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CENTRAL ADMINISTRATIVE TRIBUNAL,  
CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO.128 OF 1996  
Cuttack, this the 4th day of August, 1998

B.Chandrasekhar and 11 others .....Applicants

Vrs.

Union of India and three 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*

4-8-98  
(G.NARASIMHAM)  
MEMBER (JUDICIAL)

*V. Somnath Som*  
(SOMNATH SOM)  
VICE-CHAIRMAN

4.8.98

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ORIGINAL APPLICATION NO.128 OF 1996  
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**CORAM:**

**HON'BLE SHRI SOMNATH SOM, VICE-CHAIRMAN**

AND

**HON'BLE SHRI G.NARASIMHAM, MEMBER(JUDICIAL)**

.....

1. B.Chandra Sekhar, son of late Sanyasi Rao, working as Inspector of Works (Grade II), APM/Doub/Visakhapatnam.
2. E.Santaram, s/o E.Satyanarayan Murthy, working as Inspector of Works (Grade II), SPM (Plg.), Bhubaneswar.
3. K.Suryanarayana, son of K.V.N.Murthy, working as Inspector of Works (Grade II), APM/Doub/Visakhapatnam.
4. Vedula Sridhar, son of V.S.R.Murthy, working as Design Assistant, SPM/Plg./Bhubaneswar.
5. S.Srinivas Rao, Son of Bullaih, working as Inspector of Works (Grade II), AEN/Settlement, S.E.Railway, Waltair.
6. Ch.Gavaraih, son of Ch.Tataiah, working as Inspector of Works (Grade II), APM/D/VBL, Bobhili.
7. L.Sambasiva Rao, son of L.Venkateswarlu, working as Inspector of Works (Grade II), APM/Doub/VBL.
8. P.V.V.Satyanarayan, son of P.Ramakrishna, working as Inspector of Works (Grade II), DEN/CON/LKMR.
9. J.V.Gupta Jee, son of late J.V.Sethy, working as Inspector of Works (Grade II), DPM(Plg.)/Visakhapatnam.
10. N.Nageswar Rao, son of N.Sri Rama Murthy, working as Inspector of Works (Grade II), APM/D/VBL.

*J.V.Gupta*

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11. Ch.Vishnu Murthy, son of Ramakrishna Rao, working as Inspector of Works (Grade II), AEN/OL/Koraput.

12. P.Raja Gopal Rao, son of late Narasingha Rao, working as Inspector of Works (Grade II), AEN/OL/Koraput .....

**APPLICANTS**

**By the Advocates - M/s. B.S.H.Rao & A.Kanungo**

**Vrs.**

1. Union of India, represented through General Manager, South Eastern Railway, Garden Reach, Calcutta.

2. Chief Personnel Officer, South Eastern Railway, Garden Reach, Calcutta.

3. Chief Administrative Officer, South Eastern Railway, Chandrasekharpur, Bhubaneswar.

4. Chief Engineer, South Eastern Railway, Garden Reach, Calcutta. ....

**RESPONDENTS**

**By the Advocate - Mr.B.Pal.**

**O R D E R**

**SOMNATH SOM, VICE-CHAIRMAN**

In this application under Section 19 of Administrative Tribunals act, 1985, 12 petitioners, who have been permitted to pursue this application jointly, have prayed for a direction to the respondents to declare the applicants to have passed the written examination on 12.11.1995 for the post of Assistant Engineer. By way of interim relief, the applicants had prayed that till the disposal of this application, the viva voce test for the post of Assistant Engineers scheduled to be held on 19.2.1996 should be stayed. On the date of admission of the petition on 15.2.1996, an interim order was passed that the applicants should be called for the viva voce test provisionally and interviewed <sup>along</sup> with other candidates, but results shall not be declared without leave of the Court. The

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respondents filed MA.No.392 of 1996 praying for vacation of interim order dated 15.2.96. The applicants filed counter to this M.A. in which they submitted that the interim order has already been implemented and they have been called to the interview in pursuance of the interim order and the respondents can only pray for leave for publishing the results of the test. After hearing the learned counsels for both sides, the Tribunal in their order dated 31.7.1996 vacated the interim order <sup>thereby</sup> permitting the respondents to publish the results.

