

Reserved

**CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD BENCH
ALLAHABAD**

(THIS THE 4th DAY OF April, 2011)

Hon'ble Dr.K.B.S. Rajan, Member (J)

Hon'ble Mr. D. C. Lakha, Member (A)

Original Application No.1006 of 2007

(U/s 19, Administrative Tribunal Act, 1985)

Gopal Prasad Gupta
Aged about 39 years,
S/o Late Kedarnath Gupta
R/o Quarter No. 54-B, Road No. 6
Izzatnagar, Bareilly.

..... ***Applicants***

Present for Applicant :Shri T. S. Pandey, Advocate.

Versus

1. Union of India, through the General Manager, North Eastern Railway, Gorakhpur.
2. Divisional Railway Manager, North Eastern Railway, Izzatnagar Division, Division Bareilly.
3. Senior Divisional Personnel Officer, North Eastern Railway, Izzatnagar Division Bareilly.
4. Pankaj Sagar, Estate Welfare Inspector Grade - 1, North Eastern Railway, Izzatnagar Division Bareilly through Divisional Railway Manager, North Eastern Railway, Izzatnagar Division Bareilly.

..... ***Respondents***

Present for Respondents : Shri Anil Dwivedi, Advocate

ORDER

(Delivered by Hon. Dr. K. B. S. Rajan, Member-J)

Heard Shri T. S. Pandey, learned counsel for the applicant and Shri Anil Dwivedi, learned counsel for the respondents.

2. Applicant of this OA stands at serial No. 4 in the seniority list of Estate Welfare Inspector Gr. II (earlier the appellation being Personal Inspector, which was rechristened vide order dated 18-12-2006) while private respondent No. 4 stands at serial 6 vide Annexure 5.

09-10-2003: Restructuring orders of Group C and D cadre provide for general policy of reservation.

3. Estate Welfare Inspector Gr. I, II and III with the creation of additional posts Estate Welfare Inspector Gr. I were all subjected to restructuring w.e.f. 01-4-2004.

4. Pursuant to the above upgradation order and creation of new posts of Inspector Gr. I, seniors to the applicant had been upgraded vide Annexure 6 and after such upgradation of the seniors, the applicant became the senior most in Grade II. While the applicant was sanguinely hoping for his turn to be upgraded as Grade I inspector, his junior, respondent No. 4 was so upgraded, under the reserved category vide order dated 18-05-2004 at Annexure 1. Applicant's representations dated 10-11-2005 and 12-7-2005 did not yield any fruitful response.

5. Hence, this O.A. heavily relying upon the decision of the Apex court in the case of Union of India vs V.K. Sirothia (2008) 9 SCC 283

and the decision of the Jabalpur Bench of the Tribunal in Ashok Kumar Srivastava and N.K. Saini and others vs Director General RDSO and Others (these having been upheld by the Apex Court). At the time of filing of the OA the 'Pushpa Rani' was not decided by the Apex court which was decided on 29-07-2008 vide **(2008) 9 SCC 242**. Decision in the case of All India Non SC and ST employees Association vs V.K. Agrawal and others **(2001) 1 SCC 165** had also been relied upon, especially the observation of the Apex court while dealing with Contempt petition No. 30 of 1999.

6. The relief sought for is as under:-

- (a) *to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 18th May 2004 (Annexure 1 to compilation No. 1) with the further order and direction in the nature of mandamus commanding the respondents No. 1 to 3 recovering the difference of arrears including the difference of pay scale between Estate Welfare Inspector Grade-I and Grade 2 from personal salary of respondents No.2 and 3 within a stipulated period of time and considered the upgradation order of the applicant on the post of Estate Welfare Inspector Grade-I.*
- (b) *Award cost to the applicant from the respondents.*
- (c) *To issue any other and further writ, order or direction which this Hon'ble Tribunal deem fit and proper in the circumstances of the case but may have not been pleaded and is found just and appropriate to this Hon'ble Court be also awarded to the applicant from the respondents.*

7. Respondents have contested the O.A. According to them,

- (a) *2 additional posts of Personnel Inspector Gr. I in pay scale Rs. 6500-10500 were received by upgrading increasing earlier 2*

number of posts to 6 posts. Thus **it is totally wrong to say, as alleged in para under reply, that 6 new post of Welfare Inspector Gr. I were created.** AT this juncture, it will not be out of place to mention here that another 2 posts of Personnel Inspector Gr. I were received as a result of chain resultant vacancies due to filling up higher Grade posts of Chief Personnel Inspector.

