OL) and for that should have worked as DRM does not have any solid footings as could be*

*seen from the observations of the ACC (Annexure A-16) as well as in the judgment of the Hon'ble High Court of Delhi in R.K. Verma (supra).*

8. *Taking into consideration the fact that the applicant was cleared for GM, Metro and the Metro Railway has been notified as a Zonal Railway on 28.12.2000 by the Ministry of Railways, as such he possessed the requisite eligibility for the promotion to the post of Additional Member (Electrical), we are of the firm opinion that applicant ought to have been considered for such promotion. Hence, we feel that ends of justice would meet only by directing the respondents to promote the applicant to the post of Additional Member (Electrical), i.e., in the grade of HAG+ w.e.f. 20.11.2013 when the said post had fallen vacant. Accordingly we order."*

The aforesaid extract would show that the tribunal considered the clearance for GM (Metro) as an equivalent to clearance for GM (Open Line).

8. The submission of Mr. Krishna, firstly, is that the DPC considered the case of the eligible candidates and, even though the respondent may have been the senior most officer in the electrical department, it was one Mr. Man Singh, who was found to be fully eligible as per the aforesaid Resolution for appointment as Additional Member (Electrical). The DPC, which considered the case of eligible candidates gave the following reason for holding the respondent to be ineligible for the aforesaid post :-

*"It was noted that the next officer Shri R.K. Bhatnagar (SI No.2 of S. No.4) does not have fitness for GM (open line) in the ACRs as he has not worked as DRM. He, therefore, does not fulfil one of the eligibility conditions for the post of AM Electrical, in terms of Resolution No. ERB.12000/11/2 dated 11.10.2000 and 7.03.2002."*

9. Mr. Man Singh was appointed on 21.11.2014 to the said post after clearance from ACC. The respondent retired on superannuation on 28.2.2015 and he, thereafter, preferred his Original Application to seek notional promotion to the aforesaid post with effect from when Mr. Man Singh was appointed. The respondent did not assail the appointment of Mr. Man Singh in the Original Application. Mr. Krishna submits that unless the appointment of Mr. Man Singh was assailed and declared to be illegal, there was no question of consideration of any other candidate for appointment to the post in question since there could not be more than one incumbent to the solitary post of Additional Member (Electrical) in the Railway Board. Mr. Krishna has also argued that it was not for the Tribunal to conclude that clearance for GM (Metro) is equivalent to clearance for GM (Open Line), as the said determination falls beyond the realm of the Tribunal's jurisdiction. Mr. Krishna points out - by reference to the Speaking Order passed by the petitioner, that the respondent had been given the opportunity to serve as DRM/Palghat in the year 2006, but he declined the said posting on personal grounds vide his letter dated 31.5.2006. The respondent, being a senior officer, was aware of the consequences which would flow from his said failure to take up the assignment as DRM. Mr. Krishna submits that if the respondent had served as DRM, he would have been cleared for appointment as GM (Open Line) in his ACRs, which was not the case.

10. Mr. Krishna submits that the Tribunal itself has taken note of the fact that there may have been "special dispensation in few cases" in respect of the two cited cases i.e. the case of Mr. S.S. Bhandari and Mr. Girish Chandra. However, such "special dispensation" could not have vested a

right in the respondent to demand, as a matter of right, that he too be given such dispensation contrary to the Resolution prescribing the eligibility criteria for appointment as Additional Member (Electrical). The reasons for the “special dispensation” had not been gone into by the Tribunal. He had no right to demand relaxation of the applicable norms. Mr. Krishna submits that the respondent sought to invoke the concept of negative equality, which is not enforceable.