2. The case of the petitioners is that they joined the Railways in Group-C post in the scale of Rs.1400-2300/-. Eleven of them were working as Inspector of Works (Grade II) and one was working as Design Assistant. The departmental authorities in their letter dated 28.2.1995 at Annexure-A/1 called for applications from intending candidates for filling up of 30% vacancies in the departmental quota of the promotional posts of Assistant Engineers. This advertisement at Annexure-A/1 lays down the eligibility criteria that all staff of Civil Engineering Department who have completed 5 years regular service (non-~~fortuitous~~) as on 1.11.1994 in the grade the minimum of which is Rs.1400/- (Rs.1400-2300/-) or in higher Group C grade will be eligible. It was also indicated <sup>that</sup> the applications should be submitted through the concerned staff officer and individual applications sent directly would not be entertained. Accordingly, the petitioners submitted their applications and in letter dated 9.8.1995 which is at Annexure-A/1 (page 11 of the O.A), respondent no.2 indicated the venue and

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the date of holding the written examination along with the subjects, the maximum marks and qualifying marks. In this letter it was mentioned that a list containing the names of eligible candidates who have volunteered for this Limited Departmental Competitive Examination is at Annexure-I to this letter. It was also mentioned that the candidatures have been accepted as provisional and if any candidate is subsequently found ineligible, his name will be deleted. Written examination was subsequently postponed to 12.11.1995 on which date the applicants appeared at the written examination and according to their submission, they did very well and expect to secure 80% marks in the written examination. They were expecting to be called to the interview after the results of the written examination, in which they came to know that all of them have come out successful, were published. But on 12.2.1996 they came to know of an order dated 5.2.1996 (Annexure-A/2) containing a list of 22 persons who had come out successful in the written examination and were called to attend the viva voce test on 19.2.1996. The applicants have stated that in this list only Diploma holders and those who had failed two/three times in the past in the Departmental Examination, have found place, but persons who have bright careers have not been included. The applicants submitted representations to the departmental authorities and one such representation is at Annexure-A/3. It has also been stated that according to the notice at Annexure-A/1 there were 15 vacancies in the General category, 5 in S.C. category and 3 in S.T. category and accordingly, six times the number of vacancies, i.e., 90 general

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candidates should have been called to the interview, but only 22 candidates have been called. The respondents have further stated that as per the departmental instructions, this Limited Departmental Competitive Examination should have been held once in two years. The last examination was held in 1992 and therefore, the next examination should have been held in 1994, but this has been held in 1995, thereby debarring eligible and meritorious persons to appear at the examination earlier for holding the promotional posts. It is further stated that in 1990, 60 vacancies were notified, but only six persons were found eligible. In 1992, 45 vacancies were notified and only 13 persons were found eligible. Thus, for the year 1992 there were 31 vacancies left. But in the notice at Annexure-A/1 the departmental authorities have notified only 23 vacancies. It is further stated that in the year 1991 the prescribed qualification for holding the post of Assistant Engineer, Group-B has been revised and it has become mandatory that a person must have the Engineering Degree for becoming Assistant Engineer. This provision, according to the petitioners, will come into force from 1.7.1996 and because of this, in order to accommodate the Diploma holders as Assistant Engineers, the respondents have published the list at Annexure-A/3 including the names of only Diploma holders. In the context of the above facts, the applicants have come up with the prayers referred to earlier.

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3. Respondents have filed a voluminous counter in which they have taken the stand that the applicants were not eligible to appear at the written examination. They were called by mistake to appear at

the written test and as they were not eligible, they were not allowed to appear at the interview. On the question of eligibility, in paragraph 5(a) of the counter, the respondents have made the following submission:

"....In this circular, it is stated that the serving Railway employees who have completed 5 years of regular (non-fortuitous) service as (sic) grade, the minimum of which is Rs.1400-2300/- or in higher Group C grade are eligible to apply".

