

RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH : ALLAHABAD

ORIGINAL APPLICATION NO.1265 OF 2002

ALONGWITH

ORIGINAL APPLICATION NO.22 OF 2003

ALLAHABAD THIS THE 15th DAY OF September, 2003

HON'BLE MAJ GEN K.K. SRIVASTAVA, MEMBER-A

HON'BLE MR. A. K. BHATNAGAR, MEMBER-J

1. Ibraar Hussain,
son of Anwar Hussain,
residence of R-52,
Nagarpur Tilhar,
District-Sahjanpur.
2. Lalit Mohan Agri,
son of Mohan Ram Agri,
resident of 18-A Medical Nursing Colony
Railway Hospital, Irratnagar,
Bareilly,
both serving as junior Commercial clerks
in N.E. Railway,
Izzatnagar Division.Applicants

(By Advocate Shri T.S. Pandey)

Versus

1. Union of India,
through Chairman and Ex-officio,
Railway Board, Rail Bhawan,
New Delhi.
2. General Manager,
North Eastern Railway,
Gorakhpur.
3. Divisional Railway Manager,
North Eastern Railway,
Izzatnagar Division,
Bareilly.

4. Senior Divisional Personal Officer,
North Eastern Railway,
Izzatnagar Division,
Bareilly. Respondents
(By Advocate Shri K.P. Singh)
Alongwith

1. Vijay Kumar Singh,
Son of Late Sri Shiv Bali Singh,
aged about 35 years,
R/o F-36, Shastri Nagar,
Izzatnagar,
Bareilly (U.P.)

2. Deepak Kishore Bisaria,
Son of Late Anand Kishore Bisaria,
aged about 33 years,
R/o D-5/88, Shastri Nagar,
Izzatnagar,
Bareilly (U.P.).

..... Applicants
(By Advocate Shri R.C. Pathak)

Versus

1. Union of India,
through the General Manager (Personnel),
North Eastern Railway,
General Manager (P) Office N.E. Railway,
Gorakhpur (U.P.).

2. The Divisional Railway Manager (P),
North Eastern Railway,
Divisional Railway Manager (P),
Office N.E. Railway Izzatnagar,
Bareilly (U.P.).

3. The Senior Divisional Commercial Manager,
North Eastern Railway,
Izzatnagar,
Bareilly (U.P.).

4. The Divisional Railway Manager (Commercial),
D.R.M. (C), N.E. Railway Office,

Izatnagar, Bareilly (U.P.).

5. The Senior Divisional Personnel Officer, D.R.W. N.E. Railway Office, Izatnagar, Bareilly (U.P.).

6. Sri Manish Kumar Srivastava, All Senior Commercial Clerks working at Kashipur Kasganj and Kathgodam N.E. Rly. Stations.

7. Sri Mahesh Chandra Sharma,

8. Sri Sushil Kumar Saranwar

..... Respondents

(By Advocate Shri K.P. Singh)

ORDER

HON'BLE MAJ GEN. K. K. SRIVASTAVA, MEMBER-A

Since the controversy involved in both the O.A.s and also the reliefs claimed are similar, this O.A. is being decided by a common order, leading O.A. being 1265/02.

O. A. NO.22/03

The applicants were appointed as Junior Commercial Clerk in N.E. Railway during the year 1988. The applicant no.1 filed a representation before respondent no.2 on 5.8.1989 for appointment/promotion on the post of Guard (Goods). Applicant no.2 also represented on 18.10.1993 for promotion on the post of Guard. The applicants refused their promotion as Senior Commercial Clerk giving option for promotion on the post of Guard. By the Railway Board's circular dated 24.12.1998 a new Rule as para 124 (3) of IREM was inserted through which the Senior Commercial Clerks were also made eligible for selection to the post of Guard ^(Goods).

A notification was issued for selection by Guard (goods) on 16.10.2002 but in the list of eligible candidates for selection of Guard (goods) the names of the applicants did not figure. Aggrieved by the same the applicants filed this O.A. in which this Tribunal vide interim order dated 10.01.2003 directed the respondents to allow the applicants to appear in the written test held on 18.01.2002. The claim of the applicants has been contested by the respondents.