11. Mr. Krishna also points out that the Tribunal has gravely erred in directing the notional appointment of the respondent as Additional Member (Electrical) with effect from the date when the vacancy arose, i.e. 20.11.2013, even though the DPC for the said post was held later, and Mr. Man Singh was appointed only on 21.11.2014. Mr. Krishna submits that a candidate cannot seek promotion from the date when the vacancy arises. He also points out that even the respondent, in his Original Application, had sought notional appointment as Additional Member (Electrical) only with effect from 21.11.2014, that is, the date when Mr. Man Singh was so appointed. The Tribunal has, however, granted relief to the respondent even beyond what he had prayed for. This demonstrates the casual approach displayed by the tribunal while deciding the Original Application.

12. Mr. Krishna further submits that even if the Tribunal felt that the appointment of Mr. Man Singh was not legally justified on account of appointment of the respondent being wrongly not considered, the Tribunal could not have taken upon itself to direct notional appointment of the respondent. The Tribunal, in that eventuality, should have directed reconsideration of the candidature of the candidates by the selection

committee/ DPC. In this regard, he placed reliance on the judgment of the Supreme Court in *Government of Andhra Pradesh and Others vs. A.P. Jaiswal and Others*; (2001) 1 SCC 748 wherein the Supreme Court relied upon the *State of Mysore vs. P.N. Nanjundiah*, (1969) 3 SCC 633. In *P.N. Nanjundiah*, the Supreme Court observed :-

*“As to the issuance of mandamus by the High Court, the High Court ought not to issue writs directing the State Government to promote the aggrieved officers with retrospective effect. The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1<sup>st</sup> respondent should have been promoted on the relevant date and so what consequential benefits should be allowed to him.”*

13. The respondent, who appears in person, has sought to support the order of the Tribunal. Firstly, he points out that there is no Selection Committee or DPC to select the Additional Member (Electrical). Whenever the vacancy of Additional Member arises, it is for the Ministry of Railways to scrutinise the service records of senior and eligible officers and shortlist 2-3 officers and recommend the names of such shortlisted candidates. The appointment is to be made with the approval of the Appointment Committee of the Cabinet. He further submits that the stand taken by the Railways in W.P. (C) No. 8464/2011 *“The Chairman Railway Board and others vs. R.K. Verma”* was that non-posting of an officer as DRM does not adversely affect his chances for being considered for next promotion to the Higher Administrative Grade and above, subject to his fulfilling other eligibility conditions for the same. The respondent, therefore, submits that it was not essential for the respondent to have accepted the post of DRM, and merely

because he had declined to accept the said post in the year 2006, the same cannot be a reason to declare him ineligible for being considered for the post of Additional Member (Electrical) in the Railway Board.

14. He further submits that the respondent was cleared for GM (Metro) and the same is equivalent to clearance for GM (Open Line). In this regard he has sought to place reliance on the notification dated 28.12.2010 issued by the Ministry of Railways, Railway Board whereby the Central Government declared Metro Railway, Kolkata, a project office, to be a Zonal Railway with its headquarters at Kolkata with effect from 29.10.2010. He submits that the nature of duties and functions discharged in relation to the Railway Metro are the same as those discharged by DRM Open Line.

15. Lastly, the respondent submits that apart from him, no one else has been denied appointment at the HAG level on account of his not possessing the clearance for GM (Open Line). He submits that apart from the two instances taken note of by the Tribunal in the case of Mr. S.S. Bhandari and Mr. Girish Chandra, there are several other such instances.

16. Having considered the rival submissions and perused the record, we are of the view that the impugned order passed by the tribunal is patently laconic and liable to be set aside for several reasons. The resolution dated 11.10.2000, which lays down the eligibility criteria for appointment, inter alia, of the Additional Member (Electrical) is in the nature of a recruitment rule. The said resolution provides that for appointment of the Additional Member (Electrical) *“the officer concerned to be considered suitable ... .. should also be clear for General Manager (Open Line) in his last ACR*

*because incumbents of these posts are directly involved in railway operations”.*

