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O.A.No. 108 of 2007

Surendra Nath Barik Applicant
Versus
Union of India & Others Respondents

Order dated 24th November, 2009,

C O R A M

THE HON'BLE MR.JUSTICE K.THANKAPPAN, MEMBER (J)
A N D
THE HON'BLE MR. C.R.MOHAPATRA, MEMBER (A)

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Applicant, working as a Head Clerk under the Workshop Personnel Officer of East Coast Railway Carriage Repair Workshop Mancheswar, Bhubaneswar by filing the present Original Application has sought the following relief:

- (a) to pass appropriate orders directing the Respondents to promote the applicant to the post of office superintendent, Grade II either against the unreserved vacancy or reserved vacancy under re-structuring of cadre;
- (b) to pass such further order/orders as may be deemed just and proper in the facts and circumstances of the case and allow this OA with costs."

2. Respondents have opposed the prayer of the Applicant on the ground that there is no vacancy under the UR category to which the Applicant belongs so as to consider and promote him to the post of Superintendent Grade II even though the applicant is the senior most employee under UR category in the feeder grade. It has been contended that on the basis of annual cadre review, vide Estt.Srl.No.62/2002 & 146/2002, the existing sanctioned strength of OS II in Personnel Branch of CRW/MCS was increased from 1 to 3. This was again revised increasing the OS II post from 3 to 4 vide Estt.Srl.No.152/03. As per the reservation roster these posts were required to be filled

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up three by UR and one by SC. Against three UR vacancies, three Head Clerks who were placed above the Applicant in the seniority list were promoted to the post of OS II and one post meant for SC candidate could not be filled up due to non-availability of SC candidate fulfilling the conditions stipulated in the Rules for being promoted to the post of OS II. They have stated that it is not correct to state that the reservation principle is not applicable to the SC/ST categories whenever there has been increase of posts under restructuring of cadre. As per the Estt.Srl.No.152/2003 reservation for SC/ST categories under restructuring of cadre is in force in the Railway. Respondents also denied the contention of the Applicant that he being the senior most head clerk, should have been promoted. According to the Respondents applicant was not senior most Head Clerk before restructuring of cadre i.e. on 30.10.2003 and after restructuring of cadre the applicant was assigned Srl.No.1 in the revised seniority list of head clerk. The post of OS II is a selection post. As such there is no wrong in filling up of the post of OS II by way of selection by calling the candidate 1:3 as per Establishment Srl. No.266/99. But the applicant refused to appear the selection stating that h has taken shelter of court of law. On the above grounds the Respondents prayed for dismissal of this OA.

3. It is the contention of the Applicant that Respondents are taking steps to promote Smt. Samita Samantaray, Head Clerk who is much junior to the applicant to the post of OS II without considering his case. Respondents

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have also filled up the post of OS II through his juniors by way of positive act of selection instead of modified way of selection. Further contention of the applicant since the vacancies created on restructuring of cadre, principle of reservation ought not to have been followed and the post ought not to have been kept vacant on the ground of non-availability of suitable SC candidate and should have been filled up by the applicant who is the senior most head clerk having the requisite year of service to hold the post. This contention of the Applicant was opposed by the Learned Counsel appearing for the Respondents by reiterating that as the OS II post is a selection post there is no wrong in filling up of the same by positive act of selection. His contention is that the applicant has lost his right to challenge as he refused to appear at the selection along with others. He also stated that reservation principle was adhered to as per the existing instruction of the Railway and since eligible SC candidate was not available the post was carried forward to subsequent year and as the post was meant for SC candidate the applicant has hardly any right to be promoted.

4. Having given our thoughtful consideration to various points put forward by the parties, perused the materials placed on record. We find no force in the submission of the Learned Counsel for the applicant so far as applicability of the principle of reservation in the vacancies available after restructuring of cadre in view of the decision of the Hon'ble Apex Court **Union of India v Pushpa Rani and others**, (2008) SCC

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(L&S) 851 and as such the plea of the applicant that reservation principle is not applicable when additional posts became available as a result of restructuring of the cadre is not sustainable. Similarly in absence of any rules or instructions produced by the Applicant, we are not in a position to accept the bald allegation of the applicant that filling up the post by positive act of selection was in any manner irregular or illegal especially when according to the Respondents the post of OS II is a selection post and posts coming under the category of selection are generally filled up by way of positive act of selection. This apart, we find that the applicant virtually challenges the promotion of others without making them parties to this Original Application. He also not challenged the selection conducted by the Respondents by making the persons selected through the said selection as parties to this OA.

5. The above being the position, we find no merit in this OA and the same is accordingly dismissed. No costs.

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(JUSTICE K.THANKAPPAN)
MEMBER (JUDICIAL)

Prabhu

(C.R.MOHAPATRA)
MEMBER (ADMN.)