It is further stated that in the letter indicating the date and time of the written examination, it has been specifically mentioned that the candidatures have been accepted as provisional and if any candidate is found ineligible, his name will be deleted. The respondents' stand is that after the written examination was held on 12.11.1995, it was detected that these 12 applicants were not eligible to appear at the written examination and they were erroneously called for the written test as they had not completed five years of non-fortuitous service in the grade of Rs.1400-2300/- or in higher grade by the cut off date, i.e., 1.11.1994. The respondents have further stated that altogether 369 candidates including these 12 applicants appeared at the written test, but only 22 qualified in the written examination by securing 60% marks in each of the two papers and accordingly, they were called to the viva voce test in the letter dated 5.2.1996. On the question of ineligibility of these 12 applicants, the respondents have stated that 173 candidates (Engineering Diploma Holders) including the 12 applicants were locally recruited in the year 1988 in

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Group C post of temporary Work Mistry in the scale of Rs.1400-2300/- in the Survey & Construction Organisation at Visakhapatnam. As per the channel of promotion for Workside staff in the Engineering Department, there is no direct recruitment quota in the category of Work Mistry. Moreover, any recruitment in Group-C post has to be done through the Railway Recruitment Board. But in view of essential and urgent need in the Survey & Construction Organisation at Visakhapatnam, the 173 persons including the 12 applicants were given ad hoc appointment by recruiting them on local basis. Because of this, none of these candidates could be provided with lien against permanent posts in Open Line. Therefore, their service as temporary Work Mistry in Survey & Construction Organisation was fortuitous service. The respondents have further stated that from June 1991 onwards the requirement of Work Mistries in Construction Organisation came down while there was requirement of fresh candidates against direct recruit quota in the category of Inspector of Works Grade III (Rs.1400-2300/-). As the 173 Work Mistries including the 12 applicants locally recruited in the Survey & Construction Organisation fulfilled the prescribed educational qualification of Engineering Diploma, a proposal for conducting a special selection for recruitment of these candidates against 75% direct recruitment quota vacancies in the post of Inspector of Works, Grade III (Rs.1400-2300) was sent to the Railway Board in Chief Personnel Officer's letter dated 19.7.1991. Ministry of Railways in their order dated 26.3.1992 approved the proposal as a special case to consider 173 temporary (casual) Work Mistries of

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Construction Organisation of S.E.Railway for their empanelment for appointment as I.O.W,Grade-III through a selection comprising of written and viva voce tests. This letter of Railway Board is at Annexure-R/4. Simultaneously, similarly placed temporary Work Mistries of Metro Organisation and other eligible candidates already in service on S.E.Railway in posts lower than that of I.O.W., Grade-III, were also called for selection in terms of Railway Board's instructions in their letter dated 9.12.1991. Accordingly, a special selection comprising written test and viva voce was held by a duly constituted Selection Committee. Chairman, Railway Recruitment Board, was associated as a Member of this Committee. According to the respondents, this selection amounted to restricted recruitment in Group-C post of I.O.W., Grade-III through Railway Recruitment Board. After approval of competent authority, a panel of 173 candidates was published vide Annexure-R/5. This included 147 candidates of Survey & Construction Organisatin, Visakhapatnam <sup>including</sup> ~~including~~ the 12 applicants in this case. The respondents have further stated that ~~these~~ orders for regular appointment of the selected candidates were issued on 18.12.1992 and the services of the temporary Work Mistries in Survey & Construction Organisation of Visakhapatnam were accordingly regularised as Inspector of Works, Grade-III with lien against permanent posts in Open Line with effect from 18.12.1992. The respondents, therefore, state that for these 12 applicants, their regular non-fortuitous service in Group-C post was from 18.12.1992 and as such by 1.11.1994 they had not completed five years of non-fortuitous service, and on this ground, they were

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ineligible to appear at this Limited Departmental Competitive Examination for 30% quota of Assistant Engineers. On the above grounds, the respondents have opposed the prayer of the applicants.

