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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH : CUTTACK

ORIGINAL APPLICATION NO.126 OF 1994
Cuttack this the 19th day of June, 2001

Surendra Ku.Behera ... Applicant(s)

-VERSUS-

Union of India & Others ... Respondent(s)

(FOR INSTRUCTIONS)

1. Whether it be referred to reporters or not ?
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not ?

Somnath Som
SOMNATH SOM
VICE CHAIRMAN
19.6.2001

19-6-01
(G.NARASIMHAM)
MEMBER (JUDICIAL)

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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH : CUTTACK

ORIGINAL APPLICATION NO. 126 OF 1994
Cuttack this the 19th day of June, 2001

CORAM:

THE HON'BLE SHRI SOMNATH SOM, VICE-CHAIRMAN
AND
THE HON'BLE SHRI G.NARASIMHAM, MEMBER (JUDICIAL)

...

Surendra Kumar Behera, aged about 45 years,
Son of Late Gandharb Behera working as
Sr.Clerk in the Office of the Bridge Inspector,
S.E.Rly., Cuttack

...

Applicant

By the Advocates

Mr.D.P.Dhalasamant

-VERSUS-

1. Union of India represented through its
Secretary to Government, Ministry of
Railway, New Delhi
2. Divisional Railway Manager, S.E.R. Khurda Road,
At/PO-Jatni, District - Khurda
3. The Senior Divisional Personnel Officer,
S.E.R., Khurda Road, At/PO - Jatni, Dist-Khurda

...

Respondents

By the Advocates

Mr.D.N.Mishra
Standing Counsel
(Railways)

O R D E R

MR.G.NARASIMHAM, MEMBER (JUDICIAL) : Applicant, Surendra Kumar Behera, Senior Clerk in the Office of Bridge Inspector, S.E. Railway, Cuttack, filed this Original Application in March/94, with a prayer to issue direction on the respondents to count the period of his adhoc service as Senior Clerk from 26.5.1980 to 21.2.1989, the date on which he was regularly posted as Senior Clerk and accordingly alter the seniority list dated 1.3.1993 under Annexure-6 by changing his position from Sl.No.44 to Sl. No.2, on the ground that he continued in that post on adhoc basis as Senior Clerk till he was regularised on 21.2.1989 as has been held by and in view of the decision of the Apex Court in Direct Recruit

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Class-II Engineering Officers' Association vs. State of Maharashtra reported in AIR 1990 SC 1607. In the Original Application several facts have been averred from the date of his initial joining the railway service as Khalasi in March, 1966. Since his seniority in the cadre of Senior Clerk needs to be determined, other facts concerning his regular promotion as Junior Clerk, though averred, are not relevant.

2. The Department in their counter opposed this prayer stating that the applicant along with others were empaneled for promotion to the post of Junior Clerks by order dated 1.10.1981. Hence question of assigning his seniority in the cadre of Senior Clerk prior to 1.10.1981 does not arise. The applicant was promoted as Senior Clerk on adhoc basis, but has been regularised as Senior Clerk with effect from 21.2.1989, after following the relevant rules, i.e., after the applicant appeared at the suitability test on 11.12.1988 and declared suitable. Hence seniority will be counted from the date of regularisation in case of departmental promotees, as mentioned under Rule-303, I.R.E.M., Vol.I, the date of regularisation is the effective date of seniority.

3. No rejoinder has been filed by the applicant.

4. We have heard Shri D.P.Dhalasamant, the learned counsel for the applicant and Shri D.N.Mishra, the learned Standing Counsel.

5. Annexure-4 dated 17.7.1980 is the relevant order promoting the applicant to officiate as Senior Clerk on adhoc basis. This order was passed by the Divisional Personnel Officer, S.E.Railways, Khurda Road. We may as well quote the

that order in extenso, as under :

" South Eastern Railway

O.O. NO. 125/80 /

OFFICE OF THE DIV. RLY. MANAGER
KHURDA ROAD: DATED: 17.7.1980

With the approval of Sr.DEN/KUR the following adhoc promotions orders are issued.

