

RESERVED

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD
ADDITIONAL BENCH AT ALLAHABAD

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Allahabad : Dated this 20th day of February, 1997

Original Application No.160 of 1992

District : Bareilly

CORAM:-

Hon'ble Mr. S. Das Gupta, A.M.

Hon'ble Mr. T.L. Verma, J.M.

1. Rajendra Singh Balmiki, S/o Shri Jassoo
Resident of 1-40-B, Old Railway Loco Colony,
Izzatnagar, Bareilly.
2. Kunwar Pal Meena S/o Shri Kishori Lal Meena,
Resident of Loco Shed, Kashganj, Bareilly.

(By Sri Sanjay Kumar, Advocate)

.....Applicants

Versus

1. Union of India through the General Manager,
N.E. Railway, Gorakhpur.
2. Divisional Railway, Manager, N.E. Railway,
Izzatnagar, Bareilly.
3. Divisional Railway Manager (P), N.E. Railway,
Izzatnagar, Bareilly.
4. Senior Divisional Mechanical Engineer (Loco),
N.E. Railway, Izzatnagar, Bareilly.
5. Rajiv Kishore Agarwal, OS-II, D.B.M. (Mechanical)
Office, N.E. Railway, Izzatnagar, Bareilly.
6. Har Nandan Prasad, Office Supdt-1,
Diesel Loco Shed, N.E. Railway,
Izzatnagar, Bareilly.

(By Sri VK Goel, Advocate)

..... Respondents

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ORDER

By Hon'ble Mr. S. Das Gupta, A.M.

Sri Rajendra Singh Balmiki and Sri Kunwar Pal Meena have jointly filed this application under Section 19 of the Administrative Tribunal Act, 1985, praying that an order dated 5-8-1991 by which the respondent no.3 had declared Sri R.K. Agarwal Respondent No.5, as successful in the selection based on which a panel was declared on 19-2-1990, and also an order dated 10-10-1991 by which a representation of the applicant no.1 against the inclusion of respondent no.5 in the aforesaid panel was rejected. ^{be quoted} They have sought a direction to the respondents to delete the name of respondent no.5 from the aforesaid panel and not to disturb the seniority position of applicant no.1 and the rightful claim of applicant no. 2 for promotion as OS-II.

2. From the facts averred it appears that the respondent no.3 had issued a notification on 31-8-1989 for selection against 12 posts of OS-II in the grade of 1600-2660. Of the 12 posts notified 8 were available for general candidates, 3 for SC and one for ST candidates. After the selection, ~~the~~ provisional panel of 10 persons was declared by an order dated 19-10-1989. This included the names of 7 general candidates and 3 SC candidates. The applicant no.1, who is a SC candidate was at Serial No.10. No ST candidate was available and one post of general candidate was left vacant as ~~there was~~ a dispute regarding the seniority of one Sri Harnandan Prasad vis-a-vis respondent no.5 was pending. Hence, only 10 names were declared in the provisional panel. Subsequently,

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the final panel was declared on 19-2-1990 in which the name of Sri Harnandan Prasad was included against the remaining posts of general candidates. This panel was exhausted when the last candidate i.e. Sri Harnandan Prasad was promoted as OS-II vide order dated 6-7-1990. Thereafter, a fresh selection was notified by an order dated 10-7-1990 for 3 posts of OS-II in the General category and one in the ST category. It is stated that in that selection all the candidates including the ST candidate failed, whereupon another notification dated 30-5-1991 was issued for a fresh selection for 5 general category posts and one ST vacancy. The applicants have averred that the respondent no.5 was also called to appear in this selection and he failed. The respondent no.5, is stated to have submitted a representation for being awarded grace marks so that he be declared qualified in the said selection. It is alleged that instead of granting him grace marks in the fresh selection examination, the respondent no.3 by the impugned order dated 5-8-91 declared him successful in the first examination pursuant to which the panel was declared on 19-2-1990. The grievance of the applicant no.1 is that due to inclusion of respondent no.5, his position in the seniority came down and the grievance of the applicant no.2, who is a ST candidate ^{is that} ~~qualified in the selection test~~, he was denied the post of OS-II as a result of the inclusion of the name of respondent no.5 against the ST post.

3. The main plea taken by the respondent against the inclusion of the name of respondent no.5 in the panel dated 19-2-1990 is that after the promotion of Sri Harnandan Prasad, the aforesaid panel was exhausted and, therefore, the name of respondent no.5 could not have been included in the aforesaid panel. The other plea

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is that there were only 8 posts of general candidates and including Sri Harnandan Prasad all the 8 vacancies got filled. Thus, the inclusion of respondent no.5 in the panel and his promotion as US-11 was against the ST vacancy which was carried forward due to non-availability of ST candidates. It is stated that such appointment was not valid as no appointment of a general candidate could be made against the post reserved for ST candidates. The representation of the applicant no.1 having been rejected by the impugned order dated 10-10-1991, both the applicants nos.1 and 2 have approached this Tribunal seeking the reliefs aforementioned.

