

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

% Date of decision : November 14, 2018

+ **WP(C) 2522/2015 and CM No.4498/2015**

UNION OF INDIA & ORS.

..... Petitioner

Through: Ms.Rashmi Malhotra with
Mr.Himanshu Kaushik, Advs.

versus

MUNNI LAL MENNA & ANR.

..... Respondents

Through: Mr.Shalinder Saini, Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE A.K.CHAWLA

J U D G M E N T

A.K.CHAWLA, J.

Instant writ petition has come to be filed extending challenge to the order dated 12.09.2014 passed by Central Administrative Tribunal (CAT) Principal Bench, New Delhi, whereby, on an OA filed by the respondent No.1, CAT directed the petitioners to restore the promotion of the respondent No.1 to the grade of Depot Superintendent Materials-III (DMS-III) with effect from 31.01.2007.

2. Concisely, the facts relevant for the disposal of the petition are that the respondent No.1-Sh.Munni Lal Meena in short, 'M.L.Meena' was

initially appointed as a clerk on 27.07.1989 and then promoted as Junior Clerk under DRM (Mumbai Central) on 12/13.02.1995. On 18.02.2002, he was transferred to the office of Dy.CMM, Kota. It emerges from the record that though thereafter he was due for promotion, on account of some debarment for one year, he came to be promoted as Senior Clerk on 22.03.2003. In the seniority list published on 03.02.2004, M L Meena was put at serial no.21 and respondent no.2-Sh.Shrikrishna Meena in short 'S.K.Meena' was placed at Serial No.6. In 2006, S.K.Meena was imposed penalty and awarded punishment of downgradation of pay scale by two stages below for three years alongwith future effect vide notice of imposition of penalty dated 26.10.2006. During this period of imposition of penalty on S.K.Meena on 31.01.2007, M.L.Meena was promoted to the post of A.D.I.-III (DMS-III) purely on temporary basis against the post reserved for ST in the pay scale of Rs.5,000-8,000. On 27.06.2007, M.L.Meena was regularized to the post of DMS-III from the date he was promoted to that post temporarily and against the reserved post. It so transpires that in the Seniority List dated 21.03.2011, while M.L.Meena was at Serial No.9 S.K.Meena was at Serial No.11, and this list stipulated that the actual promotion of S.K.Meena in DMS-III was from 19.12.2009, but his performance promotion was to be reckoned with effect from 20.07.2009. S.K.Meena felt aggrieved of the seniority so fixed under the Seniority List dated 21.03.2011 and made a representation. On this, M.L.Meena came to be issued show cause notice dated 08.06.2011 proposing to give benefit of promotion to S.K.Meena with effect from 31.01.2007 on the reserved post on which M.L.Meena stood regularized. M.L.Meena, made representation thereagainst. It was rejected and vide letter dated 01.11.2011, the petitioners

communicated for reckoning the date of performa promotion of S.K.Meena with effect from 31.01.2007 and that of M.L.Meena with effect from 01.08.2009 and vide Office Order dated 14.02.2012, the petitioners amended the Seniority List dated 21.03.2011 to the effect that the seniority of S.K.Meena was to be read immediately below the person at Serial No.9 and that of M.L.Meena was to be read immediately below the person at Serial No.12. Consequentially, M L Meena got below S K Meena in seniority. It resulted into filing of OA No.786/2012 by M.L.Meena. This OA came to be allowed by CAT and the petitioners were directed to restore the date of promotion of M.L.Meena to the grade of DMS-III to 31.01.2007 and his seniority to be so determined. Aggrieved thereof, the petitioners have preferred the instant petition.

3. Petitioners have assailed the impugned order of CAT primarily on the premise that M.L.Meena was not promoted against a clear vacancy to the post of DMS-III and the promotion granted to him was against a reserved vacancy for ST during which period S.K.Meena was undergoing the period of penalty and that, CAT did not appreciate the instructions of the Railway Board No.RBE 217/2002 dated 27.11.2002 and that, promotion could be given only after being found fit by DPC. It would be beneficial to advert to such grounds of challenge in para 5 of the petition, which are, as follows:

"a. Because the impugned order is contrary to facts and law.

b. Because impugned order has been passed by the Hon'ble Tribunal on the basis of a totally wrong appreciation of the facts on record. It is submitted that tribunal has failed to appreciate that the applicant was not promoted against clear vacancy to the post of DMS-III. Since there was not suitable ST candidate available in cadre of DMS III Scale Rs.5500-9000, hence the post of DMS II was downgraded as DMS-III on adhoc basis.

c. Because the Ld. Tribunal erred in not appreciating the fact that since the no suitable ST candidate was available in the cadre of DMS-III Scale Rs.5500-9000, hence the post of DMS-III was down graded as DMS III in pay scale of Rs. 5000-8000 on adhoc basis. The applicant was not promoted against clear vacancy. since shri Krishan meena was under penalty, hence Shri Munni Lal Meena was promoted as DMS III in Scalw Rs. Rs.5000-8000 on adhoc basis against downgraded post of kota vide order dated 31.01.2007. It was clearly mentioned that post of DMS-III against reserved vacancy for ST candidate is purely on temporary basis.

