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CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK

O.A.NO. 90 OF 2007

(Decided on May, 2007)
JUNE

CORAM:

**HON'BLE SHRI N.D.RAGHAVAN, VICE-CHAIRMAN
AND
HON'BLE SHRI B.B.MISHRA, ADMINISTRATIVE MEMBER**

.....
Narayan Sahoo, aged about 57 years, son of late Arakhita Sahoo, working as Chief Pharmacist Grade I under the Chief Medical Superintendent, E.Co.Railway, Khurda Road, residing at C/o Dasarathi Sahoo, Bikash Nagar, P.O.Jatni, Dist.Khurda

..... Applicant

Advocate for the applicant - M/s Achintya Das & D.K.Mohanty
Vrs.

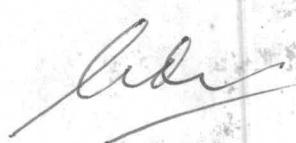
1. Union of India, service through General Manager, E.Co.Railway, Chandrasekharpur, Bhubaneswar.
2. Chairman, Railway Board, Rail Bhavan, New Delhi PIN 110 001.
3. Chief Personnel Officer, E.Co.Railway, Chandrasekharpur, Bhubaneswar, PIN 751023
4. Sr.Divisional Personnel Officer, E.Co.Railway, Khurda Road, P.O.Jatni, Dist.Khurda, PIN 752050
5. Sri S.K.Barik, Chief Pharmacist, Sambalpur Railway Hospital, P.O.Modipara, Dt. Sambalpur, PIN 768002

..... Respondents

Advocates for the Respondent No. 1 - M/s S.K.Ojha &
A.K.Sahoo

Advocate for Respondent Nos.2,3 & 4 - NONE

Advocates for Respondent No. 5 - M/s G.Rath, S.N.Mishra,
T.K.Praharaj & S.Rath

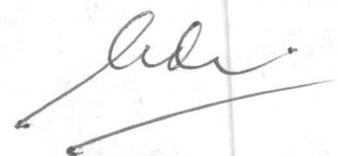


ORDER

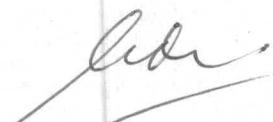
N.D.RAGHAVAN, VICE-CHAIRMAN

The applicant, who is presently working as Chief Pharmacist, Grade I, under the Chief Medical Superintendent, East Coast Railway, Khurda Road, has filed this Original Application for quashing of the letter No. ECoR /Pers/ Gaz/Med/A/Ph.O/Selection dt.04.08.2006 (Annexure A/4) and the Circular No. ECoR/Pers/Gaz/Medl/AphO>Select dt.18.10.2006 (Annexure A/7) issued by the Chief Personnel Officer, E.Co.Railway, Bhubaneswar (Respondent No.3) and for a direction to the Respondents to publish the result of the selection to fill up the regular vacancy that was conducted in response to the Circular dated 04.04.2005 (Annexure A/1). He has also prayed for the interim relief to direct the Respondents not to proceed with the Circulars dated 18.10.2006 (Annexure A/7) and dated 23.11.2006 (AnnexureA/8) during pendency of the Original Application.

2. Brief facts of the case of the applicant are that the Chief Personnel Officer, E.Co.Railway, Bhubaneswar, issued a Memorandum dated 4.4.2005 (Annexure A/1) for formation of a panel of Group B Assistant Pharmacy Officer in the pay scale of Rs.7500-1200/- in the Medical Department of East Coast Railway