4. The applicants have filed a rejoinder with copy to the other side in which they have stated that they were appointed in 1988 on regular basis after following the entire selection procedure prescribed for recruitment and they were not appointed locally as is done for recruitment of casual labourers. The applicants have stated that recruitment of Work Mistries through Railway Service Commission was not in vogue for several years. In 1988 when the applicants were recruited, such recruitment was done following the Railway Board's earlier directive dated 27.2.1974 at Annexure-A/8 in which it is mentioned that the Railway Board approves the proposal of General Manager, Eastern Railway, for filling up of the posts of Work Mistries in the following manner:

- (i)  $66\frac{2}{3}\%$  of the vacancies from open market without the agency of Railway Service Commission, and
- (ii)  $33\frac{1}{3}\%$  by promotion from among Class IV staff.

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The applicants have stated that such recruitment, therefore, was on the basis of system laid down by the Railway Board in 1974, long before the applicants were recruited in 1988. As regards the actual recruitment of the applicants, in the rejoinder, the stand taken by the respondents that such recruitment was done locally has been controverted by saying that for recruitment to the post of temporary Work Mistries employment notice

was published in Indian Express and Eenadu newspapers as also in Employment News. This is borne out by the letter of Chief Project Manager at Annexure-A/4. It is stated that the qualification and age requirement were also laid down and from Annexure-A/4 it appears that the candidates were subjected to rigorous selection both written test and viva voce. The applicants have also stated that the candidates who appeared at the written test came from Kerala, Tamil Nadu, Uttar Pradesh, West Bengal, Orissa, etc. and therefore, this selection was made at all India level. A committee of three J.A. Grade Officers constituted a Selection Committee. After qualifying in the selection process, the applicants were offered appointment. The recruitment notice is at Annexure-A/5 and one such offer of appointment is at Annexure-A/6. It is submitted by the applicants that the newspaper advertisement and the offer of appointment merely state that the nature of appointment is temporary and there is probationary period of 12 months. It was mentioned in the offer of appointment that on completion of probationary period of one year, selected persons will be given regular scale of pay of Rs.1400-2300/-.. Because of this, the applicants have averred that their appointment was not casual or ad hoc appointment. They have also stated that some of the applicants after joining the service passed Bachelor of Engineering in First Class and some were granted Study Leave for prosecuting M.Tech. On completion of the probationary period, their services were regularised and the orders regularising their services are at Annexure-A/7 series. The applicants have stated that in these orders of regularisation, it is mentioned that

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the applicants are regularised as temporary Work Mistries in a regular manner from different dates in November and December 1988 and applicant no.4 from February 1989. They have stated that their appointment as temporary Work Mistry was in accordance with the rules which were then in force and therefore, their service as temporary Work Mistries cannot be held to be fortuitous. Appointment orders do not say that their appointment is ad hoc or casual or they are required to undergo further test for regularisation. The applicants have further stated that conceding for argument's sake, though not accepting, that the service rendered by them prior to 18.12.1992 was ad hoc or casual, even then the same has to be taken into account for the purpose of reckoning minimum eligible service of five years. It has been stated <sup>that</sup> in the Railway Board's circular dated 25.7.1964 it has been laid down that for regular appointment of casual labour with temporary status for Class IV post, the stipulation is for five years continuous service. In this circular, the Railway Board has laid down that all continuous temporary service preceding permanent absorption in the regular cadre may be counted in reckoning the 5 years qualifying service in case of promotion of such persons in regular Group D posts <sup>to Group C posts.</sup> The applicants have stated that the same principle should also apply in their case even if it is taken that their service prior to 18.12.1992 is ad hoc or casual. The applicants have further stated that in the special selection held in accordance with the circular of the Railway Board at Annexure-R/4, some casual Work Mistries of Metro Railway, Calcutta, were also considered. But their cases are different from the

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case of the petitioners because those casual Work Mistries in Metro Railway were working on a consolidated pay and had not been appointed with regular scale of pay as in the case of the petitioners. Lastly it has been mentioned that the stand of the respondents that the applicants have been found ineligible to appear at the examination cannot be accepted because the respondents have not issued any order to the applicants declaring them as ineligible. The applicants have pointed out the case of one K.Ravichandran who was also recruited through the special selection procedure, the panel in respect of which is at Annexure-R/5. In this list the name of K.Ravichandran appears at serial no. 39. If the stand of the respondents is accepted, then K.Ravichandran's eligible service will also have to be reckoned from 18.12.1992. But in the order at Annexure-A/2, along with other candidates, K.Ravichandran has also been called to the interview. On the above grounds, the applicants have controverted the submissions of the respondents.