17. Admittedly, the respondent was not clear for General Manager (Open Line) in his last ACR. The tribunal took upon the task of determining the equivalence between General Manager (Open Line) with General Manager (Metro), even though, the petitioner had taken the stand that General Manager (Metro) cannot be equated with General Manager (Open Line) while passing the speaking order dated 21.09.2015. A perusal of the impugned order shows that the only reason given by the tribunal for equating General Manager (Metro) and General Manager (Open Line) was that metro railway had been notified as a Zonal Railway by the Ministry of Railways on 28.12.2000. The purpose of issuance of the said notification was not examined by the Tribunal, since it did not fall for its consideration. Merely because the Metro Railway, Kolkata may have been declared as a Zonal Railway for administrative reasons, it did not follow as a sequiter that the functions and responsibilities performed by the General Manager (Metro) could be considered the same as those performed and discharged by General Manager (Open Line). It is argued by the petitioner – and there is no reason to dispute it, that compared to the Kolkata Metro, the Rail traffic on any Zonal Railway is far greater in terms of geographical area; extent of Railway network; number of passenger and goods trains etc. Mr. Krishna has pointed out that in a metro network, the traffic runs on parallel tracks in one direction, which is not the case in the Railways. There are no railway crossings in a metro rail. The logistics of the two are completely different and not comparable. It was pointed out by the petitioner in its reply to the

respondents representation that in the ACR/ APAR forms General Manager (Open Line) and General Manager (Metro) were separately described in different columns. If the two were to be equated, there was no purpose of describing them separately, and providing different columns in the assessment forms. There was no purpose of maintaining two different designations and General Manager (Metro) could have been designated as General Manager (Open Line) itself.

18. In our view, the petitioner is correct in raising a grievance that the tribunal exceeded its jurisdiction in ruling upon the equivalence of General Manager (Open Line) and General Manager (Metro). The said equivalence could have been examined and drawn only by the petitioner, since it is the petitioner who is aware of the functional requirements and demands of the responsibilities of the two posts. Thus, on the face of it, the respondent did not meet the eligibility criteria for being considered for the position of Additional Member (Electrical) in the railway board, since in his ACRs he was not shown as clear for General Manager (Open Line).

19. Pertinently, the respondent was granted the opportunity to serve as DRM/ Palghat in the year 2006, but he consciously declined the said posting on personal grounds on 31.05.2006. The respondent – being a senior officer, would have known the consequences which could flow from his refusal to serve as DRM in relation to his future progression. Therefore, he cannot turnaround later on and claim that he was eligible to be considered for Additional Member (Electrical), even though he was not clear for General Manager (Open Line) in his ACR. Not having shouldered the heavy responsibility of DRM/Palghat and proven his mettal, the respondent

could not have staked his claim to the post of Additional Member (Electrical).

20. Reliance placed by the respondent on the decision of the Division Bench in **R.K. Verma** (supra) also appears to be misplaced and is of no avail. The stand taken by the petitioner railways in the case of **R.K. Verma** (supra), on which the respondent places reliance, reads as follows:

*“j. Non-posting of an officer as DRM does not adversely affect his chances for being considered for next promotion to the Higher Administrative Grade and above, subject to his fulfilling the other eligibility conditions for the same.*

*k. Non-posting of an officer as DRM will also not adversely affect his chances of being considered for various posts of General Manager/equivalent, which are ex-cadres posts above the posts in Higher Administrative Grade. Subject to fulfilling of laid down norms, such an officer is eligible for consideration for various posts of General Managers/equivalent. This issue has been submitted in detail at para 3 (k) [sic: 4(k)] below.”*

21. The stand taken by the petitioner in the case of **R.K. Verma** (supra) does not relate to promotion as Additional Member of the Railway Board, and particularly to promotion as Additional Member (Electrical). The fact that the respondent did not serve as DRM may not come in his way for consideration for other posts of General Manager or equivalent, but that does not mean that when there is a specific eligibility criteria laid down for consideration for the post of Additional Member (Electrical), the said eligibility condition would get diluted on account of the stand taken by the railways in a legal proceeding. No such implication can be drawn from the stand taken by the Railways in **R.K. Verma** (supra). If that were the case,

the Government would come out with a fresh resolution to amend the eligibility criteria laid down in its resolution dated 11.10.2000.