1. Sri S.K.Behera, Offg.
Jr.Clerk in scale
Rs.260-400/- (RS) of
BRI/CTC

Allowed to officiate as
Sr.Clerk purely on local
adhoc measure in scale
Rs.320-560/- (RS) w.e.f.
26.5.80 and posted in
same station against the
existing vacancy

The above promotion is purely adhoc measure and does not confer him any title or claim for his future promotion, confirmation and continuance as such over his seniors

Sd/-
DIV..PERSONNEL OFFICER/KUR.

It will be seen that the applicant was allowed to officiate as Senior Clerk on local adhoc measure at the same station against an existing vacancy. It has also been made clear that this promotion does not confer any title or claim for future promotion/confirmation and/or continuance as such over his seniors. In other words, it has been made clear through this order that by such local adhoc promotion to officiate as Senior Clerk he cannot be placed above his seniors in the gradation list, which was by then existing. Further the order does not spell out or indicate that the applicant has been given this adhoc promotion after following the relevant rules for promotion to the cadre of Senior Clerk. On the other hand, the very fact that it was made purely on local adhoc measure would indicate that cases of others including his seniors were not taken into consideration. This promotion was made just as a stop-gap-arrangement as the applicant was available at the same station. This apart, Annexure-2, the seniority

of Junior Clerks reveals that the applicant, who figures at Sl. No.50, has been appointed as Junior Clerk on regular basis on 11.6.1982 and this date has been shown as the effective date of seniority in that grade. The applicant has challenged his regular promotion to the cadre of Junior Clerk on 11.6.1982 before this Tribunal. Even in this O.A. there is no prayer to that effect. Hence when he was not regularly promoted as Junior Clerk prior to 11.6.1982, his claim for counting his seniority in the cadre of Senior Clerk from the date of his adhoc promotion on 26.5.1980 is meaningless.

6. Under Rule 174 of I.R.E.M., Vol I (1989 Edn.), 331/3% of vacancies in the grade of Senior Clerks will be filled up under two modes, i.e., 20% by Direct Recruitment of Graduates in the age groups of 18 to 25 years through the Agency of Railway Recruitment Boards and the 2nd, i.e. the remaining 13/1/3% through a Limited Departmental Competitive Examination from amongst serving Graduates working as Junior Clerks through the Agency of Railway Recruitment Boards. The rest 66 1/3% of vacancies are apparently filled by promotion through non-selection. Thus for promotion to the cadre of Senior Clerks, certain formalities under these rules are to be undertaken. It is only after a Junior Clerk coming under the zone of consideration becomes successful to be eligible to be promoted as Senior Clerk. As earlier stated, applicant has been given promotion on local adhoc measure under Annexure-4, by not following these rules of promotion.

7. During hearing reliance was placed on the following decisions.

1) Direct Recruit Class-II Engineering Officers' Association vs. State of Maharashtra (AIR 1990 SC 1607)

2) Rajbir Singh vs. Union of India & Ors. (AIR 1991 SC 518)

3) Ajit Kr.Rath vs. State of Orissa (2000 SCC(L&S) 192

While summing up their views in Para-44 of the judgment under (A) in Direct Recruit Class-II Engg.Officers' Association case (Supra) the Apex Court made it clear that where initial appointment is only adhoc and not according to rules and made as stop-gap-arrangement, the officiation in such post cannot be taken into account for considering the seniority. Under (B) it was held that if initial appointment is not made by following the procedure laid down under the rules, but the appointee continues in that post uninterruptedly till the regularisation of his service in accordance with rules, the period of officiating service will be counted.

The learned counsel for the applicant placed reliance on this observation of the Apex Court. Though the view of the Apex Court under (A) *prima facie*, appears to be contrary to its view under (B), it is not so, as has been explained by the Apex Court in Ajit Rath's case (Supra). In State of West Bengal vs. Aghorenath Dey reported in (1993) 3 SCC 371, a three Judges Bench of the Apex Court had an occasion to interpret the aforesaid two views of the Constitution Bench of the Apex Court in Direct Recruit Class-II Engg.Officers' Assn. case. In Aghorenath Dey's case the three Judges Bench in Para-25 (as quoted in Para-27 of Ajit Kr.Rath case) held as under :

"The conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of

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certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the latter expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest".