O.A. NO. 1265 OF 2002

In this O.A. filed under section 19 of Administrative Tribunals Act 1985, the applicants have prayed for quashing the notification dated 24.09.2002 and Railway Board Circular dated 05.06.1998 circulated by respondent no.2 vide order dated 24.12.1998 (Annexure A-1 & 2) with further direction to respondents to re-structure and re-cast the correct Seniority list of Junior Commercial Clerks, Senior Commercial Clerks both, in terms of judgment laid down by Hon'ble Supreme Court in the case of A.K. Juneja II to give the finality to the seniority list.

2. The facts, in short, are that the applicant no.1 was appointed as Junior Commercial Clerks in April 1987 in Izzatnagar Division and applicant no.2 was appointed as Junior Commercial Clerks in the same division in June 1988. As per the applicant they submitted their options for promotion for the post of Guard (goods) in pursuance of the provisions contained under para 124(I) (II) (b) of the IREM on various dates. Both the applicants were promoted as Senior Commercial Clerks during 1993, 1995 and 1996 but they refused to accept promotion as Senior Commercial Clerks as *Mr. A.K. Juneja*

they had already submitted option for promotion to the post of Guard (goods). On different dates during the period from 09.11.1990 to 6.4.94 Senior Commercial Clerks and Junior Commercial Clerks on 28.05.1996 and 26.06.1999. The Railway Board issued circular dated 05.06.1998 adding para 124 III in IREM. A notification for the post of Head Commercial Clerks amongst the Senior Commercial Clerks was issued on 24.09.2002 notifying the list of eligible candidates in which the names of both the applicants do not find place. Aggrieved by this the applicants have filed this O.A. This Tribunal by order dated 03.12.2002 passed the interim order directing the respondents to allow the applicants to appear in the selection held for Guard (goods) on 18.01.2003. The applicants have appeared in the selection and have moved Civil Misc. Application no.1903/03 praying that the direction be issued to the respondents to declare the result of the applicant in the aforesaid selection held on 18.01.2003 and 25.03.2003. The claim of the applicant has been contested by the respondents by filing CA.

3. Shri T.S. Pandey, learned counsel for the applicant submitted that once the applicants had given option for promotion to the post of Guard (Goods), the action of the respondents in not including the names of the applicants in the list of eligible candidates for selection to the post of Guard (goods) is illegal, arbitrary and discriminatory. The names of the juniors have been included in the list ignoring the seniority of the applicants. The learned counsel for the applicant argued that once they had refused promotion as Senior Commercial Clerks during 1993, 1995 and 1996 on the basis that they had given option for promotion to the post of Guard (goods), the respondents could not ignore the claim of the applicants.

4. The learned counsel for the applicant also submitted that the seniority list of Senior Commercial Clerks and Junior Commercial Clerks issued on 28.05.1996 and 26.06.1999 are incorrect as they are in violation of Apex Court judgment in A.K. Juneja II case. The learned counsel stated that the above seniority lists are tentative and provisional and, therefore, ^{The respondents have} they cannot be treated to be final ^{to re-cast the seniority list as and when promotion orders are issued.} ^{in which they have now} In fact, no final seniority list has been issued by respondent no.3 after re-structuring w.e.f. 01.03.1993. In support of this the learned counsel has placed reliance on the judgment of Apex Court in case of A.K. Juneja II.

5. The learned counsel for the applicant also challenged the Railway Board's Circular dated 05.06.1998 by which para 124 III has been added in IREM making Senior Commercial Clerks eligible to appear in the selection for Guard (goods). In fact, the circular is violative of Article 309 and Article 14 of the Constitution of India. The learned counsel has placed reliance on the judgment of Hon'ble Supreme Court in the case of U.O.I. Vs. Tulsiram Patel reported in 1987 UPLBEC 1241. The learned counsel submitted that the Executive orders cannot prevail over the statutory provisions and since the instructions of the Railway Board dated 05.06.1998 are executive in nature they cannot form the part of statutory provisions of IREM.

