

CENTRAL ADMINISTRATIVE TRIBUNAL,

CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO. 739 OF 1994
Cuttack, this the 2nd day of November, 2000

Prafulla Chandra Jena and four othersApplicants
Vrs.

Union of India and others Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the Reporters or not? Yes.
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? No.

(G.NARASIMHAM)
MEMBER (JUDICIAL)

(SOMNATH SOM)
VICE-CHAIRMAN

d.11.2000

CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO. 739 OF 1994
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CORAM:

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

1. Prafulla Chandra Jena, son of late S.C.Jena
2. Khageswir Paschima Kabat, s/o D.P.Kabat
3. P.Ramana, s/o P.Raman Murty
4. S.Ananda Rao, s/o S.Papa Rao
5. Nakul Jena, son of Jugala Jena

all are Assistant Guards under Divisional Railway Manager (P), S.E.Railway, Khurda Road, P.O-Jatni, Dist.Khurda

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Applicants

Advocates for applicants-M/s G.A.R.Dora
V.Narasingh
G.P.R.Dora

Vrs.

1. Union of India, through the General Manager,
S.E.Railway, Garden Reach,
Calcutta-43.
2. Divisional Railway Manager(P),
S.E.Railway,
Khurda Road,
P.O-Jatni, Dist.Khurda

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Respondents

Advocate for respondents - Mr.Ashok Mohanty

Sdm .
SOMNATH SOM, VICE-CHAIRMAN

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In this application the five petitioners, who were working as Assistant Guards, have prayed for a direction to the respondents to treat the applicants' service as Assistant Guards as regular from 16.5.1990 and count their seniority in that post from that date. The

second prayer is for a direction to the respondents to treat the applicants as eligible for promotion to the post of Goods Guard taking into account their service as regular from the above date, and the third prayer is to promote them to the post of Goods Guard from the date from which others will be promoted with consequential benefits.

2. By way of interim relief it was prayed that the respondents should be injunctioned from holding the examination on 24.12.1994 for selection to the post of Goods Guard, or in the alternative, allow the applicants to participate in the selection and not to publish the results. In order dated 20.12.1994 the respondents were directed to allow the petitioners to participate in the examination for promotion to the post of Goods Guard but not to publish the results. Later in order dated 5.1.1996 the above interim order was further clarified that only the result of the petitioners should not be published. It was also directed that five posts of Goods Guard should be kept vacant.

3. The respondents have filed counter opposing the prayers of the applicants, and the applicants have filed rejoinder.

4. For the purpose of considering this petition it is not necessary to record all the averments made by the parties in their pleadings. It is only necessary to note that admittedly the five petitioners, who were working as Token Porters, participated in a selection process initiated in 1989 for filling up of 12 posts of Assistant Guards of which eight were unreserved, two were meant for SC and two for ST. The applicants have stated that later on it was decided to fill up 23 posts of

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9 Assistant Guard through the same selection out of which 17 were unreserved. The respondents have denied this and have stated that the written examination was held in 1990 for filling up of 12 posts only and not 23. It is the admitted position that the applicants passed the written test and were declared suitable. The applicants have stated that they were promoted to the post of Assistant Guards on 16.5.1990 in order dated 6.7.1990 (Annexure-1). But even though they had cleared the test, their appointment was wrongly and illegally treated as ad hoc. They were again called to take the written examination for promotion to the post of Goods Guard which was held on 18.10.1992 and 30.10.1992. The applicants took the examination again and were declared successful and were regularly promoted as Assistant Guards with effect from 29.12.1992. They filed representation on 25.4.1994 (Annexure-5) for regularisation from 16.5.1990, but this was not done.

S. Jom

5. The applicants have stated that the next promotion for Assistant Guards is to the post of Goods Guard and in letter dated 20.10.1994 (Annexure-6) applications were invited from the staff who had put in three years of regular service in different categories of lower posts including Assistant Guard as on 20.10.1994. The petitioners applied for taking the examination but they were not called to the test and that is why they have come up in this petition with the prayers referred to earlier.

6. We have heard Shri G.A.R.Dora, the learned counsel for the petitioners and Shri Ashok Mohanty, the learned panel counsel for the respondents.

The learned counsel for the petitioner has relied on the decisions of the Hon'ble Supreme Court in the case of The Direct Recruit Class II Engineering Officers' Association and others v. State of Maharashtra, AIR 1990 SC 1607, and the case of Rajbir Singh and others v. Union of India and others, AIR 1991 SC 518. These two decisions have also been taken note of.

