

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL

ALIAHABAD BENCH

ALIAHABAD.

Allahabad this the 15th day of July 1997.

Original Application no. 1312 of 1995.

CORAM : Hon'ble Dr. R.K. Saxena, J.M.

Hon'ble Mr. D.S. Baweja, A.M.

Umacharya Dwivedi, S/o Late D.N. Dwivedi,
aged about 52 years, resident of Qr. no. RE-5-B
Ram Bagh Colony, Allahabad .

..... Applicant.

(Counsel of the applicant - Shri S.S. Sharma)

Versus

1. Union of India through Secretary,
Railway Board, Rail Bhawan, New Delhi.

2. The General Manager,
Headquarters office, Northern Railway,
Baroda House, New Delhi.

3. The General Manager, Railway Electrification,
Nawab Usuf Road, Allahabad.

..... Respondents

(Counsel of the respondents - Shri G.P. Aggarwal)

ORDER.

Hon'ble Mr. D.S. Baweja, A.M.

1. This application has been filed with a
prayer for the following reliefs :-

(i) To quash the order dated 26.9.1994 and
11.7.1995.

(ii) To direct respondents to conduct the
Viva-Voce test of the applicant for selection held for
promotion to the post of Assistant Personnel Officer

against 30% vacancies against which two clear posts are still lying vacant / unfilled.

(iii) To direct respondents to announce the applicant result after Viva-Voce test and promote him thereafter as per his position in the merit list.

(iv) To grant all consequential benefits.

2. The applicant at the time of filing this application was working as Senior Personnel Inspector (grade Rs 1600-2600) under General Manager, Railway Electrification, Allahabad, with effect from 31.3.1989. He holds lien on Allahabad Division, Northern Railway, General Manager, Northern Railway vide letter dated 2.7.1993 invited applications for selection to the post of Assistant Personnel Officer against 30% quota. The applicant applied for the same. The written test was held on 7.5.1994 and the applicant appeared in the same being eligible as per the list published on 1.4.1994 in Northern Railway Gazette No. 7. The result of the written test was notified on 12.9.1994 and six candidates including the applicant had qualified. The Viva-Voce test was fixed on 26.9. 1994. The applicant was not allowed to appear in the test. He was informed that he did not fulfil the requisite condition of 5 years of non-continuous service in the grade Rs 1400-2300 and above on the crucial date i.e., 31.5.1992. Being aggrieved by this, the present application has been filed on 8.12.1995.

3. The applicant's case is that the selection for the post of Welfare Inspector was started in 1985. The applicant being eligible applied for the same and appeared in this selection. However, the result was declared only on 1.1.1988. In the meantime the post of Welfare Inspector in Concrete Sleeper Factory, Northern Railway, Subedar was required to be filled urgently. Due to refusal of the Welfare Inspectors of Headquarter office and Allahabad Division for the said post, the applicant was posted against this post vide letter dated 21/22.8.1986, in the grade Rs 1400-2300. Thereafter he was promoted in the grade of Rs 1600-2600 from 31.3.1989. After having been selected in the selection result notified on 1.1.1988, his promotion in the grade Rs 1400-2300 was regularised from 12.8.1986 vide letter dated 20.1.1988. In view of these facts, the applicant claims that he had completed 5 years of service in the grade Rs 1400-2300/- and above on 31.5.1992. The applicant also submits that his case is similar to the applicant in O.A. no. 2068/1990. "Ashwani Kumar Vs. U.O.I" decided on 20.8.1992 by the Principal Bench, New Delhi, and, therefore, entitled for the same benefit as allowed to Shri Ashwani Kumar. Further one Shri Mahesh Kumar Gaur who was also declared passed in the written test alongwith the applicant was also not allowed to appear in the Viva Voce test. However, subsequently his adhoc period in the grade Rs 1400-2300 was considered and he had been made eligible thereby the applicant has been discriminated. The applicant further states that out of seven posts notified for the selection, only three have been filled up and four posts are still vacant. The applicant alleges that action of the respondents is discriminatory, arbitrary and against the principles

of natural justice and provisions of Article 16 of the Constitution of India.