against 70% vacancies for the assessment period from 01.04.2003 to 31.3.2005 for which written examination was held on 17.6.2005 and supplementary examination on 28.6.2005. The Chief Personnel Officer by office memorandum dated 5.10.2005 (Annexure A/3) declared the result of the written test wherein the applicant's name appeared against Serial No.1 and viva voce test was notified to be held on 7.10.2005. After the viva voce test was held on 7.10.2005, as the result/panel of the selection was not published, the applicant submitted a representation dated 30.8.2005(Annexure A/5) to the General Manager (Respondent No.1) requesting to publish the result of the selection. The Chief Personnel Officer, vide his letter dated 4.9.2006 (Annexure A/6) informed the applicant that by his letter dated 4.8.2006 (Annexure A/4) the selection was cancelled. Thereafter the Chief Personnel Officer issued another Memorandum dated 18.10.2006 (Annexure A/7) for selection of incumbents for formation of Group B/Medical panel of Assistant Pharmacy Officer (ad hoc) in Medical Department of ECo Railway, Bhubaneswar, for the assessment year 2005-07, inviting options from eligible Group C staff (Pharmacist II and Pharmacist I) of East Coast Railway. The applicant submitted a representation dated 10.1.2007 (Annexure A/9) to the General Manager (Respondent



No.1) requesting to cancel the selection conducted pursuant to the notification dated 18.10.2006 as the same suffered from procedural irregularities. When no action was taken by the Respondents, the applicant filed the O.A. on 2.3.2007 for the relief and interim relief as stated earlier.

3. The applicant has submitted that the order dated 4.8.2006 (Annexure A/4) cancelling the selection conducted pursuant to the notification dated 4.4.2005 being violative of the Railway Board's statutory instruction contained in their letter No.E(NG)1-2002/PM3/3 dated 3.7.2002 is bad, illegal and liable to be quashed. He has also submitted that for formation of the panel in respect of one permanent post of Assistant Pharmacy Officer against 70% vacancies for the assessment period from 01.04.2003 to 31.3.2005, the selection process had taken place pursuant to the notification dated 4.4.2005 (Annexure A/1) and though the applicant had duly qualified in the written test and had appeared at the viva voce test, the Chief Personnel Officer did not publish the panel and when the applicant made a representation alleging non-publication of the panel, the Respondent-authorities arbitrarily cancelled the same without any rhyme or reason. The further submission of the applicant is that the notification dated



18.10.2006 (Annexure A/7) is violative of Para 203.7 of the Indian Railway Establishment Manual, Vol.I and of Railway Board's instructions contained in their letter No. E(NG187/PM1/14/AIRF dated 10.5.1989 (Annexure 10) and Para 15 of S.E.Railway Estt. Srl.No. 78/96 (Annexure A/12).

4. The Tribunal, by order dated 12.03.2007, directed issuance of notices to the Respondents returnable within four weeks and further directed that the Respondents might go ahead with the process of selection in question, but the final result of the selection should not be published without the leave of the Tribunal. Accordingly, the notices were issued directing the Respondents to show cause as to why the application should not be admitted, or why it should not be disposed of at the stage of admission itself, and if admitted, why it should not be disposed of at the subsequent stage without any further notice and that in order to contest the application, they might file their reply along with the documents in support thereof after serving copy of the same on the applicant or his legal practitioner within four weeks of the receipt of the notice and appear before the Tribunal either in person or through a legal practitioner or presenting officer appointed by them in this behalf.



They were also given notice to appear along with the relevant records before the Tribunal.

5. Shri S.K.Ojha, the ld. Standing Counsel (Railways) and his associate, claiming to have appeared for Respondent No.1, i.e., the General Manager, East Coast Railway, Chandrasekharpur, Bhubaneswar, have filed a Vakalatnama on 4.4.2007. The said Vakalatnama has been executed by the Dy.General Manager, East Coast Railway, Bhubaneswar, who is not a party-Respondent to the O.A. Shri Ojha also filed a counter purported to be on behalf of the Respondents, though all the departmental Respondents 1 to 4 have not duly appeared in the case. The above defects were notified, but Shri Ojha failed to rectify the same. MA No. 261 of 2007 has also been filed purportedly on behalf of the departmental Respondent Nos. 1 to 4 praying for vacation of the interim order dated 12.03.2007 and for permission to publish the result of the selection.

