

A.P.R.

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

THIS THE ~~10~~ DAY OF APRIL 2001

Original Application No.1456 of 1999

CORAM:

HON.MR.JUSTICE R.R.K.TRIVEDI, V.C.

HON.MR.S.DAYAL, MEMBER(A)

1. Akhil Bharatiya Shoshit Karmachari Sangh through its Secretary M.K.Chaturvedi, S/o Sri H.P.Chaturvedi, R/o B-291 Krishna Nagar, Izat Nagar Bareilly.
2. R.C.Srivastava son of Shri Bachhan lal R/o 211/B New Model railway Colony, Izat Nagar, Bareilly.
3. Vinod Pokhriyal, son of Sri Guna Nand R/o 45/6Jokhan Kainal Road Kathgodam (Nainital)

... Applicant

(By Adv: Shri T.S.Pandey)

Versus

1. Union of India through its Ex-Officio Secretary & Chairman Railway Board, Rail Bhawan, New Delhi.
2. General Manager, N.E.Railway, Gorakhpur
3. Divisional railway manager, North Eastern Railway, Izat Nagar Bareilly.
4. Senior Divisional personnel Officer Izat Nagar, Bareilly.
5. Senior Divisional Operating Manager N.E.Railway, Izat Nagar, Bareilly
6. Smt. Pratibha Rani Office Supdt D/o unknown through DRM(Operating) N.E. Railway, izat Nagar, Bareilly.
7. Sri Bachhu Lal Office Supdt Gr.I Operating Son of unknown through DRM(Operating) N.E.Railway, Izat Nagar Bareilly.
8. Sri Bala Singh Laspal, Mail/Exp Guard S/o unknown through DRM(Operating) N.E.Railway, izat Nagar, bareilly.
9. Sri M.L.Meena Mail/exp Guard, S/o unknown through DRM(Operating), N.E.Railway, Izat Nagar, Bareilly.

... Respondents

(By Advs:S/Shri A.K.Gaur/A.S.Diwakar)

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O R D E R (Reserved)

JUSTICE R.R.K. TRIVEDI, V.C.

Applicant no.1 in this OA is a union of employees whereas applicant no.2 and 3 are its members. By filing this OA u/s 19 of A.T. Act 1985 applicants have prayed to quash promotion orders dated 4.5.1993 and 4.6.1993 (Annexure 1 & 2 respectively to the OA). It has been further prayed that respondents 1 to 5 may be directed to consider the promotion of applicant no.2 to the post of Office Supdt. Gr.I of Operating branch of Izat Nagar Division and to consider applicant no.3 on upgraded grade of Guards. By order dated 4.5.1993 (Annexure 1) respondents have promoted respondent no.7 Bachha Lal from Office Supdt. Gr.II to Office Supdt. Gr.I in the pay scale of Rs.2000-3200. This promotion has been granted w.e.f. 1.3.1993. It is further stated in the order that one post of Office Supdt. Gr.I has increased on account of restructuring under Board's order dated 27.1.1993. By this order three vacancies of O.S.Gr.II (including one caused by promotion of respondent no.7) have also been filled.

By order dated 4.6.1993 (Annexure 2) 21 posts of Guard passengers in grade 1400-2600 have also been filled. The cadre of these 21 posts of Guard passengers was constituted by order dated 27.1.1993. Under this order respondent no.8 Bala Singh Laspal and respondent no.9 Mohan Lal Meena both belonging to reserve category of SC have also been promoted.

It has also been stated in para 10 of the OA that respondent no.3 Divisional railway Manager, Izat Nagar Bareilly has, in pursuance of the Railway Board's order

dated 10.5.1998 and General Manager(P) N.E.Railway Gorakhpur, notified creation of one post of Chief Office Supdt in grade of 7450-11500 and two posts of O.S.in grade of 6500-10,500 and as respondent no.6 is the senior most O.S.Gr.I; is going to be appointed as Chief Office Supdt. The grievance of the applicants is that promotion to respondent no.7 to 9 has been granted in pursuance of the clause VI of Railway board's order dated 16.11.1984 ^{and} ~~NS~~ Clause 10 of Railway Board's order dated 27.1.1993 which have already been held to be illegal by Central Administrative Tribunal and by Hon'ble the Apex court. It has also been stated that the promotion to respondent no.6 has also been given in contravention of the judgements of the Tribunal and Hon'ble Apex court.

Resisting the claim of the applicant counter affidavits have been filed on behalf of respondents 1 to 5, respondent no.6 & 7. However, respondent no.8 & 9 have not put in any contest.