6. The learned counsel for the applicant further submitted that keeping in view the option of the applicants and their refusal again and again for promotion to the post of Senior Commercial Clerks, the applicants are eligible for promotion

to the post of Guard (goods). They have appeared in the selection held on 18.01.2003 and 25.03.2003. Their results should be declared and if they are found successful, they should be sent for training as per rules restoring their seniority vis-a-vis those who have already been sent for training.

7. The learned counsel for the applicant finally submitted that respondents were given number of opportunities for filing counter affidavit which they have not and, therefore, the version of the applicants has to be taken as correct in view of the judgment of Hon'ble Allahabad High Court in the case of Juggi Lal Kamalapath Vs. R.J. Gupta and Anr. reported in AIR 1962 Allahabad 407 (V 49 C 100).

8. Resisting the claim of the applicants Shri K.P. Singh learned counsel for the respondents at the outset submitted that CA has been filed in the connected case i.e. O.A. No.22/03 and since both the cases are connected the same holds good for this O.A. also.

9. The learned counsel for the respondents submitted that by giving option it does not mean that one's seniority will not be affected if one refused the promotion. In the instant case, the applicants have refused their promotion to the post of Senior Commercial Clerks during 1993, 1995 and 1996 and each time their seniority was bound to be affected. Respondents gave, time and again their refusal which was accepted by the competent authority resulting into loss of seniority by them on each occasion. The seniority list was revised as per the Board's direction given from time to time. The names of the

applicants was shown at right place in the seniority list of Commercial Clerks in the pay scale of Rs.975-1540/- (3200-4900 RPS). The applicants were not in the criteria of calling up in the written test as per 1x3 formula and hence the applicants were not called for selection for the post of Guard(goods).

10. The learned counsel for the respondents submitted that Railway Board is competent to issue circulars and the circular dated 05.06.1998 is not in violation of Article 309 and Article 14 of the Constitution of India. The learned counsel for the respondents submitted that before Fifth Pay Commission Report Senior Commercial Clerks and Guard (Goods) were in the same scale but after Fifth Pay Commission Report Pay Scale of Guard (Goods) was enhanced and, therefore, after careful consideration the Railway Board issued the impugned circular dated 05.06.1998.

11. The learned counsel for the respondents finally submitted that the applicants appeared in the selection for Guard (goods) held on 18.01.2003 and 25.03.2002 because of interim order of this Tribunal dated 03.12.2002. Since only three times the number of vacancies for Commercial Branch was to be considered, the names of the applicants was not included in the list of eligible candidates due to their earlier seniority and, therefore, once they were not eligible the court should consider that their appearing in the selection because of interim order should not be considered as eligibility.

12. We have heard counsel for the parties, carefully considered their submissions and closely perused records.

13. The learned counsel for the applicant has argued that

the applicants have given their option for promotion to the post of Guard(goods) and accordingly refused their promotion to the post of Senior Commercial Clerks. The respondents could not ignore the claim of the applicants. We do not find much substance in this argument. There is no Rule which lays down for maintaining a separate seniority list in regard to those who opt for a particular promotion and refuse the promotion in their stream. The very fact that the applicants refused their promotion in 1993, 1995 and 1996 they had to lose their seniority each time as per rules and the applicants cannot take the plea that since they had given option their seniority could not be affected. The learned counsel for the applicant has placed reliance on the judgment of Hon'ble Supreme Court in the case of A.K. Juneja II. In our considered opinion, the same, in no way, would be helpful to the applicants. The contention of the learned counsel for the applicants that as and when promotion orders are issued, seniority list has to be re-casted in view of the judgment of Hon'ble Supreme Court in A.K. Juneja case would go contrary to the interest of the applicants because when they refused promotion to the post of Senior Commercial Clerks in 1996, they continued to be working as Commercial Clerks. Therefore, the argument of the applicant's counsel that the names of the applicant's juniors has been incorrectly included at serial nos. 19, 20, 21, 30, 39, 51 and 52 for selection to the post of Head Commercial Clerks does not hold good because the persons shown against the above serials had already been promoted as Senior Commercial Clerks whereas applicants continued to be Commercial Clerks. From perusal of Annexure A-11 of O.A. No. 22/03, which is the representation of Shri Vijay Kumar Singh applicant no. 1 of O.A. No. 22/03 dated 09.10.2002, it is established that all the applicants in both

the O.As were only Commercial Clerks on 09.10.2002 and not the Senior Commercial Clerks. Therefore, the applicants cannot claim the seniority as Senior Commercial Clerks keeping in view their initial date of seniority pertaining to the years 1987/88.