6. In the counter purportedly filed on behalf of the departmental Respondents 1 to 4, it has been stated that for filling up one unreserved post of Assistant Pharmacy Officer for the assessment period 1.4.2003 to 31.3.2005 the notification dated 4.4.2005 (AnnexureA/1 to the OA) was issued and five candidates including the applicant were asked to exercise their

Ldr.

willingness/unwillingness to appear at the selection on the principle of 1 x 5 formula. Besides, a stand-by list (reserve list) of another extra 3 eligible candidates from the seniority list was prepared to meet the eventuality of dropout of any senior candidate(s) constituting the field. As one Sri Ch.Gandhi, Chief Pharmacist, Waltair, submitted his unwillingness subsequently to appear at the written examination scheduled to be held on 17.6.2005, Respondent No.5, who was included in the reserve list and submitted his willingness to appear at the written examination, was called upon to appear at the supplementary written test held on 28.6.2005. Three candidates including the applicant qualified in the written test were called for the viva voce test which was scheduled to be held on 07.10.2005. The viva voce could not be conducted as some procedural irregularities were committed in allowing the standby candidate to appear at the written examination and subsequently the selection was cancelled with the approval of the General Manager by office memorandum dated 4.8.2006. It has also been stated in the counter that pursuant to a fresh notification dated 18.10.2006 (Annexure A/7 to the O.A.), five candidates including the applicant and respondent No.5 were called upon to appear at the written examination. All of them appeared at the

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written examination on 24.12.2006, but only two candidates including the Respondent No.5 qualified in the written examination and appeared at the viva voce test held on 20.3.2007. It has been submitted that the O.A. is not maintainable as the applicant has failed to implead the other candidate who had qualified in the written examination conducted pursuant to the notification dated 18.10.2006 and that the applicant having participated in the said selection process and having become unsuccessful, is estopped from challenging the said selection.

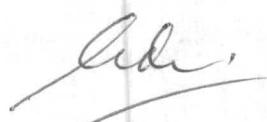
7. Private Respondent No.5 has appeared and filed a counter. In his counter he has more or less taken the same pleas as in the counter purportedly filed on behalf of the departmental Respondents and has relied on the decisions reported in AIR 1986 SC 1043 and AIR 1995 SC 1088.

8. The applicant has filed rejoinders to the counters filed by the Respondents contesting the pleas of the Respondents

9. We have perused the pleadings of the parties and heard the learned counsel on both sides.

10. From the pleadings of the parties the following issues arise for our determination:

- (i) Whether the order dated 4.8.2006 (Annexure A/4) cancelling the selection process conducted pursuant



to the notification dated 4.4.2005(AnnexureA/1) is violative of the Railway Board's instruction contained in circular No. E(NG)1-2002/PM3/3 dated 3.7.2002?

- (ii) Whether the Respondent Nos. 1 and 3 were justified in cancelling the selection conducted pursuant to the notification dated 4.4.2005 (Annexure A/1) because of their allowing Respondent No.5 to appear at the written examination as a reserve list candidate?
- (iii) Whether the vacancy in the post of Assistant Pharmacy Officer, Group B (Rs.7500-12000/- in Medical Department of E.Co.R against 70 % vacancies as notified by the Railways-Respondents for the assessment period 2003-05 (vide letter dated 4.4.2005 Annexure A/1) and for the assessment period 2005-07 (vide letter dated 18.10.2006 AnnexureA/7) was one and the same ?
- (iv) Whether the Railways-Respondents, while issuing the circular dated 18.10.2006 for formation of Group B Asst.Pharmacy Officer (ad hoc) for the assessment period 2005-07, acted in contravention of Para 15 of the S.E.Railway Estt.Srl.No. 76/96 (Ad hoc Promotion)?
- (v) Whether for non-joinder of one of the candidates who qualified in the written test conducted pursuant to the notification dated 18.10.2006, as a

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party-Respondent to the O.A., the applicant's O.A. will fail?

(vi) Whether the applicant having participated in the selection process and having become unsuccessful therein, is estopped from challenging the cancellation of the selection process conducted pursuant to the notification dated 4.4.2005 (Annexure A/1) as well as the selection process conducted in pursuance of the notification dated 18.10.2006 (AnnexureA/7)?

(vii) To what relief the applicant is entitled?