4. The respondents have contested the application by filing Counter reply. The respondents have submitted that the applicant had mentioned in-correct date of his promotion in the application made by him for the selection of Assistant Personnel Officer. Based on the date mentioned in the application, the applicant was allowed to appear in the written examination and he also qualified in the same. However subsequently on scrutiny of service particulars, it was found that with regular promotion in the grade - 1400-2300 was from 20.1.1988 and he was not eligible. Accordingly he was not allowed to appear in the Viva-Voce test. As regards the selection to the post of Welfare Inspector, the respondents contend that no selection was started in 1985 as contended by the applicant. The selection was notified vide letter dated 11.5.1986, written test was conducted on 19.9.1987 and 10.10.1987 and the panel was declared on 1.1.1988. The applicant was selected and placed at serial no. 3. The respondents also assert that the applicant was promoted as Welfare Inspector in the grade of Rs 1400-2300 from 12.8.1986 purely on adhoc basis and thus not entitled for regularisation from 12.8.1986 against the panel notified on 1.1.1988 and get benefit of non-fortuitous service. Referring to the case of Shri Mahesh Kumar Gaur, cited by the applicant, the respondents have averred that the service particulars were not furnished correctly and after verification of the particulars, he was found

eligible. Thus the respondents contend that there action is not discriminatory, arbitrary and against the principles of natural justice.

5. The applicant had contested the submissions of the respondents in the rejoinder reply and maintaining his grounds advanced in the original application.

6. As per order dated 22.12.1995, it was provided while considering the prayer for the interim stay that any appointment made from the impugned panel shall be subject to the final outcome of this original application.

7. We have heard Shri S.S. Sharma and Shri G.P. Aggarwal learned of the applicant and the respondents respectively. We have carefully deliberated on the arguments advanced during the hearing and also pursued the material on the record.

8. The first question which falls for consideration before going into the merits of the reliefs prayed for is whether the promotion of the applicant as Welfare Inspector in the grade Rs 1400-2300 vide order dated 21/22.8.1986 was adhoc or regular. It is admitted fact that selection for the post of Welfare Inspector was conducted and the panel was declared vide letter dated 1.1.1988 and the applicant was selected and was placed at serial no. 3 alongwith two other candidates. Based on the selection the promotion order was issued vide letter dated 20.1.1988. The main defence of the applicant is that as per order dated 20.1.1988, the promotion of the applicant as Welfare Inspector from

12.8.1986 was regularised as is clear from the fact that in respect of the other two candidates, the promotion was ordered with immediate effect based on the option exercised by them. In view of this interpretation of the order, dated 20.1.1988, the applicant claims that the period from 12.8.1986 to 19.1.1988 becomes non fortuous service and thus his service in the grade of Rs 1400-2300 becomes five years stipulated on the specified date. The respondents have on the other hand have taken a stand that the promotion of the applicant vide order dated 21/22.8.1986 was on adhoc basis and only on empanelment his promotion in the grade Rs 1400-2300 was regularised. In view of this, the respondents contend that non - fortuous service will count from 21/22.8.1986 only and on this basis he was not eligible for Group 'B' Selection.

9. Keeping the above rival contention in focus, we will look at the facts of the case and the relevant documents brought on record to determine the nature of promotion vide order dated 21/22.8.1986. The respondents have stated that the post of Welfare Inspector is a selection post. Though the respondents have not brought on record the rules concerning selection to the post of Welfare Inspector but in para 5 of the Counter reply, it is submitted that all group 'C' employees of all the Departments are eligible for selection. The respondents have stated that the selection for the post of Welfare Inspector was notified vide letter dated 14.5.1986. The applicant has averred that the selection was started in 1985. This contention of the applicant is factually incorrect as the material brought on record to support this contention refers to the

selection to the post of Personnel Inspector.

In any way, this is not very material to the controversy but it is admitted by the applicant that he was posted as Welfare Inspector in Concrete Sleeper plant Subedargang during the pendency of the selection from 12.8.1986 vide order dated 21/22.8.1986.

The applicant has also averred that his promotion and posting as Welfare Inspector was done with the approval of Chief Personnel Officer (C.P.O). The copy of the approval order has not been however brought on record by the either party. The applicant has also stated that no Welfare Inspector either from Headquarter in Allahabad Division was willing for posting in the Concrete Sleeper plant and since the post was lying vacant for a long time and was required to be filled up early, the applicant was promoted and posted. From this back ground leading to the promotion of the applicant as Welfare Inspector from 12.8.1986 three facts emerge namely (a) the applicant was not subjected to any selection / screening before being posted as Welfare Inspector vide letter dated 21/22.8.1986 (b) the applicant was not the senior most eligible employee as per the rules for selection to the post of Welfare Inspector and (c) the applicant was promoted during the period when regular selection was in process and in which the applicant was taking part. Keeping these facts in focus, how the contention could be tenable ? Since the selection was in process when the applicant was posted as Welfare Inspector as per order dated 21/22.8.1986 and he had appeared in this selection, then how the applicant could be promoted on regular basis ignoring the claims of the others. The promotion order dated 20.1.1988 states