4. By way of an amendment application Sri Harnand Prasad was also impleaded as a respondent and a further plea was taken by the applicants that the grant of seniority to the respondent no.5 as a result of which his name was included in the panel on 19-2-1990 was wholly illegal and arbitrary as the claim of respondent no.5 for seniority was rejected by the Divisional Personnel Officer and twice by the Divisional Rail Manager and, therefore, the Chief Personnel Officer, who had granted the seniority had no jurisdiction to sit in appeal over the decision of the Divisional Rail Manager as both are of equal rank and there is no provision of filing a third appeal. It was further stated that on an appeal by Sri Rajendra Kumar Saxena, the ~~Divisional~~ ^{Additional} General Manager, N.E. Railway, by his order dated 3-9-1992 granted seniority to the appellant over respondent no.5 superseding the order of the Chief Personnel Officer.

5. The official respondents have filed a detailed counter affidavit to contest the claims of the applicant nos.1 and 2. It has been stated there-in that in order to form a panel for filling of posts of senior clerks against

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10% special quota, a selection was held in 1977 in which respondent no.5 appeared. In the panel, which was formed by the order dated 25-6-1977 the name of respondent no.5 was at the top in the merit list. The name of Sri Vinod Chandra Sharma, Rajendra Kumar Saxena and Keshav Verma, were also included in this panel. This panel was, however, never declared as certain employees represented challenging the validity of the selection itself. Therefore, a fresh selection was held in which Sri Rajendra Kumar Saxena, and Sri Vinod Chandra Sharma did not appear. The panel on the basis of the fresh selection was declared by order dated 14-9-1977 in which the name of respondent no.5 and another were included against the general vacancies. Thereafter Sri Rajendra Kumar Saxena submitted a representation before the competent authority praying that the panel which was formed by the order dated 25-6-1977, itself be treated as a validly formed panel for promotion on the post of senior clerks. On this appeal the Divisional Railway Manager decided that Sri Rajendra Kumar Saxena, Sri Vinod Chandra Sharma and respondent no.5 be granted promotion w.e.f. 25-6-1977 itself. The office, however, issued order of promotion of only Sri Rajendra Kumar Saxena and Sri Vinod Kumar Sharma w.e.f. 25-6-1977 whereas respondent no.5 was promoted w.e.f. 14-9-1977. Being aggrieved the respondent no.5 submitted a representation praying that he be also promoted w.e.f. 25-6-1977. This representation was dismissed by the Divisional Personnel Officer. An appeal was filed before the Divisional Railway Manager, who dismissed the appeal. The respondent no.5 thereafter filed a further appeal before the Chief Personnel Officer N.E. Railway Gorakhpur on 1-2-1990, which was allowed by the Chief Personnel Officer by his order dated 16-8-1990.

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directing that respondent no.5 should be given promotion on the post of senior clerk w.e.f. 25-6-1977. Thus, respondent no.5 became senior to Sri Rajendra Kumar Saxena in the grade of senior clerk. It has been further stated by the respondent that during the pendency of the appeal of respondent no.5 which was ultimately decided by the Chief Personnel Officer by the order dated 16-8-1990, respondent no.5 as well ^{as} others including Sri Rajendra Kumar Saxena and Sri Vinod Chandra Sharma were granted promotion to the post of Head Clerk treating respondent no.5 as junior to Sri Rajendra Kumar Saxena. Therefore, his name was not included in the panel of OS-II formed on the basis of selection held in 1989 and declared by order dated 19-10-1989. This was, however, not as a result of dispute regarding his seniority qua Sri Har Nandan Prasad as alleged by the applicants. Subsequently, when the appeal of respondent no.5 was allowed, he was included in the panel of 19-10-1989 at the appropriate place by virtue of his seniority as senior clerk as he had also appeared in the selection and had qualified in the same.

6. The case of the respondent is that respondent no.5 was wrongly excluded from the panel of 19-10-1989 and, therefore, the Railway Board Circular regarding exhaustion of panel would not be applicable to the facts and circumstances of the case. As regards the claim of ~~respondent~~ ^{applicant} no.2, the respondents' case is that he was never selected for promotion to the post of OS-II and his ~~name~~ ^{name} was also not included in the panel declared even on 16-1-1991. Their further case is that the respondent no.5 was not promoted against any vacancy reserved for Scheduled Tribe. He was legally entitled to be included in the panel of 19-10-1989 against the general category

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post and he was, therefore, granted only proforma empanelment when his appeal regarding seniority was allowed.

7. The respondent no.5 has filed a separate written statement. However, the averments therein need not be traversed as these ^{are} similar to the written statement filed by the official respondents.

