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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH : CUTTACK

ORIGINAL APPLICATION NO.743 OF 1996
Cuttack this the 10th day of Oct 2001

Narayan Chandra Pradhan

.....

Applicant.

V e r s u s .

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 Central Administrative Tribunal or not? No.

Somnath Som
(SOMNATH SOM)
VICE-CHAIRMAN
10.10.2001

20.10.01
(G.NARASIMHAM)
MEMBER(J)

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ORIGINAL APPLICATION NO. ~~7~~43 OF 1996
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CORAM:

THE HON'BLE SHRI SOMNATH SOM,
THE HON'BLE SHRI G.NARASIMHAM,

VICE-CHAIRMAN
MEMBER(J)

....

1. Narayan Chandra Pradhan,
aged about 48 years,
S/o. Late Ratan Pradhan,
Jr.Clerk, Under P.W.1
Bhadrak S.E.Railway,
P.S.Charampa, Dist.Bhadrak.
2. Prahallald Barik,
S/o. Late Padmanava Barik,
Jr.Clerk, Office of the Sr.DEN
S.E.Railway, Khurda Road Jatni,
District-Khurda.
3. Goddoi Parasuram
S/o.Late G.Bairagi,
Jr.Clerk, under I.O.W.(Hq)
S.E.Railway, Khurda Road,
P.O.Jatni, Dist.Khurda.

By the Advocates

... Applicants.
M/s G.A.R.Dora
V.Narasingham
J.K.Lenka.

V e r s u s

1. Union of India athrough 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.
- By the Advocate(s)

... Respondents.
Mr.Bijay Pal

.....

ORDER

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G.NARASIMHAM, MEMBER(JUDICIAL): These three applicants who were confirmed class-IV employees of South Eastern Railway and who were promoted as ad hoc Jr.Clerks alongwith 18 others under order dated 28.9.80(Annexure A/1), filed this application on 8.10.96 with the following prayers:

- a) Direct the respondents to reckon applicants seniority as Jr.Clerks from the dates of their initial promotion.
- b) Direct the respondents to promote the applicants as Sr.Clerks from the dates their juniors were promoted with consequential benefits and to show their names in the Sr.Clerk seniority list above their juniors.
- c) Issue any other appropriate relief or reliefs in favour of the applicants justified under the circumstances.

2. According to the applicants they were promoted after passing test and as such description of their promotion as ad hoc was wrong. When order was passed for their reversion, they challenged it before the High Court of Orissa in O.J.C. No.1976 of 83. By judgement dated 10.1.85 (Annexure A/3), the High Court quashed the order of reversion as bad and held that they must be deemed to be continuing in the post of Jr.Clerks. SLP filed by the

Department against this judgment of the High Court was dismissed by the Apex Court on 26.8.87 (Annexure A/4) with an observation that the department may file review before the High Court. The review filed before the High Court was rejected 1.4.91 (Annexure A/5). Thereafter by order dated 31.7.91, the department clarified that the earlier reversion order be treated as cancelled. Since the order of the Court' was implemented in July 1991, the names of the applicants could not find place in the seniority list of Jr. Clerks published in the year 1988. Thereafter, no seniority list of Jr. Clerks was published. But 20 employees promoted as Jr. Clerks long after the promotion of applicants have been promoted as Sr. Clerks between 1985 and 1989. In the seniority list of Sr Clerks published in the year 1994, these 20 employees could find place. The applicants in their representation dated 31.3.96 (Annexure A/7) addressed to DRM South Eastern Railway, Khurda Road claiming seniority over these 20 employees and sought for promotion to the cadre of Sr. Clerks from the day they were promoted but without any response. Hence this application.

3. The respondents in their counter opposed the prayers of the applicants stating that they were promoted to the cadre of Jr. Clerks as ad hoc basis only on the basis of literacy test, but not on the basis of prescribed departmental test for consideration of their promotion to cadre of Jr. Clerks. The judgments of the High Court as well as Supreme Court would reveal that the reversion order was only quashed. Since the reversion order was

quashed the applicants were restored to their original position as ad hoc Jr.Clerks. There was no direction in those judgments in ~~this~~ regard to their regularization or seniority. As per the Rules it is only after passing the prescribed departmental tests they could be regularised as Jr.Clerks. In fact, ⁱⁿ the departmental ^{test} that has been held that they have been empanelled in order dated 13..5.95 for regular promotion as Jr.Clerks. This order has not been implemented because an analogous case. O.A. 42 of 94 was by then pending before this Tribunal in the matter of seniority and regularization. In fact, the applicants had not appeared such tests earlier in spite of circular letter dated 2.2.83.

4. No rejoinder has been filed.

5. We have heard Sri G.A.R.Dora, learned Senior Counsel for the applicants and Sri B.Pal, the learned Senior Counsel for the respondent. During hearing, Sri Dora placed reliance on the judgment of this Bench in O.A.706 of 97. Respondents in ^{turn} ~~turn~~ relied on the judgment of this Bench in O.A. 42 of 94. Besides in the original application, judgments of this Tribunal in O.A.145 of 91 and O.A.419 of 91 were cited as instances. Hence we perused all these records.