that the promotion of the applicant on adhoc basis is regularised. This does not imply that the promotion as Welfare Inspector is regularised from the date he was posted on adhoc basis. The plea of the applicant that he was posted in Concrete Sleeper Plant against a regular vacancy and as such his promotion was regular being against non-fortuous vacancy is not sustainable. It is admitted that vacancy of Welfare Inspector was regular but mere this fact cannot make the promotion of the applicant as regular without notifying all the tests of the regular selection. The post of Welfare Inspector is not indirect channel of promotion of the clerical cadre in which the applicant was working and it is in ex-Cadre post which is through open to all the group 'C' staff. The applicant was one of the eligible candidates and not the senior most. Under these circumstance by no stretch of imagination, it could be inferred that the promotion of the applicant vide order dated 21/22.8.1986 was not adhoc but regular. Looking from another angle it could be shown that such an inference will lead to an illogical situation. The applicant is at serial no. 3 among the three candidates placed on the panel. If the applicant's contention is accepted, then the other two senior candidates are promoted from the date of the promotion order while the promotion of the applicant is regularised from 12.8.1986. In such an event, this would imply that the applicant gains seniority over the other two who are placed above him in the panel. Can the several rules permit such a situation ? The applicant has not arised the issue of seniority

and the relief mainly concerns the treatment of the period from 12.8.1986 to 19.8.1986 as non-fortuous service so that he meets with the eligibility criteria. However, considering the facts detailed above, the issue of seniority and non fortuous service are linked with each other. If the adhoc period of the service is counted as non-fortuous, then it flows that the applicant's seniority will count from 12.8.1986. Therefore, the relief prayed for implies that the adhoc period of service will count from seniority. In the light of the facts and circumstances discussed earlier, we have no hesitation to conclude that the promotion of the applicant from 12.8.1986 as Welfare Inspector was on adhoc basis even though the same was against a regular vacancy.

10. Having recorded our findings above that the promotion of the applicant from 12.8.1986 was on adhoc basis, he will now consider merit in the reliefs prayed for. The basic issue is whether service as Welfare Inspector in the grade Rs 1400-2300 from 12.8.1986 to 19.1.1988 was non - fortuous. If so then the question of granting reliefs prayed for only will arise. For treatment the period of adhoc service as non-fortuous service, the applicant has placed reliance in the judgment dated 20.9.1992 in O.A. no. 2068 of 1990 in case of "Ashwani Kumar Vs. U.O.I " of Principal Bench. The applicant asserts that facts of the case in Ashwani Kumar are exactly similar to that of the applicant and since Ashwani Kumar was allowed the relief, the applicant is also entitled for the similar benefits.

The applicant has brought on record the copy of this judgement. In this judgement, it is concluded that the adhoc service followed by regularisation of promotion in accordance with rules will count for seniority placing reliance on what is held in para 47 B of the judgement of the Apex Court in the case of "Direct Recruit Class II Engineering Officers Association Vs. State of Maharashtra" JT 1990 (2) SC 264. We have carefully perused this judgement and it is our considered view that the principle in para 47B enunciated in this case is not applicable on the facts of the case of Ashwani Kumar and also in respect of the case in hand. The conditions laid down in para 47 A and B of the judgement of the Constitution Bench in "Direct Recruit Class II Engineering Officers Association" are based on the deliberations in para 13 of the judgement. It will be relevant here to reproduce an extract as under to support our view point :-

"..... We were taken through the judgement by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiating by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbant nor on availability of substantive vacancies. The principle for deciding seniority has

to conform to the principles of equality spelt by Articles 14 and 16. If an appointment is made by way of stop gap arrangement without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause. But if the appointment is made after considering the claim of all the eligible candidates and the appointee continues in the post uninterruptedly till regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for the purpose of seniority." In the present case the posting of the applicant as Welfare Inspector was done without following the rules for selection and without considering the claim of all the eligible persons. In view of this, the applicant is not entitled for the claim of non fortuous service for the adhoc period of service and thereby the seniority from 12.8.1986.