As earlier discussed, the applicant was given adhoc promotion without following the departmental rules for promotion and that too on a legal adhoc measure at the same station, much prior to his regular promotion in the cadre of Junior Clerk. The conclusion of the Apex Court in Direct Recruit Class-II Engineering Officers Association case under (B) will not be of any help to the applicant.

~~This is just another slip in this Original.~~

Next, in the case of Rajbir Singh, where Railway employees were regularised while in promotional posts on adhoc basis. This case will not help the applicant because the employees therein were promoted on adhoc basis against the substantive vacancies after finding them qualified to the posts through holding some tests and on this background their seniority was declared from the dates of adhoc promotions.

On the other hand at Para-2 the Apex Court observed as follows:

"It is well settled by several decisions of this Court that an appointment against a purely temporary adhoc or fortuitous post does not entitle the holder of the post to be a member of the service and as such, such fortuitous or adhoc appointment does not entitle the holder of the post to get the benefit of the period of such adhoc or fortuitous service".

Apart from the aforesaid latest position, Rule 302, of Indian Railway Establishment Manual, Vol. I, 1989 Edition is clear on this issue. We may as well quote the relevant position of the rule as under :

"... In categories of posts partially filled by direct recruitment and partially by promotion, the criterion for determination of seniority should be the date of regular promotion after due process (emphasis made) in the case of promotee ... "

As earlier discussed, the applicant was not given adhoc promotion through a regular test and after considering his eligibility. The suitability test was held only on 11.12.1988 and thereafter he was declared suitable.

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 There is yet another flaw in this Original Application where the applicant claims that his position in the seniority list under Annexure-6 to be changed from Sl. No.44 to Sl. No.2. In other words, he wants a direction to be issued to the departmental authorities that he should be declared senior in the cadre of Senior Clerks to Senior Clerks placed at Sl. Nos. 2 to 43, under Annexure-6. If this prayer of the applicant is allowed, then the Senior Clerks figuring at Sl. Nos. 2 to 43 under Annexure-6 would be vitally affected. Since their seniority would be vitally affected, they are necessary parties in this Original Application. Their non-impleadment would necessarily entail dismissal of this Original Application. In State of Bihar vs. Kameswar Prasad Singh reported in 2000 SCC(L&S) 845 (in Para-26 at Page-849) the Apex Court clearly observed that in the absence of persons likely to be affected by the relief prayed for, the Writ Petitions should have normally been dismissed unless there existed specific reasons for non-impleadment of the affected persons. In that case the Apex Court dismissed the Writ Petitions on that ground also, observing that neither was any reason assigned by the writ petitioners nor did the Court (High Court) felt it necessary to deal with this aspect of the matter and that ignoring such a basic principle of law has resulted in supersession of 168 Inspectors and 407 Deputy S.P.Os. In the case before us, the applicant has not assigned any reason as to why he has not impleaded persons over whom he claims seniority to be placed at Sl. No.2 under Annexure-6. On this ground also the application fails.

18 Before closing, we may take note of another fact

that by order dated 1.1.1993, (Annexure-10) the applicant was assigned duties of Head Clerk, in addition to his own work because of the promotion of Head Clerk, Shri B.C.Das to O.S. Gr.II. The Bridge Inspector, S.E.Railway, Cuttack, under whom the applicant has been serving, had addressed a letter to Sr.D.E.N., Khurda Road, recommending promotion of the applicant as Headclerk on adhoc measure till such time a regular man was posted. By order dated 17.3.1994, the then Hon'ble Vice-Chairman of this Bench allowed the applicant to continue as Headclerk in case he was holding the post on that date. Thereafter on 2.9.1994, the then Hon'ble Member (Administrative) of this Bench modified that order to the effect that promotion accorded to other candidates (apparently to the cadre of Headclerks) if any, would be subject to the result of this Application. These interim orders now stand vacated.

14. For the reasons discussed above, we do not see any merit in this application which is accordingly dismissed, but without any order as to costs.

Somnath Som
 SOMNATH SOM
 VICE-CHAIRMAN
 19.6.2001

LC.6.07-
 (G.NARASIMHAM)
 MEMBER (JUDICIAL)

B.K.SAHOO//