

O.A.No. 639/2004 and OA Nos.658-851 OF 2004.

Himansu Sekhar Paikray & Others vs. Union of India & Ors.

PRESENT:

Advocate for Applicant - M/s. J.Patnaik, H.M.Dhal, A.A.Das, B.Mohanty, T.K.Patnaik, S.Das, P.K.Nayak, S.Patnaik & A.Patnaik, Advocates.

Advocate for Respondents- Mr..P.C. Panda, Advocate (Railways).

Order dated: 31/05/2007

By filing M.A.No.768 of 2004, 195 Applicants have sought for permission to prosecute their grievances in one Original Application. As joining together and maintaining one Original Application was strongly opposed by the Learned Standing Counsel for the Respondents, instead of allowing them to file separate Original Application, the said prayer of Applicants was allowed subject to payment Rs.50/- by each of the Applicants so as to enable the Registry to assign separate OA numbers to each of the Applicants. Accordingly, on payment of the additional amount of Rs.9,750/-, the matter was registered by assigning separate number to each of the Applicants. Therefore, since common question of law and facts involved in all these OAs, the same were heard analogously, and it is ordered that this common order will govern all the cases. ✓

2. The case of the Applicants is that for filling up of all total 1012 Group 'D' posts ( 787 posts of Gangman in Civil Engineering Department and 225 posts in Operating Department of the Railways), vide Employment Notice No.1/98 dated 05.11.1998, the Respondent No.3 invited applications from amongst the eligible candidates through Employment Exchanges situated within the geographical jurisdiction of the Khurda Road Division i.e. Director of Employment Officer, Bhubaneswar, Khurda, Puri, Bhubaneswar, Special Employment Exchange for SC/ST, Bhubaneswar, Cuttack, Jagatsinghpur, Kendrapara, Jajpur, Bhadrak, Keonjhar, Dhenkanal, Angul, Berhampur, Parlakhemundi, Srikakulam, fixing the last date as 30.11.1998.

3. In the Notice dated 05.11.1998, it was made clear that no application shall be entertained directly by hand. So far as age is concerned, it was mentioned that the candidates must be between 18 to 33 years as on 1.11.1998 (Upper age relaxable by 3 years for OBC and 5 years for SC/ST candidates). Casual Labour, ex-Casual Labour and Substitutes will get age relaxation as per rules. The minimum qualification was prescribed as Class-VIII passed but preference will be given for higher qualification. So far as the manner of selection is concerned, it was provided that the candidates must possess good physique and should be able to/of do/doing hard manual labour and lifting approximate weight of

50 kg and must pass the medical examination prescribed for the category applied for. It was made known that common selection will be conducted for Gangmen and Group D in Operating Department comprising physical test, written test and viva-voce test, Candidates who qualify in the physical test will be eligible to appear in the written test. Those who qualify in the written test will be called for via-voce in the order of merit. Applicants having fulfilled the norms stipulated in the advertisement offered their candidature to be considered against the vacancies notified.

4. But a few days after the notification dated 05.11.1998, another notice dated 26.11.1978 (sic) under Annexure-2, was published extending the last date of submission of applications to 30.12.1998 as also stating that those who will apply directly in response to the employment notice their applications will be considered along with those who are sponsored by the Employment Exchanges on equal footing. In Notification dated 01.11.2003 under Annexure-3 the procedure of the recruitment was changed to the extent that the selection will be restricted to physical test and written test only. The viva voce test was dispensed with and the final result of the selection was to be on the basis of written marks only.

5. It is the case of the Applicants that as per the Recruitment Rules, selection is to be confined to the candidates who had registered

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their names in the Employment Exchanges located within the geographical jurisdiction of the concerned Railway Division. Such was the term put in by the Respondents under Annexure-1 but the Respondents unilaterally changed the said conditions by allowing the candidates from out side the geographical territorial jurisdiction of the Railways Division. According to them, on 31.07.1998, Sambalpur Division of the Railways invited applications for filling up of certain number of Group D posts lying vacant under them. When the Sambalpur Division confined the selection to the eligible candidates who had registered their names in the Employment Exchange located within the geographical jurisdiction of Sambalpur Division, the Khurda Division committed gross discrimination in allowing the candidates from outside their geographical jurisdiction and thereby squeezed the chances of selection of the Applicants. They have stated that there was no uniform policy so far as recruitment to Group D posts in Railways is concerned. It has been pointed out that the norm/criteria fixed by the Indian Railways for recruitment to Gr. D posts in the other Divisions of the Railways in the country was completely different than the procedure adopted by the Khurda Road Division and, therefore, the selection needs to be quashed. Therefore, they have approached this Tribunal in the present Original Application filed under section 19 of the Administrative Tribunals Act, 1985 with the following prayers:



“(i) The selection to the post of Group ‘D’ in Khurda Road Division in pursuance of Annexure – 1 and 2 be declared as illegal, arbitrary contrary to law and the same be quashed;

(ii) The Respondents be directed to conduct the recruitment test for Group D posts afresh in accordance with Rules.”

6. The Respondents, in response to the notice of this Tribunal, have filed their counter stating therein that there was no irregularity or illegality in the matter of conducting the process of selection. The selection was conducted in accordance with the procedures laid down in the Railways. They have submitted that pursuant to the Railway Board’s instructions 17.09.1998 received through the Headquarters Office of the South Eastern Railway, Garden Reach, Kolkata (Annexure-R/2) the confinement of the selection to the candidates, whose applications are received through employment exchanges situated within the geographical jurisdiction of Khurda Road Division was modified under Annexure-2 by making the selection open to all eligible candidates even outside the Geographical Territorial jurisdiction of the Khurda Road Division. As regards the change of the method of selection, under Annexure-3, the response of the Respondents is that as already six years have elapsed from the date of advertisement, to minimize the gap of selection it was decided by the competent authority to finalize the process of recruitment on the basis of written test

result without resorting to viva-voce test. This was intimated to all candidates called upon to appear in the written test in letter dated 01.11.2003. Candidates were also made known by publishing it in news papers and circulating the same in the examination halls. As regards the assertion that there was no uniformity in the matter of selection, it has been pointed out by the Respondents that notice for recruitment was issued by the Sambalpur Division on 31.07.1998 which was prior to the Board's instructions dated 17.09.1998. But the latter has certainly the binding effect on the Notification dated 05.11.1998 issued by the Khurda Road Division of the Railways and therefore, the Respondents were duty bound to carry out the amendment to the advertisement by adhering to the directions issued by the Railway Board. Lastly they have submitted that there was no nepotism or favoritism in the matter of selection. Empanelment of the candidates were made strictly in accordance with their merit in the written test. The candidates have no right to question the validity and propriety of the selection process; especially after being unsuccessful in the process of selection. Hence, they have fervently prayed for dismissal of this O.A.

7. Heard Mr. Jagannath Patnaik, Learned Senior Counsel appearing for the Applicants and Mr. P.C. Panda, Learned Counsel



appearing for the Respondents/Railways and perused the materials placed on record.

8. Before proceeding further in the matter, we may express our anguish about the casual approach in the matter of filing of counter. Though the Respondents have stated to have filed documents as Annexure-R/1, R/2 etc. but no such documents have been placed on record. However, we hope that in future, the Respondents, as well as their Counsel, will be careful while filing counter in different cases.

9. It has been argued by the Learned Senior Counsel for the Respondents that there was no uniformity in the matter of selection inasmuch as when for the same Group D posts, the selection was confined to the territorial jurisdiction of Sambalpur Railway Division, for Khurda Road Division though, under Annexure-1 it was restricted to the candidates residing in territorial jurisdiction of Khurda Division, vide Annexure-2, zone of consideration was expanded without any valid/justified reason. The contention of the Learned Senior Counsel for the Applicants that there is no wrong in the order of the Railway Board that instead of keeping it confined to the candidates sponsored by employment exchange, as per the decisions of the Apex Court, there should be an open advertisement inviting applications from open market. He also does not dispute that there should be wide publication of the