11. So far as issue nos. (i) and (ii) are concerned, it is the admitted case of the parties that in pursuance of the circular dated 4.4.2005 (Annexure A/1) five eligible candidates in order of their effective date of seniority were called for the written examination for the formation of Group B panel for the post of Assistant Pharmacy Officer (Jr.Scale) against 70% vacancies and the applicant's name figured at Sl.No.2 of the list annexed to the letter dated 5.5.2005 (Annexure A/2) which notified 17.6.2005 as the date and the center of the written examination. Besides, a list of another extra three eligible candidates from the integrated seniority list as standby (reserve list) was also prepared and published asking for option from them to appear at the aforesaid selection test in the event of dropout of any senior candidates earlier enlisted on the principle of



1 X 5. This standby/reserve list included the name of Shri S.K.Barik (Respondent No.5). As Shri Ch.Gandhi, one of the eligible candidates included in the first list of five candidates indicated his ~~by~~ unwillingness to appear at the written examination, Respondent No. 5 was allowed to appear at the supplementary written examination held on 28.6.2005. By letter dated 5.10.2005 (AnnexureA/3) the Chief Personnel Officer published the result of the main and supplementary written examinations held on 17.6.2005 and 28.6.2005 and the applicant's name found place at serial No.1 and that of the Respondent No.3 at sl.No.3 of the list of three candidates who qualified in the written examination. In the said letter dated 5.10.2005 (Annexure A/3) It was notified that the viva voce test would be held on 7.10.2005 ~~that he~~ and ¹ the applicant, Respondent No.5 and another were called upon to report and submit their bio data for the viva voce test. It is the case of the applicant that he appeared at the viva voce test that was held on 7.10.2005 as scheduled whereas the Railway-Respondents in their counter have stated that the viva voce test could not be held because of commission of the procedural irregularity in allowing the standby candidate (Shri S.K.Barik -Respondent No.5) was allowed to appear at the supplementary written examination and

Adr.

the Respondent No. 5 has not thrown any light on the said aspect. The applicant has not produced any material before us showing that the viva voce test was held on 7.10.2005. The Railways-Respondents have also not produced any contemporaneous document in support of their plea that the viva voce test could not be conducted on 7.10.2005. It is thus difficult on our part to come to a definite conclusion as to whether or not the viva voce test was conducted. However, one thing has to be kept in mind that when the applicant has asserted in the O.A. that the Chief Personnel Officer had notified 7.10.2005 (AnnexureA/3) as the date of holding of viva voce test and three candidates including the applicant and Respondent No.5 were called upon to report and submit their bio data and that the viva voce test was held on 7.10.2005 and he appeared at such viva voce test, the Railways-Respondents, while denying this assertion of the applicant, should have produced documentary proof before the Tribunal showing that the viva voce test could not be held and this fact was duly brought to the notice of the candidates including the applicant who were called upon to appear at the viva voce test. In the absence of such material being adduced by the Railways-Respondents, we are unable to accept the

Adv.

statement of the Railways-Respondents in this regard and we, therefore, draw adverse inference against the Railway-Respondents.

11.1 The other aspect of the matter is about cancellation of the selection. The applicant has stated that when the panel/result of the selection was not published, he made a representation dated 30.8.2006 to the General Manager (Respondent No. 1) requesting for publication of the panel. Surprisingly, this representation dated 30.8.2006 made by the applicant to the General Manager (Respondent No. 1) came to be replied by the Chief Personnel Officer by his letter dated 4.9.2006 (Annexure A/6), the relevant portion of which is quoted below:

“Sub:Formation of Group-B panel of Asstt.Pharmacy Officer (ad hoc) in scale of Rs.7500-12500/- in Medical Department against 70% quota.

Ref: Your representation to the General Manager/ECoR dated 30.8.2006.

Vide CPO/ECoR/BBS' letter No. ECoR/Pers/Gaz/Med/A.Ph.O/Selection dated 04.08.2006, the A.Ph.O.(Ad hoc) selection of ECoR has been cancelled with the approval of the General Manager, East Coast Railway.

This disposes your above referred representation dated 30.08.2006.