11. We are supported in our above view by two judgements of the Apex Court where it is held that adhoc service without selection as per rules even though uninterruptedly followed by regularisation in the same post would not count toward seniority. The first judgement is in the case of "Chief of Naval Staff and another Vs. G. Gopal Krishna Pillai and others" 1996 Supreme Court Cases (L&S) 328 where in the decision

of Ernakulam Bench has been quashed. Their Lordships have held as under in para 5 :-

" In the instant case, the respondent Shri Pillai was not selected by a regular constituted selectionbody for giving adhoc appointment to the post of Storekeeper and on such selection, he had continued in adhoc service till regular appointment to such post was made. It also appears to us that the Tribunal in passing the impugned order has relied on condition 'B' as referred to in the decision of the Constitution Bench in "Direct Recruit Class II Engineering Officer's Association" in support of the impugned order. In our view the principle enunciated in the said case is not applicable in the facts of the case because the initial appointment of Shri Pillai by way of adhoc arrangement was not made by following the procedure laid down by the Rules as referred to in condition B in the said decision. Hence the decision of the Tribunal cannot be sustained. We, therefore, allow this appeal and set aside the impugned order without however any order as to costs."

12. The second case is "Union of India Vs. S.K. Sharma Professor of Civil Engineering Punjab Engineering College Chandigarh" 1992 SCC (L&S) 601 where same view is held that adhoc service cannot be counted for determining seniority while setting aside the decision of Chandigarh Bench. In paras 7 and 8, it is held as under :-

"7. In D.N. Aggarwal Vs. State of M.P., it was held that regular appointment at later date cannot relate back to the date of adhoc appointment and the employee is not entitled to claim the period of officiation between the dates of adhoc

appointment and regular appointment for being counted for the purpose of seniority. A Constitution Bench of this Court in "Direct Recruit Class II Engineering Officer's Association Vs. State of Maharashtra" held as under :-

"Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of confirmation. Seniority cannot be determined on the sole test of confirmation for, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter-se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. The corollary of the rule is that where the initial appointment is only adhoc and not according to rules and made as a stop gap arrangement, officiation in such post cannot be taken account for considering seniority.

8. In the circumstances mentioned above, we are clearly of the view that the respondent was not entitled to claim his seniority on the post of Professor (senior scale) from September 28, 1969 and the appellants have rightly counted his seniority from 29, 1973 when he was regularly selected in accordance with rules on the said post....."

From the above referred judgements of the Apex Court, it would be seen that referring to the judgement of the the Constitution Bench in "Direct Recruit Class II Engineering Officers Association Vs. State of Maharashtra", it is held that working on the said

post on adhoc basis would not confer any right to claim seniority on the post by reckoning the adhoc service. As mentioned earlier, though the relief prayed for is to treat the period of adhoc service as non fortuous for the purpose of counting period of 5 years of non fortuous service for being eligible for Group 'B' selection but granting of such relief in fact would imply that seniority will also count from the date of adhoc promotion. Keeping this in view and what is held by the Hon'ble Supreme Court in the judgement referred to above. We come to the conclusion that the claim of the applicant is not tenable.

13. Judicial discipline demands that a Division Bench should follow the earlier judgement. Unless it is unable to agree with the view taken by the earlier Bench and in that event the matter should be referred for consideration of the Full Bench. This is unexceptional, but it is subject to the law laid down by the Hon'ble Supreme Court. We have already demonstrated above that view held in the judgement in Ashwani Kumar's case placing reliance in the judgement of "Direct Recruit Class II Engineering Officers' Association" is not supported by the view held by the Apex Court based on the same judgement.

14. In addition to the case of "Ashwani Kumar" which forms the basis for filing of the present application claiming the same benefits, the applicant has cited the following cases to support his claim :-

- i) Som Dutt Sharma Vs. U.O.I(1989) ATC 508.
- ii) Rajbir Singh Vs. U.O.I 1992 SCC (L&S) 153.
- iii) Kailash Chandra Rajawat Vs. U.O.I(1994) 26 ATC 737.
- iv) V.K. Arora Vs. U.O.I (1996) 33 ATC 654.

We will review these judgements briefly. The judgement in Som Dutt Sharma's case is earlier to the judgements of the Hon'ble Supreme Court referred to above. In the case of Rajbir Singh, facts are distinguishable as the applicants were appointed on adhoc basis after passing the regular tests. In Kailash Chandra Rajawat's case, the issue refers to the counting the adhoc period for eligibility for promotion to the next grade as an experience required as per the rules in the channel of promotion. In view of this, the facts are distinguishable from the present case V.K. Arora's case covers the situation where the adhoc promotions were done as per seniority and it was held that the adhoc service will count for the purpose of next promotion which was due after rendering certain years of service. The issue did not concern the seniority and, therefore, the ratio of this judgement is of no help to the applicant's case. Keeping the above in view, none of the cited judgements come to the rescue of the applicant.

15. After careful consideration of the facts and various judgements relied upon, we have

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no hesitation to conclude that there is no merit in the application and the same is dismissed accordingly. No order as to costs. Stay order dated 22.12.1995 is vacated.

MEMBER (A)

MEMBER (J)

am/