vacancy through media enabling all eligible candidates to know and apply for the post. But his argument is that the Railway Board Circular does not mandate the authority to change the advertisement by making the selection from amongst the candidates outside the territorial jurisdiction of the Khurda Road Division as has been done in the case of Sambalpur Division. He has, therefore, argued that this being a clear case of deviation from the precedence, consistency and uniformity, the entire process of selection needs to be quashed. He has laid emphasis that without any prior intimation, suddenly the authorities changed the manner of the selection, advertised under Annexure-1, that too, in the midst of the Test, by declaring that the selection will be made based on the result of the written test and there would be no viva voce only to avail of opportunity to show favour to some of their chosen persons. By placing reliance on Annexure-4, he has pointed out that the Respondents fixed the norm of the physical test contrary to the policy adopted by other Divisions of the Indian Railways. They have intentionally flouted the uniform policy only to eliminate the Applicants from the zone of selection. He has stated that by putting the stringent clause in the physical test, they have not only deviated from the uniform policy but also violated the human rights by way of asking to face life risk test for sustenance of livelihood. His contention is that by virtue of expanding the zone, the ineligible candidates became eligible and thereby the

chances of getting berth against the vacancies were jeopardized. Therefore, he has fervently prayed this Tribunal to declare the entire process of selection as null and void by directing the Respondents to conduct fresh selection to the posts making it confined to the candidates who have registered their names in the employment exchanges situated with the geographical jurisdiction of the Khurda Road Division of the Railways.

10. Per contra, Mr. P.C.Panda, Learned Counsel for the Railways strongly opposed the arguments and stand taken by the Applicants by stating that there was no wrong either in the process of selection or by making the selection wider. He has argued that Annexure-2 was issued as per the Circular of the Railway Board. He has also argued that viva voce test was taken out in view of the time consumed in the matter of selection and as the vacancies were required to be filled up on urgent basis to meet the public service. His contention was that Sambalpur Division issued advertisement on 31.07.1998. The Khurda Road Division issued advertisement on 05.11.1998. The Railway Board instructions dated 17.09.1998 circulated under Estt. Srl. No.244/98 under Annexure-R/2. Hence the Sambalpur Division stuck to the advertisement dated 31.07.1998; for the later Railway Board's instruction having no retrospective effect. Therefore, the Applicants can

hardly have any claim with regard to this aspect of the matter. He has argued that it was within the scope of the authorities to decide the norm of the selection. The procedure was made applicable to all the candidates who appeared in the selection. Therefore, the Applicants have no right to question taking viva-voce test out of the selection process and ordering that the selection should be made on the basis of the result of the written test which is not available for challenge by the Applicants. This principle was followed uniformly. In absence of any discrimination from amongst the candidates in the process of selection, and in absence of specific plea as to how they have been prejudiced by such process, there is no scope for them to challenge the entire process of selection. Lastly, he has argued that having participated in the selection and failed, they are estopped under law to challenge the validity of the selection. He has, therefore, prayed for dismissal of this O.A.

11. Having given our thoughts to the rival submissions of the parties, we may observe that neither of the parties was able to produce the Rules governing the recruitment to the posts in question. Therefore, we are to take a decision on the basis of the factual matrix and law suiting the issues in hand. In this connection we may record that Public employment opportunity is a national wealth in which all citizens are equally entitled to share and that no class of people can monopolise public employment in the name of 'territorial jurisdiction' or other

grounds. The right to equal opportunity to public employment may not be treated as a new form of entitlement limited to a particular area under the specific provisions made in the Rules. As per the mandate available under Article 16 of the Constitution of India every citizen irrespective of the place of birth has a right to be considered for the post in question.

**Article 16 of the Constitution of India deals “EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT”.**

The relevant provisions outlined therein are as under:-

“(1) There shall be equality of opportunity of all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State”.

Article 14 enshrines the Fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds – religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not related to any employment or office under the State. Article 16, Clause (1) guarantees equality of opportunity for all citizens in matters relating to employment of appointment of any office under the State and Clause (2) prohibits discrimination on certain

grounds in respect of any such employment or appointment. It would thus be clear that Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in the favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matter relating to employment or appointment to any office under the State. Equality postulates identity of the class and once that is absent, discrimination cannot arise. Merely because fortuitous circumstances arising out of some peculiar developments or situations create advantages or disadvantages for one group or the other, there cannot be a case of discrimination. If one class has not been singled out for special treatment, the mere circumstances of advantages accruing to one or the other cannot result in a breach of Article 14 of the Constitution.