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5. We have heard Shri B.S.H.Rao, the learned counsel for the petitioners and Shri B.Pal, the learned Senior Counsel appearing for the respondents and have also perused the records. The learned Senior Counsel for the respondents has filed a Written Note of submission and the learned lawyer for the petitioners has filed a Reply to the same. At the time of hearing, the learned counsel for the petitioners had also filed a written note of submissions along with Annexures and Railway Board's circulars in a booklet. It was submitted by the learned Senior Counsel for the respondents that these documents have been filed on the date of hearing and therefore, these should not be

taken into account. On further submission on this matter, it was conceded by the learned counsel for the respondents that the documents at Annexures A/1 to A/8 are attached to the application and rejoinder and he has no objection to these annexures being taken into consideration. Annexures A/11 and A/14 are also different circulars of the Railway Board to which he has also no objection. His objection is confined to Annexure-A/9 of the booklet which is a list of successful candidates in the written examination according to the best of the knowledge of the applicants. Annexure-A/10 is also a statement showing the dates on which these 12 applicants have completed regular service of five years in the scale of Rs.1400-2300/-, according to their understanding. As this Annexure-A/9 of the booklet has not been filed earlier than the date of hearing, we do not take notice of this Annexure. In any case, this Annexure is nothing but a list of candidates who to the best of the knowledge of the applicants came out successful in the written test. From the above recital of facts, it would be clear that nothing turns on this list. Annexure-A/10 of the booklet is a tabular statement showing dates on which these 12 applicants, according to them, have completed 5 years of service. It is also unnecessary to take this document into consideration because in the Annexures to the rejoinder, copy of which has been given to the learned counsel for the respondents, the applicants have enclosed the orders in which after completion of their probationary period which was initially 12 months and which was later on reduced to 6 months, their services were regularised. The dates of

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completion of five years of regular service, according to the applicants, are included in this Annexure-A/10 of the book let from the date of their regularisation as given in Annexure-A/7 series. In view of the above, these two anneures are not taken into consideration.

6. From the above recital of facts, it is clear that the point of controversy in this case is rather limited. The sole point for consideration is whether the service rendered by the applicants from different dates in November and December 1988 and in the case of applicant no.4, from February 1989, till 17.12.1992 is to be taken as fortuitous or non-fortuitous service. In course of his submissions, the learned counsel for the petitioners has submitted that as the eligibility condition was laid down in the initial notice at Annexure A/1 and as the petitioners applied through their superior officers and the superior officers forwarded their applications, obviously their superior officers took the view that they had the eligibility with regard to the minimum period of non-fortuitous service of five years as on 1.11.1994. The petitioners applied on 3.4.1995 and after four months, in order dated 9.8.1995 they were admitted in the examination and therefore, the respondents must be held to be estopped from later on taking the stand that the applicants were not eligible to sit for the examination. Secondly, it has been submitted that the applicants were appointed in 1988 through a regular process of selection in accordance with a method of recruitment laid down in February 1974. They were appointed on probation. Their appointment orders do not show that the appointment was

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casual or ad hoc. These merely say that the appointment is temporary. As such it cannot be held that their service from 1988 to 1992 is fortuitous. It is further submitted by the learned counsel for the petitioners that in Government organisation, initially all appointments are given on temporary basis and later on persons are made permanent or confirmed, as the case may be. Therefore, mention of the word "temporary" in their original appointment orders or in the orders regularising their service does not make their service from 1988 to 17.12.1992 fortuitous. The third submission made by the learned counsel for the petitioners is that even granting for argument's sake, though not conceding, that their service prior to 18.12.1992 was ad hoc or casual, even then their service from 1988 to 1992 has to be taken into account for the purpose of minimum eligible service of five years in the scale of Rs.1400-2300/-.. Lastly, it has been submitted that the respondents, while taking a particular stand in respect of the applicants and holding them ineligible, they called to the interview one K.Ravichandran, who was also given appointment vide Annexure-R/5.