The stand taken by the respondents 1 to 5 in their counter reply is that the promotion orders dated 4.5.1993 and 4.6.1993 are based on rules and regulations applicable as per extant rules. It has also been stated that one post of Chief Office Superintendent has been created in the scale of 7450-11500 which shall be filled on the basis of seniority and on fulfilment of other conditions. It has been stated that promotion to respondents 6 has been granted according to the instructions in force at that time and they do not suffer from any illegality. Respondent no.6 in her counter reply has submitted that she was appointed as Junior clerk on 12.12.1975 she was promoted to the post of Senior clerk on 8.10.1976 and to the post of Head

clerk on 27.10.1980. She was promoted to the post of O.S.Gr.II on 21.12.1984. She was further promoted as O.S.Gr.I on 1.1.1984. It is claimed that she was promoted to the post of O.S.Gr.I before the Railway Board's order dated 16.11.1984 was issued. It is claimed that promotions granted to her were not based either under clause VI of order dated 16.11.1984 or clause 10 of order dated 27.1.1993. She being the seniormost O.S.Gr.I is entitled to be promoted as Chief O.S. on her own right. It has been stated that the petitioner is put to strict proof of the facts that promotion to her was against the ratio of judgement of Hon'ble Supreme court in case of 'J.C.Mallick'.

Respondent no.7 in his counter reply has submitted that he was appointed as a Junior Clerk on 20.6.1983. he was promoted as Senior clerk on 30.10.1984. Then he was promoted to the post of Head Clerk on 30.10.1985 and as O.S.Gr.II on 2.7.1990. He was promoted as O.S.Gr.I by virtue of order dated 4.5.1993 being senior most in grade of O.S.II. It is claimed that his promotion was because he was senior most in the feeder cadre and no benefit of reservation was given to him. Para 6 of letter dated 16.11.1984 was not applied while promoting him to the post of O.S.Gr.I.

We have heard Shri T.S.Pandey learned counsel for the applicant, Shri A.K.Gaur learned counsel appearing for respondents 1 to 5 and Shri A.S.Diwakar learned counsel appearing for respondents 6 & 7.

Shri T.S.Pandey learned counsel for the applicant has submitted that respondents 6 to 9 were granted quick promotions on the basis of the reservation policy and promotion of respondent no.7 to O.S.Gr.I could not be granted as he was already given accelerated promotion to the post of O.S.Gr.II on the basis of he being a

candidate of reserve category. The promotion granted to respondents 8 & 9 as Guard Passengers has also been challenged on the same ground. In respect of respondent no.6 it has been submitted that as she was promoted and appointed as O.S.Gr.I on the basis of reservation policy she could not be further promoted to the post of Chief Office Supdt, on the sole ground that she belong to reserve category. Learned counsel has placed reliance on the judgement of Hon'ble Supreme court in 'Ajit Singh and Others Vs. State of Punjab J.T.1999(7) SC 153

2. Ajit Singh Januja and Others Vs. State of Punjab and Others (1996) 2 SCC 715
3. Un reported Judgement dated 26.10.1995 passed by Calcutta Bench of this Tribunal in OA 765/95 Shantanath Ghosh vs.Union of India and Ors
4. Unreported judgement dated 30.4.1996 passed by Allahabad Bench of the Tribunal deciding in bunch of OAs in case of Akhil Bharatiya Shoshit Karmachari Sangh and another Vs.Union of India & Ors.

Shri A.S.Diwakar learned counsel appearing for respondent no.6 & 7 has submitted that the relief sought is only against order dated 4.5.1993 and 4.6.1993. the promotion granted to respondent no.7 to 9 granted earlier have not been questioned. It is further submitted that respondent no.6 was promoted as O.S.Gr.I on 1.1.1984. Respondent no.6 was promoted as O.S.Gr.I on 1.3.1993. They were senior most O.S.Gr.II and consequently they were promoted. Applicants no. 2 and 3 were not in the feeder cadre and they could not be promoted. No prayer has been made to quash promotion of respondent no.6 on 1.1.1984. Learned counsel has also submitted that for challenging the promotion of

respondents 7 to 9 applicants ought to have pleaded the facts on which basis it may be judged that their promotions were in contravention of the judgements of Hon'ble Supreme court and this Tribunal. Applicants are not entitled for any relief in absence of necessary pleadings. Shri A.S.Diwakar has placed reliance on the judgement of Hon'ble Supreme court in a case of 'Jai Bhargawa & Ors Vs. State of Haryana AIR 1999 SC 1085

Shri A.K.Gaur learned cocounsel appearing for respondents 1 to 5 has submitted that this OA is highly belated and applicants are guilty of latches ^{and} are not entitled for relief claimed. Reliance has been placed on the judgement of Hon'ble Supreme court in case of 'T.R.Kapoor and others Vs.State of Haryana and Others AIR 1989 SC 2082.