8. In the rejoinder affidavit filed by the applicants, it has been stated that the respondent no.5 was not even eligible to appear in the selection ~~also~~ in 1977 for the post of senior clerk as he had not completed one year's qualifying service and that against only two vacancies available in that order for general candidates, Sri Rajendra Kumar Saxena and Sri Vinod Chandra Sharma were promoted. They alleged that the Chief Personnel Officer could not, therefore, have allowed his appeal and assigned him seniority over Rajendra Kumar Saxena. Their further case is that there were only 8 vacancies of OS 11 for general candidates, even if assignment of seniority to respondent no.5 was corrected, the name of Sri Har Nandan Prasad, ~~though~~ later impleaded as respondent no.6, ~~therefore~~ ^{he} could have been deleted from the panel. Since there were only 8 vacancies of general candidates, the 9th candidate in panel could only be against the Scheduled ~~cast~~ ^{Tribe} vacancies. It has been further stated that the applicant no.2 was successful in the selection but later he was deliberately declared failed with ulterior motives. Moreover, even assuming that he had failed, being ~~the~~ best amongst the failures, he had a right to be promoted.

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9. Later the newly impleaded respondent no.6, Har Nandan Prasad also filed a counter affidavit in which he also took a stand that his empanelment, ~~was~~ not having been challenged at any stage, had attained finality and, therefore, cannot be challenged at this stage. He has also stated that the inclusion of respondent no.5 in the panel was illegal as he failed to fulfil the conditions regarding continued suitability, inasmuch as, he appeared in subsequent selection but did not qualify.

10. We have heard learned counsel for both the parties and perused the pleadings on record carefully.

11. From the rival pleadings, it is quite clear that the respondent no.5 was earlier denied ^{to senior clerk} promotion on the basis of examination in 1977. His appeal was dismissed twice at two levels but his appeal before the Chief Personnel Officer was allowed and he was granted proforma promotion and seniority as senior clerk. This happened only after the panel for US-11 formed in 1989 had ^{been} already exhausted after promoting Sri Har Nandan Prasad, who was 8th general candidate. Admittedly, in that selection, there were 8 vacancies of general candidates. ~~Therefore,~~ When the appeal of respondent no.5 was allowed, it was incumbent on the respondents to include his name in the aforesaid panel since persons junior to him had been empanelled and promoted. We have seen from the record of selection which were made available to us by the respondents that the respondent no.5 had actually qualified in the selection.

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Therefore, the only alternative available to the respondents was to include respondent no.5 also in the panel and thereby ^{empanelling} ~~being~~ 9 general candidates against 8 vacancies or to delete the last general candidate i.e. Har Nandan Prasad, respondent no.6 from the panel and include only the name of respondent no.5. However, by that time, respondent no.6 had already enjoyed the benefit of regular promotion for several years and the seniority position on the basis of such promotion had become a settled position. In such a situation, if respondents had adopted the first alternative, which was to have 9 names of general candidates against 8 general vacancies in the panel, we do not find any illegality in the action of the respondents nor any infirmity on equitable considerations. Whether or not the appeal of the respondent no.5 could have been allowed by the respondents, is not an area which we are required to examine as such granting of notional seniority has not been challenged in this CA. However, in the circumstances enumerated by the respondents, which led to the allowing of the appeal of respondent no.5, appear to us to provide sufficient justification for allowing the appeal of this respondent. The only question which arises ^{is} as to how 9 general candidates would be empanelled against 8 vacancies. Although the respondents have denied that they have empanelled respondent no.5 against Scheduled Tribe vacancy which could not be filled, the fact remains that it was against this vacancy only that the 9th candidate could be accommodated. Technically this was not wholly regular as the Scheduled Caste vacancy could have been allotted to the general candidates only after it was

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dereserved. There is nothing from the record to show that any action was taken to dereserve the post. However, in these circumstances, we are inclined to ignore this irregularity as otherwise, there would have been ~~an injustice~~ ^{a patent} injustice, both to respondent no.5 had his name not been included in the panel and to respondent no.6, if his name was deleted from the panel long after he was promoted on the basis of his empanelment.

11. So far as the applicant no.2 is concerned, the respondents have ~~have~~ specifically stated that he did not qualify in the examination. We have seen the result of 1988 examination, and we have found that this applicant did not appear in that examination. It is stated by the respondents that even in subsequent examination, he did not qualify. No rule has been, cited before us to show that he ~~could~~ ^{must} have been considered for promotion as the best amongst failures.

12. In view of the foregoing, we are not satisfied that the applicants have made out a sufficient case for our interference. The OA is accordingly dismissed, leaving the parties to bear their own costs.

O.A NO. 1162 OF 1995

Hari Nandan Prasad.....Applicant

Vs.

Union of India and Ors.. . . . Respondents

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13. This application was filed by Sri Har Nandan Prasad who was impleaded as respondent no.6 in the earlier OA No.160 of 1992, after he was impleaded. Through this OA he has prayed that the order dated 16-8-1990, as well as the order dated 10-1-1991, to the extent ~~they~~ ^{it} relates to Sri Rajiv Kishore Agarwal, Respondent no.6 in the present OA.

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^{Respondent No 5}
and ~~Respondent No 5~~ in the earlier OA No.160/92. He has also
prayed for quashing the order dated 5-8-1991 by which
the aforesaid respondent ~~was~~ was promoted as OS-II.

14. The facts of the case need not be stated as these
are already covered in the facts already set out while
disposing the earlier OA. For the reasons already
indicated in the foregoing OA this OA stands dismissed.

Member (J)

Member (A)

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