- (b) Respondent No. 4, who was the senior most Personnel Inspector Gr. II in the Scheduled Caste group, was promoted as Personnel Inspector Gr. I vide office and
- (c) In terms of paragraph 14 of the Railway Board's letter dated 09.10.2003, which is regarding restructuring of certain Group 'C' and 'D' cadre w.e.f. 01.11.2003, the existing instructions with regard to reservation of SC/ST wherever applicable will continue to apply. Thus the promotion order dated 18.05.2004 is perfectly just, proper and in accordance with relevant rules and instructions on the subject and deserves to be upheld by the Hon'ble Tribunal.

8. The applicant has filed his rejoinder, reiterating his stand as in the O.A.

9. Counsel for the applicant argued that though the respondents claim that limitation comes in the way of the applicant inasmuch as the original representation is of 2005 and the applicant had approached the tribunal only in 2007, the fact remains that the

decision in Pushpa Rani was awaited and as such, the application for condonation of delay had been filed giving full justification.

10. As regards the decision in Pushpa Rani, the counsel argued that in his respectful submission, Pushpa Rani is to be treated as per incurium in view of the judgment of the Apex court in the case of V.K. Agrawal (supra). He had also placed reliance upon the decision of the Apex Court in the case of P.S. Badal vs State of Punjab **(2007) 51 AIC 623 (SC).**

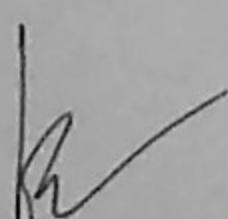
11. Counsel for the respondents filed written arguments, which is the condensed version of their counter.

12. Arguments were heard and documents perused. The decision in 'Pushpa Rani' did take into account the decision in V.K. Agarwal. And the Addl. Solicitor General distinguished the same from the case of Pushpa Rani. Finally, the Apex court in the case of Pushpa Rani (2008) 9 SCC 242 held as under:-

28. *The next question which merits consideration is whether the policy of reservation can be applied at the stage of restructuring of Group C and D cadres in the Railways and whether Para 14 of Letter dated 9-10-2003 is violative of doctrine of equality enshrined in Articles 14 and 16 of the Constitution.*

29. *A cursory reading of the relevant extracts of Letters dated 25-6-1985 and 9-10-2003 reproduced hereinabove may give an impression that the policies contained therein are similar but a closer scrutiny thereof reveals the following stark dissimilarities:*

(i) In terms of Para 5.1 of Letter dated 25-6-1985, the existing classification of the posts covered by the restructuring orders i.e. "selection" and "non-selection" was to be retained. However, for the purpose of promoting an individual railway employee there was deemed modification of the selection procedure and the promotion was to be made without holding any written test and/or viva voce. As against this, action in terms of



Para 4 of Letter dated 9-10-2003 is required to be taken for making appointment on the basis of selection/non-selection/suitability/trade test and in Para 5, the requirement of D&A/vigilance clearance has been made mandatory for effecting promotion with reference to the cut-off date.

(ii) While the policy contained in Letter dated 25-6-1985 did not specify any minimum period of service as a condition for promotion, Para 6 of Letter dated 9-10-2003 lays down the requirement of minimum period of service as a condition for promotion and also declares that residency period prescribed for promotion to various categories should not be relaxed.

(iii) Para 9 of Letter dated 25-6-1985 postulated retention of basic functions, duties and responsibilities and addition of other duties and ~~268~~ responsibilities, whereas Para 7 of Letter dated 9-10-2003 mandates that posts being placed in the higher scales of pay should include the duties and responsibilities of greater importance because restructuring is contemplated on functional, operational and administrative considerations.