7. The first contention of the learned counsel for the petitioner is that the applicants had cleared the test for promotion to the post of Assistant Guard in 1990 and as against 23 vacancies of which 17 were unreserved, only 17 candidates were declared selected and therefore they should have been given regular appointment as Assistant Guard from 16.5.1990 and not ad hoc appointment. The respondents have pointed out that in 1989 it was decided to fill up 12 vacancies and examination for those 12 vacancies was held in 1990. The respondents have enclosed a detailed calculation sheet showing how they had worked out 12 vacancies of which 8 were unreserved and two were meant for SC and 2 for ST. It is the admitted position that 17 candidates including the applicants were found suitable. Besides the bald assertion that vacancies were 23, the applicants have not filed any document to show that the test was held for filling up 23 vacancies. It has been submitted by the learned counsel for the petitioners that the applicants were given ad hoc appointment on 16.5.1990 as Assistant Guard and have continued in that post till they were regularised on 29.12.1992 after they once again took the test in October 1992 and cleared the same. As the

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applicants continued on ad hoc basis from May 1990 till December 1992 when they were regularised, it has been argued by the learned counsel for the petitioners that this itself shows that vacancies were available to accommodate them. The respondents have also admitted that after the calculation of 12 vacancies as above, some more vacancies came up. But it has to be noted that the examination was held for filling up 12 vacancies and therefore just because more vacancies came up the applicants cannot claim that they should have been appointed against these vacancies. The respondents have stated that ~~after~~ out of 17 candidates including the ^{Jdm} applicant who passed the examination held in 1990, 13 were General category candidates and four were S.C. candidates. Accordingly, out of 13 general category candidates, the first eight were appointed as Assistant Guards on regular basis and two out of four successful SC candidates were appointed against the two vacancies meant for SC, and there being no successful ST candidate, the two posts meant for ST candidates were not filled up. As the examination was held for filling up 12 vacancies out of which eight posts were for General Category candidates and as the applicant could not come within the first eight General Category candidates, they cannot claim that they should have been given regular appointment which came up later for which examination was not held.

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8. As regards the ad hoc appointment of the applicants, the respondents have stated that as there was some additional requirement of Assistant Guards subsequent to assessment of vacancies and notification, the seven

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who were successful, i.e., five General Category candidates and 2 SC candidates were given appointment to the post. These seven candidates, which include the five applicants, were asked and they did furnish declaration that they would not claim any right for empanelment for the post of Assistant Guard on regular basis. Accordingly, they were sent for training and were given ad hoc promotion to the post of Assistant Guard. The vacancies notified were 12 and out of this 10 were filled up by giving regular appointment as Assistant Guard to first eight of the thirteen successful General Category candidates and the first two of the successful SC candidates. As the applicants could not come within the first eight of thirteen successful General Category candidates, it cannot be claimed by him that they should have been given regular appointment. It is also to be noted that the applicants gave declaration before joining as ad hoc Assistant Guards that they will not claim regularisation in the post of Assistant Guard on the basis of such ad hoc appointment and therefore, they cannot be allowed to turn back and claim regularisation from 16.5.1990 on the basis of their ad hoc service. Therefore, the contention of the learned counsel for the petitioners that terming their appointment as ad hoc in May 1990 is wrong and illegal, is held to be without any merit and is rejected.

9. The second limb of argument of the learned counsel for the petitioners is that granting for the sake of argument, though not conceding, that the applicants were rightly appointed on ad hoc basis to the

post of Assistant Guard in May 1990, the fact of the matter is that they continued as Assistant Guards on ad hoc basis from May 1990 till their regularisation in December 1992. It has been argued that going by the law as laid down by the Hon'ble Supreme Court in **Maharashtra Engineering Case(supra)**, this period of ad hoc service should have been counted for fixing their seniority as Assistant Guard. As we have already noted, in this case for filling up the vacancies of 1989 the selection was taken up in 1990 and all the available vacancies for General Category and SC Category were filled up by giving regular appointment to persons who were at the top of the panel. Therefore, the ad hoc promotion of the applicants as Assistant Guard against some other vacancies which came up later cannot be taken to be appointment in accordance with the rules. The respondents have also stated that such ad hoc appointment was given by way of stop gap arrangement and therefore, going by law as laid down by the Hon'ble Supreme Court in paragraph 44(A) of the above decision, this period cannot count towards their seniority as Assistant Guards. It is also to be noted that once the vacancies in General and SC categories were filled up in 1990, the fact of the applicants having passed the selection test ceased to have any validity and that is why the applicants had to take the selection test once again in 1992 for their eventual regularisation in December 1992. The facts of **Rajbir Singh's case (supra)** are widely different from the present case. There the appellants were appointed in Class IV posts in 1971 and were promoted to Class III posts in 1975. Their services in Class III posts were regularised in September 1986 and their eleven years of ad hoc service in Class III posts were not taken into