Sd/

(Ajay Mohanty)

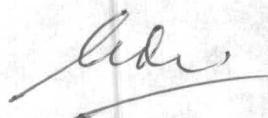
Dy.Chief Personnel Officer (Gaz)
For Chief Personnel Officer”

The applicant's case is that the Memorandum dated 4.8.2006 (AnnexureA/4) never saw the light of the day and only when he



made a representation dated 30.8.2006 (Annexure A/5) to the General Manager, the Chief Personnel Officer intimated the fact of cancellation of the selection. The applicant's contention appears to have substance in as much as the applicant along with two others including Respondent No.5 were the qualified candidates who were called upon to report and submit their bio data and were called upon to appear at the viva voce test scheduled to be held on 7.10.2005. If at all the selection was cancelled, all the said candidates including the applicant were entitled to be communicated with the decision of cancellation of the selection. The Memorandum dated 4.8.2006 does not show it to have been sent to the applicant and others. This is another feature appearing in the case casting doubt on the stand of the Respondent-Railways.

11.2 As regards the validity of the Memorandum dated 4.8.2006 (Annexure A/7) issued by the Chief Personnel Officer (Respondent No.3), the applicant has submitted that the said Memorandum is violative of the Railway Board's instruction contained in letter No. E(NG)1-2202/PM3/3, dated 3.7.2002 (Annexure A/11) in as much as no reason has been disclosed in the Memorandum dated 4.8.2006 cancelling the selection. In order to



examine the applicant's contention, we would like to quote here-in-below the relevant portion of the Memorandum dated 4.8.2006:

"MEMORANDUM

**Sub: Formation of a Group-B/Medical panel of A.Ph.O
(ad hoc) in East Coast Railay.**
**Ref: This office notification No. ECOR/Pers/Gaz/Med
A/Ph.O/Selection dated 04.04.2005.**

With the approval of the General Manager, East Coast Railway the selection of Group B/A.Ph.O.(ad hoc) is cancelled.

(Ajay Mohanty)
Dy.Chief Personnel Officer (Gaz)
For Chief Personnel Officer"

By letter No. E(NG)1-2202/PM3/3, dated 3.7.2002 (Annexure

A/11) the Railway Board circulated the order dated 21.3.2002 passed by the Allahabad Bench of the Tribunal in O.A.No. 359 of 2001 in the case of Prabhat Mohan Saxena and others v. The UOI through GM (CST) and others, to all the concerned officers of the Railways for their guidance in future. The Allahabad Bench of the Tribunal in that case, while considering the question similar to the one in the instant case, directed that it is obligatory on the officers to disclose reasons in the order of cancellation of selection. The Railways-Respondents have not specifically replied to this assertion of the applicant and have tried to justify their action by explaining that since a candidate from out of the standby/reserve list was allowed to appear at the supplementary written examination, a



procedural irregularity was committed and the *viva voce* could not be conducted. It is to be noted here that Respondent No.5 happened to be the candidate included in the standby/reserve list who was allowed by the Railways-Respondents to appear at the supplementary examination. But in view of the decision of the Allahabad Bench of the Tribunal and in view of the specific instruction of the Railway Board, which has force of rule under Rule 157 of the Indian Railway Establishment Code, we have no hesitation to hold that the Memorandum dated 4.8.2006 is violative of the said Railway Board's instruction and is unsustainable.

11.3 However, since the Railways-Respondents have given the reasons for cancellation of the selection pursuant to the circular dated 4.4.2005, we have to examine whether the reasons assigned by the Railways-Respondents are justifiable or not. The Railways-Respondents have stated that allowing the standby/reserve list candidate (Respondent No.5) was a procedural irregularity which vitiated the written examination as well as the result of the written examination. It was the Chief Personnel Officer who decided to prepare and publish the standby/reserve list of three candidates in order to meet the contingency of dropout of any of the candidates included in the first list of five persons. In the first list of five



persons the Respondent No. 5 was not included. When one of the eligible candidate Ch.Gandhi expressed his unwillingness to appear at the written examination, the Railways-Respondents called upon him to appear at the supplementary examination to complete the zone of five candidates. If under the rules the Railways-Respondents adopted this course, which appears to be wholesome, how could they take a view that this was a procedural irregularity. The Railways-Respondents have not produced any rules or instructions of the Railway Board showing that allowing the standby/reserve list candidate (Respondent No.5) amounted to a procedural irregularity vitiating the written examination and the results thereof. We, therefore, hold that the Railways-Respondents cancelled the selection conducted pursuant to the notification dated 4.4.2005 for no justifiable reasons and hence the Memorandum dated 4.8.2006 is not sustainable and liable to be quashed.