(iv) While the policy contained in Letter dated 9-10-2003 postulates progressive phasing out of excess number of posts in a particular cadre, no such provision was made in the policy circulated vide Letter dated 25-6-1985.

(v) The instructions contained in Letter dated 25-6-1985 did not provide for direct recruitment against upgraded posts, but Para 15 of Letter dated 9-10-2003 unequivocally lays down that direct recruitment percentages will not be applicable to the additional posts becoming available as a result of restructuring and the same will apply to normal vacancies after the cut-off date.

(vi) Para 18 of Letter dated 9-10-2003 shows that the Scheme of restructuring is a self-financing and expenditure neutral proposition. There was no such provision in the earlier policy.

(vii) Annexure 1 appended to Letter dated 25-6-1985 shows that the percentage of the upgraded posts becoming available as a result of restructuring varied from 20 to 60 in different grades, except in the cadre of Tool Checkers where the percentage varied from 10 to 40. As against this, the percentage of additional posts (as indicated in Annexures A to K appended to Letter dated 9-10-2003) becoming available as a result of restructuring of different cadres in Group C and D posts varied from 1 to 10, except in one or two cadres where it was more than 20.

30. From what we have noted above, it is clear that the policies contained in Letters dated 25-6-1985 and 9-10-2003 are substantially dissimilar. The exercise of restructuring envisaged in the first policy was in the nature of upgradation of substantial number of posts in different cadres and the upgraded posts were to be filled simply by scrutinising the

service records of the employees without holding any written and/or viva voce test and there was no merit-based selection. In contrast, the restructuring exercise envisaged in Letter dated 9-10-2003 resulted in creation of additional posts in some cadres with duties and responsibilities of greater importance and which could be filled by promotion from amongst the persons fulfilling the conditions of eligibility and satisfying the criteria of suitability and/or merit. Para 13 of Letter dated 9-10-2003 is, in itself, demonstrative of the difference between simple upgradation of posts in the cadre of Supervisors which are required to be filled without subjecting the incumbents of the posts to normal selection procedure whereas the additional posts becoming available in other cadres are required to be filled by promotion.

31. In legal parlance, upgradation of a post involves the transfer of a post from the lower to the higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment — *D.P. Upadhyay v. N.R. Baroda House* .

32. The word "promotion" means "advancement or preferment in honour, dignity, rank or grade". "Promotion" thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law the expression "promotion" has been understood in the wider sense and it has been held that "promotion can be either to a higher pay scale or to a higher post" — *State of Rajasthan v. Fateh Chand Soni* .

33. Once it is recognised that the additional posts becoming available as a result of restructuring of different cadres are required to be filled by promotion from amongst the employees who satisfy the conditions of eligibility and are adjudged suitable, there can be no rational justification to exclude the applicability of the policy of reservation while effecting promotions, more so because it has not been shown that the procedure for making appointment by promotion against such additional posts is different than the one prescribed for normal promotion. In *Fateh Chand Soni case*¹³ this Court interpreted the provisions contained in the Rajasthan Police Service Rules, 1954, which regulate appointment to the selection scale in the service and held that such appointment constitutes promotion. The Court then considered two earlier judgments in *Lalit Mohan Deb v. Union of India* and *Union of India v. S.S. Ranade* and declared that the High Court was in error in holding that appointment to the selection scale does not constitute promotion.

34. In *Ram Prasad v. D.K. Vijay* it was submitted that the view taken in *Fateh Chand Soni case* requires reconsideration because the same is inconsistent with the latter judgments in *Ajit Singh Januja v. State of Punjab* and *Ajit Singh (II) v. State of Punjab* . While rejecting this plea, the Constitution Bench observed: (Ram Prasad case)

"15. The contention of Shri Gopal Subramanium for the general candidates that appointment from senior scale to selection scale is not a promotion and that Fateh Chand Soni requires reconsideration in view of the judgments in *Union of India v. S.S. Ranade and Lalit Mohan Deb v. Union of India* cannot be accepted. We are unable to agree. We find that both these cases have been referred to and explained in *Fateh Chand Soni* case. Therefore, the reserved candidates are entitled to be promoted to the selection scale by way of the roster points. But this has to be done in the manner mentioned in *R.K. Sabharwal v. State of Punjab*⁴. The appeal of the general candidates has to fail."