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7. The learned senior counsel for the respondents has, on the other hand, submitted that the service rendered by the applicants from 1988 to December 1992 was fortuitous. The applicants having appeared in a later selection test and accepted appointment under Annexure-R/5, cannot claim that their earlier period of service should be taken into account. Secondly, it is submitted that this qualifying service

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of five years in the scale of Rs.1400-2300/- was meant for five years of service in the above scale in the Open Line organisation only. The applicants came over to the Open Line organisation only on 18.12.1992 and therefore, on this ground also, they cannot be taken to have completed five years of qualifying service.

8. In reply it is submitted by the learned lawyer for the petitioners that the last point of the learned Senior Counsel for the respondents that five years qualifying service meant five years qualifying service in Open Line organisation cannot be accepted because this stand <sup>not</sup> has been taken by the respondents in their counter and has been mentioned only at the time of hearing.

9. The different submissions made by the learned counsels of both sides are taken up in <sup>after</sup> admitting seriatim. The stand of the petitioners that admitting the applicants to the written examination, the respondents are estopped from questioning their eligibility at a later stage and that no orders have been issued to them declaring them ineligible to sit for the examination cannot be accepted because in order dated 28.2.1995 the departmental authorities merely called for the names of candidates willing to appear at the examination. In order dated 9.8.1995 while admitting the candidates including the 12 applicants to the written examination, it was specifically laid down that the candidates have been accepted as provisional and if later on any candidate is found ineligible, his name will be deleted. Therefore, it cannot be said that merely because the applicants were admitted to the examination, their candidatures have been finally accepted. In this letter dated 9.8.1995 it was also

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mentioned that the names of ineligible candidates would be deleted and therefore, it was not necessary on the part of the respondents to issue any formal order declaring them ineligible. In all recruitment examinations held by Public Service Commissions, ineligible candidates are merely deleted and no orders are issued to them declaring them ineligible. This contention of the learned counsel for the petitioners must therefore fail.

10. As regards the main question as to whether the service rendered by the applicants from 1988, after their regularisation in Survey & Construction Organisation, till 17.12.1992 is fortuitous or non-fortuitous, learned counsel for the petitioners has drawn our attention to the Railway Board's letter dated 18.3.1954 at Annexure-A/11 which defines the expression "fortuitous service". This definition is quoted below:

"(1) "Fortuitous service" should be taken to mean officiating promotion as a local arrangement in leave or other short vacancies where it is administratively inconvenient to post the person eligible for such promotion.(This is equally applicable to "Selection" and "Non-selection" posts)."

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From the above it is clear that a service would become fortuitous service when instead of giving appointment to the regular eligible person, some other person is given officiating promotion as a local arrangement because of leave vacancy or other short-term vacancy. When a regular incumbent goes on leave, in the leave vacancy, the next eligible person from the feeder cadre can be promoted for the leave period. But sometimes if the period of vacancy is short, instead of giving

officiating promotion to the next eligible person, by local arrangement some other person is promoted during the period of vacancy, but without prejudice to the claim of the seniormost eligible person. Such officiating arrangement is made only for the short term period. Such arrangement as per the above definition can be called fortuitous service. It is submitted by the learned counsel for the petitioners that besides this definition of "fortuitous service" in the circular dated 18.3.1954, there is no definition of "fortuitous service" in any other circular or instruction of the Railway Board. This contention has not been denied by the learned Senior Counsel for the respondents. In the instant case, the petitioners were recruited after applications were called for by advertisement in the Employment News and also in newspapers. They were subjected to rigorous test. It is mentioned in letter dated 26.4.1995 at Annexure-A/4 that the selection both written examination and viva voce was as per norms of the Railway Recruitment Board. The applicants have stated in their rejoinder that in response to the Employment Notice persons from different parts of the country applied for the posts. Through this rigid process of selection they were selected and engaged on probation initially for a period of 12 months which, it is stated, was later on reduced to six months. In the original offer of appointment at Annexure-A/6 series it has been mentioned that the appointment is temporary and for the post of temporary Works Mistry. This offer of appointment does not say that this appointment is on casual or ad hoc basis. On completion of the