14. Besides all those who are alleged to be junior to applicants in the list dated 24.09.2002, are in fact not junior to the applicants as they were already Senior Commercial Clerks. We find substance in the submission of the learned counsel for the respondents that the applicants did not fall in the criteria of calling up in the written test as per 1x3 formula. The applicants counsel has challenged the ^{"legality"} of the Railway Board Circular dated 05.06.1998 by which the Senior Commercial Clerks have been made eligible to appear for selection for Guard(goods). The argument of the applicants is that the circular is in contravention of provisions of para 124 (1) & (2) of IREM, by which para 124 (3) has been added making Senior Commercial Clerks eligible to appear in the selection for Guard(goods). The counsel for the applicants in both the O.As pleaded that if Senior Commercial Clerks are made eligible to appear in selection for Guard(goods), Commercial Clerks will never get a chance to appear for selection for promotion as Guard(goods). They also pleaded that earlier to the issue of the circular dated 05.06.1998, Senior Commercial Clerks were not eligible to appear for selection as Guard (goods) because the scales of Senior Commercial Clerks and Guard (goods) were same. The learned counsel relying upon the judgment of Hon'ble Supreme Court in the case of TulsiRam Patel (Supra) submitted that the executive order cannot prevail over the statutory

provisions.

15. Shri T.S. Pandey, learned counsel for the applicant also argued that the Railway Board Circular dated 05.06.1998 has got to have the approval of the Department of Personnel in consonance with the Government policy, therefore, these are the Executive instructions and these instructions cannot be included as part of statutory provisions contained in IREM. ^{in the case of TulsiRam Patel(Supra)} In para 124 the judgment of Hon'ble Supreme Court/their Lordships have observed that "Executive instructions stand on a lower footing than a statutory rule for they do not have the force of a statutory rule". In the present case the law laid down by Hon'ble Supreme Court will not be applicable because the instructions of the Railway Board have statutory force as held by Hon'ble Supreme Court in the case of B.S. Vedera Vs. U.O.I. and Ors. reported in 1969 SC 118. In para 25 of the judgment in the case of B.S. Vedera the following has been held by their Lordships:-

"The Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Art. 309. Under Rule 157, the President has directed the Railway Board, to make rules of general application to non-gazetted railway servants, under their control. The rules, which are embodied in the Schemes, framed by the Board, are within the powers, conferred under Rule 157, and, in the absence of any Act, having been passed by the 'appropriate' Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated, retrospectively also. Such indication, about retrospective effect, is clearly there, in the provisions."

The same view has been taken by the Hon'ble Supreme Court in the case of Shyam Sunder Vs. U.O.I. and Ors. reported in AIR 1969 SC 212 (V 56 C 40).

16. The learned counsel for the applicant has also placed reliance on the judgment of this Tribunal dated 05.02.2002 in O.A. No.317/01 regarding maintenance of Seniority list. We have carefully perused the same and we find that the above case is easily distinguishable and will not be applicable in this case.

17. In the facts and circumstances and our aforesaid discussions, we do not find any good ground for interference. There is no merit in both the O.As.

18. M.A. No.1903/03 in O.A. No.1265/u2 is for declaring the result of the applicant who were permitted to appear in the selection on 18.01.2003 and 25.03.2003 because of the interim order of this Tribunal dated 03.12.2003. The same is rejected because, in view of our discussions, the applicants were not eligible for appearing in the said selection. Similarly M.A. No.680/03 is also rejected on the same ground.

19. Both the O.As fail and are dismissed as lacking in merit. No costs.