We have carefully considered the submissions of the learned counsel for the parties. Before we proceed to consider the rival contentions advanced by the parties it shall be appropriate to state the significant change in legal position brought about by the Constitution Bench of Hon'ble Supreme court in case of 'R.K.Sabarwal and others Vs. State of Punjab and Others 1995 SCC(L&S) 548. Para 5,6 & 7 of the judgement are very relevant which are being reproduced below:

5."we see considerable force in the contention raised by the learned counsel for the petitioners. The reservations provided under the impugned government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year.

The purpose of "running account" is to make sure that the Scheduled Castes/Scheduled tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts ..." are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1,7,15,22,30,37,44,51,58,65,72,80,87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied

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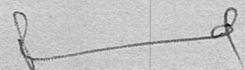
and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1,7,15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. The expressions 'posts' and 'vacancies' often used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

7. When all the roster points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong. Jeevan Reddy, J speaking for the majority in Indra Sawhney v. Union of India observed as under: (SCC p.737, para 814)

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"Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Castes and other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75, if the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500 i.e. till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause(4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose



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of applying the rule 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be."

From the aforesaid judgement it is clear that the Hon'ble Supreme Court directed to give effect to the policy of reservation against the post and not the vacancy. For giving such effect total^u number of the posts in a cadre are to be filled by the operation of the roster. The "running account" is to operate only till the quota provided under the instructions is reached and not thereafter. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belong in the roster. In case of non availability of the reservation candidate at the roster point it was left open to the State government to carry forward the point in just and fair manner. Hon'ble Supreme Court also provided that the decision of the Constitution Bench on the^u points shall operate prospectively. The judgement of Hon'ble Supreme court was given on 10.2.1995. In the present case promotions were given to the respondents 6 to 9 much before 10.2.1995. In our opinion, promotions granted to the applicant cannot be questioned on the ground on the basis of the judgements of Hon'ble Supreme court as contended by learned counsel for the applicants. The promotions were granted in 1993. This OA was filed on 19.11.1999 i.e. after about 6 years, we do not find any justification to upset the promotions after such a long time.

Even if the question of delay is ignored for the sake of arguments, in our opinion applicants are not entitled for reliefs claimed as necessary pleadings are

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not there. In order to question the legality of the promotion of respondents 6 to 8 it was necessary for the applicants ^{to show} that the roster had already been satisfied and the promotion to respondents 6 to 8 would be contrary to the judgement of Hon'ble Supreme court. No such facts and figures based on total strength of the cadre have been mentioned in the OA. Applicants have only stated vaguely that accelerated promotions were given to them. The respondents have denied this fact in counter reply and have submitted that promotions were granted to them strictly according to the extant rules and policy of reservation. In such facts and circumstances it is difficult for this Tribunal to determine whether the promotion of respondents no.6 to 9 would be beyond the roster point and without such a finding their promotion cannot be held to be illegal.

We have perused the seniority ^{list} filed alongwith the OA and we also do not find that the applicants could question promotion of respondents no.6 on the basis of seniority. In seniority list dated 1.4.1978(Annexure 3) respondent no.6 has been shown as Senior Clerk at sl.no.15. Applicant no.2 R.C.Srivastava has been shown as Junior Clerk at sl.no.19. Date of appointment of respondent no.6 was 12.12.1975 whereas the appointment of applicant no.2 was of 16.2.1977. There was no question of he being senior to respondent no.6 at any point of time. He is not effected by any promotion given to respondent no.6. Those who were effected by promotion of respondent no.6 did not raise any objection. Similar is the position of applicant no.3. He was appointed after appointment of respondent no.8 Balasingh Laspal and he could not be effected. Applicant kept quiet for a long period of six years and



filed this OA only in 1999 after six years. hon'ble Supreme court in case of 'T.R.Kapoor (Supra) held in para 11 as under:

"In the first place the petitioners had acquiesced in the interpretation of the Rules by the State Government all along and it was only after the decision in A.S.Parmar's case(AIR 1984 SC-643),they choose to move this Court under Art.32 of the Constitution to seek promotional benefits. Having remained complacent for a long number of years, the petitioners cannot now turn round and say that notwithstanding their inaction, they should be granted promotion from deemed dates on the basis of seniority. Secondly, in the long interval of time that had elapsed before the petitioners,several other Class II officers holding engineering degrees have been promoted to class I service. The benefits which had accrued to those persons by reason of their promotions cannot now be disturbed or interfered with by giving the petitioners promotions from deemed dates of eligibility for promotion. In otherwords, a settled state of affairs among the class I promotees cannot be unsettled now."

The judgement is squarely applicable to the facts of the present case. The applicants acquiesced to the promotions granted to respondents 6 to 9. they have questioned it now after long time only after the change in the legal position after judgements of Hon'ble Supreme court and this Tribunal,in our opinion, applicants are not entitled for relief. ..pl4

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For the reasons stated above, we find no merit in this OA and it is accordingly dismissed. However, there will be no order as to costs.

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MEMBER (A)

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VICE CHAIRMAN

Dated: April 12th, 2001

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