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probationary period, the services of the petitioners were regularised vide Annexure-A/7 series as temporary Work Mistries on a regular measure in the scale of Rs.1400-2300/- from November and December 1988 and in one case, from February 1989. This is, therefore, not a case where the petitioners have been appointed to posts which rightfully should have gone to some other persons and as an interim, ad hoc or casual nature the petitioners have been appointed and so, it is urged, their service from 1988 to 17.12.1992 cannot be taken as fortuitous. Learned Senior Counsel for the respondents has stated that in clause 2 of the offer of appointment it was mentioned that although efforts would be made to absorb the applicants in the regular cadre of the Railway on completion of works, but no such guarantee could be given. On the basis of this, it is urged that it would be clear that the applicants' service as temporary Work Mistries from 1988 to 17.12.1992 is only for the duration of the work in Survey and Construction Organisation and this appointment cannot be considered as non-fortuitous appointment. It is further submitted that later on after obtaining a special dispensation from Railway Board such casual Work Mistries of the Construction Organisation of the S.E.Railway along with Work Mistries in Metro Railway, Calcutta, had to undergo a special selection test vide Railway Board's order at Annexure-R/4 and thereafter they were absorbed as I.O.W., Grade III, vide order at Annexure-R/5. It is submitted by the learned Senior Counsel for the respondents that if their regularisation vide Annexure-A/7 series is taken to be in regular service,

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then there was no need for them to appear at a selection test and get regular appointment vide Annexure-R/5. As the petitioners willingly appeared at the test in pursuance of Annexure-R/4 and got regular appointment vide Annexure-R/5 and as they had not challenged the arrangement at Annexure-R/4 and their appointment at Annexure-R/5, they cannot be allowed to question this at a late stage in this application. From the definition of "fortuitous service" given by the Railway Board in the circular referred to by us above, it is clear that *prima facie* this is not a case of fortuitous service because the petitioners on being appointed as temporary Work Mistries did not occupy posts which rightfully belonged to some other persons. They were recruited in accordance with a circular of the Railway Board of 1974, wide publicity was given and candidates from different parts of the country applied for the posts. This contention has not been controverted by the respondents. Therefore, it cannot be held that the appointment of the petitioners in Survey & Construction Organisation as temporary Work Mistries was locally organised. After the period of probation, they were given regular scale of pay. It has also been urged by the petitioners in the rejoinder and not controverted by the respondents that some of them were granted Study Leave or Extraordinary Leave for prosecuting higher studies like M.Tech. All these go to show that their services as temporary Work Mistries in the Survey & Construction Organisation cannot be taken to be fortuitous. As regards the contention that the petitioners have not challenged earlier Annexures R/4 and R/5, the point at issue here is not that their

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appointment in pursuance of Annexure-R/5 is illegal. The point at issue is whether their service prior to appointment under Annexure-R/5 is fortuitous or non-fortuitous. Therefore, the fact that the applicants have not challenged Annexures R/4 and R/5 at the relevant point of time can have no bearing on the question whether their service from 1988 to 17.11.1992 is fortuitous or non-fortuitous. The other point of the learned Senior Counsel for the respondents is that at the time of their appointment, it was made clear to them that no guarantee could be given for their permanent absorption in the Railways. In other words, their services would be liable to be terminated after completion of the work in Survey & Construction Organisation. This condition applies to all temporary Government servants. If the posts are abolished, temporary Government servants have to be retrenched subject to the principle of last come first go and subject to their getting absorbed in some other vacant posts elsewhere in the same Department or through the Surplus Cell in some other Department. This is a universal system which applies to all temporary Government servants and this cannot have any bearing on the question whether their service for the relevant period was fortuitous or non-fortuitous.

11. The third aspect of the matter is that it is submitted by the learned counsel for the petitioners that even granting for argument's sake, though not conceding, that the applicants' service from 1988 to 17.11.1992 was casual or ad hoc, even then that period of service should count towards five years eligible service because the same was not fortuitous.