(emphasis supplied)

35. A careful reading of the policy contained in Letter dated 9-10-2003 shows that with a view to strengthen and rationalise the staffing pattern, the Ministry of Railways had undertaken review of certain cadres. The basis of the review was functional, operational and administrative requirement of the Railways. This exercise was intended to improve the efficiency of administration by providing incentives to the existing employees in the form of better promotional avenues and at the same time requiring the promotees to discharge more onerous duties. The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadres should be filled by promotion by considering such of the employees who satisfy the conditions of eligibility including the minimum period of service and who are adjudged suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing the existing incumbents in the higher grade without subjecting them to the rigor of selection.

36. In view of the above discussion, we hold that the Railway Board did not commit any illegality by directing that the existing instructions with regard to the policy of reservation of posts for Scheduled Castes and Scheduled Tribes will apply at the stage of effecting promotion against the additional posts and the Tribunal committed serious illegality by striking down Para 14 of Letter dated 9-10-2003.

13. Thus, where there is an element of creation of new posts in the course of restructuring, reservation would apply while in respect of such cadres where there is no creation of new posts but only certain posts have been upgraded, there is no question of reservation. By such holding, the Apex court has ensured simultaneous existence of the ratio in Sirothia and Pushpa Rani.

14. In the instant case, according to the applicant, six new posts of Grade I inspectors have been created which would mean that reservation would apply and if there is actually creation of new posts, the impugned order cannot be quashed as the case would squarely fall under the ratio in Pushpa Rani. Of course, the fact of creation of six new post has been denied by the respondents in para 6 of their counter, already extracted above and at the cost of repetition, the same is again reproduced below:-

Thus it is totally wrong to say, as alleged in para under reply, that 6 new post of Welfare Inspector Gr. I were created."

15. If so, it is to be seen as to whether there has been any creation of new posts of Gr. I or not. If there is no creation of new posts and if the complement of the cadre of Inspector remained same then the ratio in Sirothia has to apply, i.e. there would be no reservation and the upgradation would be based purely on seniority.

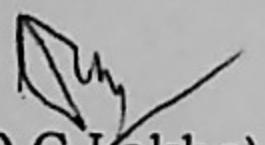
16. This point therefore, needs examination at the hands of the respondents as the relevant statistics have not been provided here.

17. In view of the above the **OA is disposed** of with a direction to the respondents to first ascertain whether there has been any increase in the total number of posts of cadre of Welfare Inspectors (Gr. III, II and I). If on analysis it is found that there is no increase in the complement, the case should be treated only as one of mere

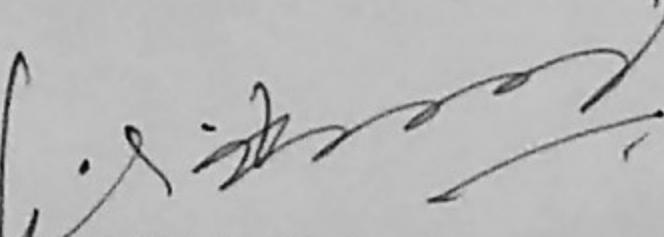
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upgradation in which event, no reservation would apply in which case, the vacancy would go to the general candidate and not for the reserved candidate. On the other hand, if there be any increase in complement, then the reservation shall apply. Depending upon such analysis, i.e. if there is increase in complement, the applicant is not entitled to consideration for upgradation and the action taken by the respondents holds good and the Applicant be informed accordingly. Instead, if there is no increase in the complement, then the case of the applicant for upgradation to the post of Welfare Inspector Gr. I be considered. However, it is made clear that the respondents shall not revert respondent No. 4, but would accommodate him by creating a supernumerary post for the limited period till such time a post is available to accommodate him.

18. Let this order be complied with, within a period of four months from the date of receipt of copy of this order. No cost.



(D.C.Lakha)
Member (A)



(Mr. K.B.S. Rajan)
Member (J)

Shashi