d. Because the Ld. Tribunal erred in not appreciating the railway board instructions no.RBE No.217/2002 dated 27.11.2002.

e. Because the Ld. Tribunal erred in not appreciating he policy of govt. that respondent no.4 has to be promoted only after being found fit by the subsequent DPC and his seniority shall also be determined on the basis of his date of promotion and respondent was promoted w.e.f.20.07.2009.

f. Because the Ld.Tribunal erred in law in directing the respondents to grant promotion to the applicant to he grade of DMSIII would be restored to 31.01.2007 and his seniority shall also be determined on the basis of aforesaid date.

g. Because it was clearly mentioned in the office order that the promotion to the post of DMS-III against reserved vacancy for ST candidate is purely on temporary basis. He will be reverted if the penalty of senior most ST employee reduced or completion of the penalty period."

4. At the onset, in view of the foregoing, it would be appropriate to deal with the factual aspect of promotion granted to M.L.Meena with effect from 31.01.2007. Undisputedly, M.L.Meena was initially promoted to DMS-III purely on temporary basis against the post reserved for ST which had been lying pending. This promotion-purely on temporary basis, did provide for being demoted later. It appears, this stipulation of demotion was provided for meeting an eventuality of reversion of claim to the said post by another employee, who may subsequently be found to be entitled to it. It is a matter of record that such stipulation was provided only for the temporary

promotion granted to M.L.Meena. The fact of the matter however is that M.L.Meena was regularized vide office note dated 27.06.2007 and this regular promotion granted to M.L.Meena was without any riders, which were otherwise attached to the promotion on purely temporary basis. There is therefore no gainsaying in the submission made on behalf of the petitioners that the regularization of M.L.Meena was made subject to any demotion at a later point of time on the occurring of any eventuality. Had it been so, the regularization made on 27.06.2007 by itself would lose its significance. To this vital factual aspect of the matter, the petitioners have not chosen to advert to even in the instant petition. The reasons are obvious. Petitioners could not have contended otherwise. Not only that, the regularization as such of M.L.Meena to the post of DMS-III vide communication dated 27.06.2007 in itself, though impliedly, proceeded on the premise that during the subsistence of the penalty imposed upon S.K.Meena, S.K.Meena was not entitled to such promotion and that is why, in the seniority published by the petitioners on 21.03.2011 also, M.L.Meena was put at serial No.9 and S.K.Meena was put at serial No.11. It is only after S.K.Meena made representation on the seniority list dated 21.03.2011, the petitioners took a somersault, possibly, adverting to the instructions of the Railway Board RBE No.217/2002. Though, no serious submission came to be made on behalf of the petitioners as to the effect of the said instruction, we observe that the said instructions are in the nature of clarifications to Rule 6(vi) of the Railway Servants (Discipline and Appeal) Rules, 1968 in short RS(D&A) Rules, 1968. These rules are promulgated in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and have a statutory force. These rules are applicable to the Indian Railway

Employees. It does not require an elaboration that such statutory rules cannot be altered, amended or modified by any administrative instructions either by the Railway Board or any other authority but for by way of a promulgation in exercise of the powers conferred on the President of India under proviso to Article 309. Therefore, the instructions of the Railway Board vide RBE No.217/2002 have to be seen in context of the administrative instructions only. In fact, a bare reading of the said instruction of the Railway Board also shows that these instructions proceed to elaborate the effect of penalty on seniority and increments etc. Rule 6 (vi) of RS(D&A) Rules, by itself only provides for the nature of the penalties that may be imposed by the competent authorities, be it minor or major. When that is so and the instruction of the Railway Board RBE No. 217/2002 do not have effect of altering, amending or modifying the rules pertaining to the minor and the major penalties, the said instructions have to be seen in the context of the administrative instructions to achieve the objectives of discipline in the institution and nothing more. Nothing more requires to be read thereunder. In that view of the matter, when we advert to the aspect of promotion given to M.L.Meena initially on purely temporary basis on 31.01.2007 and that came to be regularized with effect from 27.06.2007 during the subsisting period of penalty imposed upon S.K.Meena, moot question for consideration in the instant petition is as to whether during the subsistence of the period of the penalty imposed upon S.K.Meena, M.L.Meena, could be regularized to the post with effect from 31.01.2007 or not. In this context, we observe that the Supreme Court in Mohammed Faizal K.A. vs. D.Sali & Ors.; AIR 2018 SC 288 adverting to the ratio of the judgment in Union of India & Ors. vs. K.V.Jankiraman & Ors. (1991) 4

SCC 109 has reiterated that when an employee is held guilty and penalized and therefore not promoted at least till the date on which he is penalized, he cannot be said to have been subjected to double jeopardy and that a denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In view thereof, the promotion granted to M.L.Meena as on 31.01.2007 cannot be said to be suffering from any perversity, with which CAT has found favour with, and, we do not see any reason to interfere therewith in exercise of the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India.

5. In view of the foregoing, the writ petition is dismissed. No order as to costs.

(A.K.CHAWLA)
JUDGE

(VIPIN SANGHI)
JUDGE

NOVEMBER 14, 2018
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