12. Law is also well settled that wider the zone of consideration better is the chance of getting candidates, which would serve the interest of nation ultimately. Therefore, we find no wrong in the decision of the authorities in expanding the zone of consideration to get better hands.

13. As regards the plea of the Applicants that there was no *viva voce*, it is observed that the object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favoritism. Selection based on

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merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public service (Ref: **Lila Dhar v. State of Rajasthan**, AIR 1981 SCC (L&S) 588=AIR 1981 SC 1777). Competitive examinations are required to be conducted by the authorities to get the best brain. Public interest requires no compromise on quality. The Courts/Tribunal should not ordinarily interfere in the selection process, unless there is serious procedural irregularities or *mala fide*. If the selection committee thinks it best to rely solely on the physical and written tests and dispenses with the viva voce test, it is not for this Tribunal to sit in the judgment of it unless *mala fide* is proved. We do not find any such infirmity in the process adopted by the Respondents. There are rulings of the Courts that the choice of selection is, therefore, not open to judicial review once a candidate is found to be qualified and eligible for appointment (Ref: **R.K.Jain v. Union of India**, AIR 1993 SC 1769). It is also settled principle that in the absence of statutory rules, the authorities are competent to evolve their own procedure for the purpose of evaluation of merit (Ref: **Secretary (Health) Department of Health, v. Anita Puri**, 1996 SCC (L&S) 1491). Also settled principle of law is that Court cannot encroach upon the powers of the selection committee by substituting its own views and opinion in the absence of oblique motive attributed to the selection

Board (Ref: S.L.Vohra (Ar Vice Marshal) (Retd.) v. Union of India, JT (1993) 3 SC 359).

14. Thus the Advertisement under Annexure-A/1 was de  
hors the Constitutional provisions. By issuance of Annexure-A/2, the  
vice in Annexure-A/1 was removed and, therefore issuance of Annexure-  
A/2 cannot be said to be bad in any manner.

15. Besides the above, another important feature of the matter  
is that conditions made in the first advertisement dated 05.11.1998  
(Annexure-1) were modified on 26.11.1978 (sic) (Annexure-2), pursuant  
to which the Applicants appeared in the physical test as also written  
examination, without any protest. Having appeared in the tests and  
having failed to qualify in the open competitive examination, they have  
travelled to this Tribunal in the present O.A by raising grievances that the  
procedure was improper. In the case of **Om Prakash Shukla vs.**  
**Akhilesh Kumar Shukla**, AIR 1986 SC 1043, the Hon'ble Supreme  
Court has held as under :

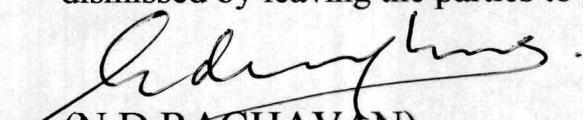
“Moreover, this is a case where the petitioner in the writ  
petition should not have been granted any relief. He had  
appeared for the examination without protest. He filed the  
petition only after he had perhaps realized that he would not  
succeed in the examination. The High Court itself has  
observed that the setting aside of the results of examinations  
held in the other districts would cause hardship to the  
candidates who had appeared there. The same yardstick  
should have been applied to the candidates in the District of  
Kanpur also. They were not responsible for the conduct of  
the examination”

16. Thus, the Applicant, by their conduct, having accepted the position are estopped to challenge the recruitment process.

17. Apart from this, under the Administrative Tribunals Act, 1985, before one could approach the Tribunal, he/she has to exhaust the alternative remedy. No material has been placed to show that the Applicants have ever approached the departmental authorities ventilating their grievances and/or their representations made in that behalf have been lying indisposed. Thus, these cases virtually are not maintainable on that count.

18. Further we notice that the issue of expansion of zone of consideration earlier received judicial scrutiny of this Tribunal in OA No. 78 of 2006 (Ajay Kumar Barik v. Union of India and others) and this Tribunal in its order dated 27-02-2006 held that there was no wrong in changing the policy of recruitment to the posts in question and we find no logic to differ from the view already taken earlier by this Tribunal.

19. In the result, we find no merit in these OAs which stand dismissed by leaving the parties to bear their own costs.

  
(N.D.RAGHAVAN)  
VICE-CHAIRMAN

  
(B.B.MISHRA)  
MEMBER(A)