22. The respondent had to establish the merit of his claim by reference to the rules applicable to him. Merely because there may have been earlier instances – which the tribunal has itself described as “special dispensation”, where officers may have been appointed as Additional Members in the Railway Board despite their allegedly not meeting the prescribed criteria, was no ground to relax or dispense with the criteria in the case of the respondent. Two or more multiple wrongs do not make a right. Pertinently, the cited cases of Mr. S.S. Bhandari and Mr. Girish Chandra do not relate to appointment of the Additional Member (Electrical).

23. We also find force in the submission of Mr. Krishna that the claim of the respondent could not have been allowed without setting aside the appointment of Mr. Man Singh as Additional Member (Electrical). There was only one post of Additional Member (Electrical) at the relevant time, and Mr. Man Singh was appointed to the said post after clearance from the ACC. If the respondent could not have secured the said post while he was in service (he superannuated on 28.02.2015) without dislodging Mr. Man Singh from the said post, he could not stake his claim for the said post on a notional basis, post his retirement. He could not be better off, only because he had retired before he staked his claim to the position of Additional Member (Electrical). Pertinently, it was not the case of the respondent that Mr. Man Singh was not eligible to be appointed as Additional Member (Electrical). The appointment of Mr. Man Singh was not even assailed by the respondent when he preferred the O.A. in question, though he claims to

have impleaded Mr. Man Singh in the earlier round vide O.A. No.4505/2014. There is no explanation for non-impleadment of Mr. Man Singh and failure to challenge the appointment of Mr. Man Singh by the respondent. By directing the petitioner to grant the post of Additional Member (Electrical) notionally from 20.11.2013, the tribunal has, in a way, deemed that there were two vacancies for the said post, which is not the case. There was no budgetary allocation for two posts of Additional Member (Electrical). Only one person could have occupied the solitary post and be paid the salary and allowances therefor.

24. While the resolution of the Govt. of India dated 11.10.2000 does not specifically provide for constitution of a selection committee/ DPC for filling up the vacancies of Additional Member in the Railway Board, it goes without saying that for making such a selection there would have to be some mechanism of assessment of the eligibility and the respective merit of the eligible candidates. The resolution cannot be read to mean that the same rules out the constitution of a promotion/ selection committee. The resolution shows that the ACC has to grant its approval eventually. However, the ACC is not constituted as a selection/ promotion committee.

25. In the present case as well, the case of the respondent was considered by a three member committee, namely, the Chairman – Railway Board; Member (Electrical), Railway Board, and; Member (Staff), Railway Board. In this light, we fail to appreciate the observations made by the tribunal in para 6 of the impugned order, that the respondent was discriminated on account of non constitution of a selection committee for consideration of his case.

26. We also find merit in the submission of Mr. Krishna that, even if for the sake of argument, it were to be accepted that the respondent met the eligibility criteria for appointment as Additional Member (Electrical), the tribunal could have only directed reconsideration of his case by the selection committee/ DPC, and could not have granted the relief of treating the respondent as having been appointed as Additional Member (Electrical). *P.N. Nanjundiah* (supra) taken note of herein above is a clear authority for the said proposition.

27. It also appears to us that the tribunal has gravely erred in directing notional appointment of the respondent from the date when the vacancy arose on 20.11.2013, even though Mr. Man Singh was appointed to the said post only on 21.11.2014 and the respondent had sought notional appointment to the said post only with effect from 21.11.2014. It does appear that the tribunal was casual in its approach in dealing with the claim of the respondent.

28. For all the aforesaid reasons, we are of the view that the impugned order passed by the tribunal is completely unsustainable. Accordingly, we set aside the impugned order, leaving the parties to bear their respective costs.

**VIPIN SANGHI, J.**

**REKHA PALLI, J.**

**JULY 13, 2017**  
**'AA'**