SJm

account while fixing their seniority while ad hoc services of some of their juniors were taken into account for fixing their seniority. In this Application it is not the case of the petitioners that in the matter of not taking into account their ad hoc service for the purpose of counting their seniority as Assistant Guards, they have been discriminated against and in case of some other Assistant Guards the ad hoc service has been taken into account for counting their seniority. In view of this, Rajbir Singh's case does not provide any support to the case of the petitioners. The learned counsel for the petitioners has also relied on the decisions of the Tribunal in OA No.145 of 1991, Nilakantha Patra v. Union of India, and OA No. 419 of 1991 , Muralidhar Sahoo v. Union of India and others, and we have perused the same. In OA No. 145 of 1991, the applicant who was a Senior Gangman and had taken the written test for appointment to the post of Junior Clerk, had prayed for a direction to the respondents to hold a separate test for the applicant and to declare him senior to his erstwhile juniors. The respondents in that case had pointed out that the applicant had cleared the written examination and was called to the viva voce and before the result was out he had rushed to the Tribunal. There the prayer was that while he is appointed as Junior Clerk, he should be made senior to other Junior Clerks who were originally his juniors. The Tribunal did not pass any order on the subject and left it to the competent authority to fix his seniority going by the two decisions relied upon by the

learned counsel for the petitioners in the present case.

From the above it is clear that no view was taken by the Tribunal with regard to seniority of the applicant in the above case and the matter was left to the departmental authorities. This decision, therefore, does not go to support the case of the applicant. In OA No. 419 of 1991 the applicant continuously worked for ten years as Publicity Inspector on ad hoc basis and continued even after his reversion, by virtue of the stay order of the Hon'ble High Court. On the matter being taken to the Hon'ble Supreme Court, the Hon'ble Supreme Court directed that the applicant would continue to hold the post of Publicity Inspector and shall be entitled to participate in future regular selection for the post. In consideration of the circumstances of the case, where the applicant had worked for ten years as Publicity Inspector and going by the law laid down by the Hon'ble Supreme Court in Maharashtra Engineering case (supra) the Tribunal directed that his seniority should be fixed in the rank of Publicity Inspector from the date of his initial ad hoc appointment. This decision/ ^{also} does not provide any support to the petitioners because in this case they continued as ad hoc Assistant Guards from May 1990 to December 1992 and were regularised on their clearing the selection test once again in 1992.

J.Som

10. The case of the petitioners must fail on another ground as well. From the above recital of facts it is clear that the entire case of the applicants is based on their assertion that they should not have been given ad hoc promotion as Assistant Guards in May 1990. Such

appointment given in May 1990 should have been regular appointment. The respondents have pointed out that the cause of action in this case, therefore, has arisen in 1990 when they were given ad hoc appointment, but the applicants have approached the Tribunal only in 1994. The applicants in their rejoinder have stated that the cause of action has arisen only in 1994 when they were not called to the selection for their next promotion to the post of Goods Guard. This contention is without any merit because the basic case of the petitioners is that they should have been given regular appointment to the post of Assistant Guard in May 1990, but they were wrongly given ad hoc promotion at that time. Therefore, the prayer of the applicant to count their service from May 1990 as regular in the grade of Assistant Guard is also barred by limitation and is rejected on that count as well.

11. In view of our above findings and conclusion, we hold that the respondents were right in not calling the applicants for the selection test for the post of Goods Guard because by the relevant date, i.e., 20.10.1994, they had not completed three years of regular service as Assistant Guard as was required in the notice at Annexure-6.

12. In the result, therefore, the Original Application is held to be without any merit and is rejected. The interim orders passed on 20.12.1994 and 5.1.1996 stand vacated. No costs.

(G.NARASIMHAM)

MEMBER(JUDICIAL)

AN/PS

Somnath Som.
(SOMNATH SOM)

VICE-CHAIRMAN

21/11/2000