6. Facts are not in dispute. Annexure A/1 dated 28.9.80 of the Department reveals that on the basis of literacy tests (written) the three applicants alongwith 18 others including 5 applicants of O.A.42 of 94 were promoted as

Jr.Clerks on ad hoc basis. It is not disputed that this literacy test is not the prescribed departmental test to be conducted in case of promotions to the cadre of Jr.Clerks. A confirmed group 'D' employee in order to be eligible for regular promotion to the cadre of Jr.Clerk has to appear and pass the prescribed departmental test which includes written as well as vive-voce. Hence the contention of Sri Dora the learned Sr.Counsel that in view of their continuous officiation as ad hoc Jr.Clerks for several years, their seniority shall have taken into account from the day joined as ad hoc Jr.Clerks cannot be accepted as per our discussion hereunder:

7. We have gone through the judgments of the then Division Bench of this place in O.A.145 of 91 and O.A.419 of 91, both of which were disposed in the year 1993. Facts similar to facts before us, though not for promotion to the cadre of Jr.Clerks were involved in those two cases. In O.A.419 of 91 the then Division Bench placed reliance on the following finding of the Apex Court at paragraph 47(a) of their judgment in Direct recruit Class-II Engineering Officer's Association Vrs. State of Maharashtra reported in (1990)2 SCC 715. which runs as follows:

"47 (a) once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that whether the initial appointment is only ad hoc and

not according to rules and made on a stop gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority".

On the basis of the aforesaid finding of the Apex Court the Bench held that seniority would count from the commencement of the date of continuous officiation.

Perhaps the Bench arrived at this conclusion because the observation in para 47 (b) of that Apex Court judgement was not placed before them, which runs as follows:

"47(B) If the initial appointment is not made by following the procedure laid down by the rules but appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, period of officiating service will be counted".

Though, to a layman the aforesaid two observation of the Apex Court may appear to be conflicting, the same are not so as explained by the Apex Court in a subsequent judgement in State of W.B. Vrs. Aghore Nath Dev reported in (1993) 3 SCC 371. The relevant passage in the Aghorenath case runs as follows:-

"We shall now deal with conclusions (A) and (B) of the constitution bench in the Maharashtra Engineers case quoted above.

There can be no doubt that these two conclusions have to

be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement the officiation in such posts cannot be taken into account for considering the seniority. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

This being the obvious inference from the conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

The question, therefore, is of the category which would

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be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of 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 qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the 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

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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 remaining procedural requirements of the rules being fulfilled at the earliest. In such cases all appointee is not to blame for the 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. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on an ad hoc basis as a stopgap arrangement and not according to rules".

7. Thus it is clear from the aforesaid observation of the Apex Court that if an ad hoc appointment is made not according to rules, officiating period will not be taken into account in determining the seniority. Seniority will be taken into account only after such ad hoc appointment is regularised according to rules. As for instance, if successful completion of a departmental test is necessary for promotion to a higher cadre, ad hoc promotion given without passing such promotional test

which is one of the prime requirements for promotion would not be taken into account for counting seniority. However, if after passing such departmental test ~~some~~ formal concurrence is necessary from a source for promotion to the higher cadre, under such circumstance a period of ad hoc promotion would be counted for the purpose of seniority as mentioned under para 47(B) of the judgement in State of Maharashtra's case (Supra). We are aware that there is a provision of 18 months Rule in Railways ~~and~~ that after completion of 18 months on adhoc basis one is not liable to be reverted. While interpreting this rule Full Bench of this Tribunal (Principal Bench) in Jathananda Case reported in 32(1989) AISLJ, 67 held that right to hold selection/promotional post accrues only to those employees who have undergone a selection test and have been empanelled for the promotion/selection test and continued as such for 18 months or more. Even this Full Bench decision which as per the convention is binding on Division Bench appears to have not been placed before the then Division Bench which ~~are~~ pronounced judgement in O.A. 419 of 91. Hence judgement in O.A. 419 of 91 will not be any help to the applicant.

8. O.A. 145 of 91 is distinguishable. In that case applicant a confirmed gangman was promoted as Junior Clerk through on ad hoc basis against a regular vacancy. Thereafter he appeared written test and being successful, he appeared the viva voce. During the pendency of the O.A. viva voce result declaring him successful was out

on these facts, the Bench without deciding his seniority, directed the Department to take a decision on seniority.

9. Shri Dora the learned Sr.Counsel also placed reliance on the judgement of this present Division Bench passed in O.A.706 of 97. This judgement is also distinguishable because there the applicants approached the Tribunal after they were regularised as regular class III employees under the Railways.

10. The fact remains that these applicants had appeared in the prescribed departmental test only in the year 1994 and not prior to that . Hence their regularisation and consequently the seniority in the cadre of Jr.Clerks would depend on their successful completion in this departmental test.

11. O.A. 42 of 94 since disposed of by this Bench relates to 5 applicants who alongwith the present applicants under Annexure A/5 were promoted as Jr.Clerks on ad hoc basis and who were also petitioners alongwith the present applicants in O.J.C.1976 of 83. Their prayer ~~is~~ similar to the prayer of applicants in this O.A. was disallowed through an elaborate final order dated 23.5.2000. We have carefully perused that record and that final order. On the basis of the legal position discussed above we see no reason to take a different view.

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12. In the result, there is no merit in this original application which is accordingly dismissed. No Costs.

Somnath Som
(SOMNATH SOM)
VICE-CHAIRMAN
10.10.07

10.10.07
(G. NARASIMHAM)
MEMBER (J)

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