It is not necessary to consider this point because we have held that their service from 1988 to 17.11.1992 is not fortuitous. But even then it would be necessary to note the rival submissions on this point. Learned counsel for the petitioners has stated that according to the Railway Board's circular dated 20.8.1964 at Annexure-A/14 in respect of casual labour, their service after grant of temporary status and before their regular appointment in Class IV posts can be counted for the purpose of their promotion to Class III posts for which five years continuous service as Class IV employees is necessary. It is submitted that on the same logic and analogy, the applicants' service from 1988 to 17.12.1992 should also count towards eligibility for sitting at the Limited Departmental Competitive Examination for 30% of Assistant Engineers. We have already noted from the Railway Board's definition that fortuitous service is for short-term vacancy and the petitioners' appointment as temporary Work Mistries for four years cannot be taken as a short term arrangement. As we have already held that the service during this period is non-fortuitous, this period will naturally have to be counted towards the five years eligibility for sitting at the examination. This point gains further support from the submission of the petitioners with regard to the case of K.Ravichandran who was appointed as I.O.W., Grade III vide Annexure-R/4 (serial no.39) with effect from 18.12.1992, but vide Annexure-A/2 we find that K.Ravichandran has been called to the interview apparently taking that he has put in five years of eligible service by 1.11.1994. This point has been

mentioned by the applicants in paragraph 8 of the rejoinder with copy to the respondents, but no submission has been made by the respondents on the point. If in case of K.Ravichandran, the respondents have held that he has got five years of eligible service as on 1.11.1994 taking into account his service prior to 18.11.1992, then there is no reason why a different set of consideration would have been applied in respect of these applicants. Learned Senior Counsel for the respondents has mentioned in his written note of submission and also during hearing that the first order dated 28.2.1995 specifically stated that all staff of Civil Engineering Department who have completed five years of regular service (non-fortuitous) by 1.11.1994 in the scale of Rs.1400-2300/- are eligible to appear. It has been submitted that the petitioners got appointment in Civil Engineering Department only from 18.12.1992 by virtue of Annexure-R/5 and therefore, they cannot be taken to have completed five years of service in Civil Engineering Department. This submission is contradicted by a sentence in paragraph 5 of the counter of the respondents which we have extracted earlier wherein it is stated that serving Railway employees who have completed five years of regular non-fortuitous service in the above scale are eligible to apply. In their counter the respondents have not taken the stand that the service of the petitioners from 1988 to 17.11.1992 in the Survey & Construction Organisation is not service under the Civil Engineering Department. They have stated that such service is fortuitous, which point we have already decided against the respondents. Therefore, at the stage of hearing, they cannot be

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allowed to raise this point that the petitioners' service in Survey & Construction Organisation is not under Civil Engineering Department. In the portion of the counter extracted by us earlier it has been mentioned that all serving Railway employees are eligible to apply subject to the minimum period of service in the appropriate scale. If it is the stand of the respondents that the petitioners as temporary Work Mistries were not working in the Civil Engineering Department, then it was incumbent on the respondents to say under which Department they were working. Even as temporary, ad hoc or casual employees the petitioners would be working under some Department of the Railways. Whether the engineering staff of Survey & Construction Organisation is in the Civil Engineering Department of the Indian Railways or not is a matter which the respondents cannot be allowed to raise at this juncture. In view of the above, we hold that the service rendered by the petitioners from the dates of their regular appointment as temporary Work Mistries on a regular basis on different dates as per Annexure-A/7 series till 17.12.1992 is non-fortuitous service and therefore, by 1.11.1994 they must be taken to have put in five years of non-fortuitous service in the scale of Rs.1400-2300/- and we hold that the petitioners were eligible to appear at the written test. The respondents are directed to declare the results of the viva voce test conducted in respect of the applicants and decide whether they could be included in the panel of successful candidates on the basis of their performance in the written test and viva voce at which they have already appeared by virtue of the interim

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order of the Tribunal. This exercise should be completed within a period of 60 (sixty) days from the date of receipt of copy of this order.

12. In the result, therefore, the Original Application is allowed, but, under the circumstances, without any order as to costs.

*L. N. S.*  
(G. NARASIMHAM)  
MEMBER (JUDICIAL)

*S. Somnath Som.*  
(SOMNATH SOM)  
VICE-CHAIRMAN

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AN/PS