11.4 The applicant in his rejoinder to the Railways-Respondents' counter has relied on decisions in the case Kumari Anamica Misra v. Another, etc. vs. U.P. Public Service Commission, Allahabad & others, 1990(1) SLJ 78(SC), Gautam Kumar Mandal and others v. Union of India and others, 2002(1) SLJ 132 (CAT), Union of India and others v. Rajesh P.U. Puthuvalnikathu and

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another, 2004 (1) SLJ 306 (SC), P.P.Sadanandam & ors v. The Secretary, railway Board and others, 2006(1) SLJ 1, and John Oomen and ors v. Union of India and another 2007 (1) SLJ 53 (CAT) and submitted that if at all, allowing the standby/reserve list candidate (Respondent No.5) was a procedural irregularity, then his candidature should have been rejected alone and the result of the selection published. We have gone through the aforesaid decisions cited by the applicant. In Kumari Anamica Mishra's case(supra), there was irregularity in calling candidates for interview. Due to wrong feeding in computer some who had passed in the written test were not called and others were called for the interview and selected. When this irregularity was detected, the UPPSC cancelled the full list and ordered re-examination. The Hon'ble Supreme Court held that the correct course was to cancel only the interview and then call those who were eligible. In Gautam Kumar Mandal's case (supra), the select panel was cancelled due to (i) inclusion of 2 persons who secured less than 60% marks, and (ii) granting notional seniority. It was observed that the mistake occurred in the calculation at the last stage of the proceedings and it was only a clerical mistake. It was held that the same was a clerical mistake and not a procedural irregularity and hence the course was to



amend the panel and not to cancel the panel. The Tribunal directed the Respondents to publish the panel deleting names of the two persons who were wrongly included in the select panel. In Rajesh P.U. Puthuvalnikathu's case (supra), the Department set up an Expert Committee to investigate irregularities and on receipt of report cancelled the whole selection. It was held by the Hon'ble Apex Court that when the defaulters were identified, it was unreasonable to cancel the whole selection. In P.P.Sadanandam's case (supra) the general Manager of the Railways found various irregularities in evaluation of papers thus giving undue benefit/loss to certain persons and cancelled the entire panel. The Tribunal relying on the decisions of the Hon'ble Supreme Court, held that when the records showed that the actual persons involved were identified and were a few, the General Manager could not have cancelled the entire panel. In the light of the above judicial pronouncements and in view of the fact that the Railways-Respondents cancelled the selection conducted pursuant to the circular dated 4.4.2005 on detection of a procedural irregularity committed by themselves by allowing the standby/reserve list, which has not been substantiated by the Railways-Respondents before us, we hold that the Respondents were not justified in canceling the entire selection and therefore, the



Memorandum dated 4.8.2006 is also not sustainable and is liable to be quashed.

12. As regards issue Nos. (iii) and (iv), the applicant has submitted that there was only one post of Assistant Pharmacy Officer, Group B, available in the East Coast Railway, for which the circular dated 4.4.2005 was issued for formation of the panel to fill up the vacancy on regular basis for the assessment period 2003-05. The Respondents, without any justifiable reason, by order dated 4.8.2006 cancelled the selection conducted pursuant to the circular dated 4.4.2005 and by circular dated 18.10.2006 notified the very same vacancy for being filled up on ad hoc basis. The Railways-Respondents have not given specific reply thereto. They have stated in their counter [vide para 2 (A)] that the East Coast Railway was carved out from the erstwhile S.E.Railway and became operational w.e.f. 1.4.2003. One post in Group-B of Asst.Pharmacy Officer was transferred to East Coast Railway from South Eastern Railway vide CPO/SER's No.114/2004 dated 12.04.2004. Thus the cadre strength of Asst.Pharmacy Officer in Group B /Medical is 1 (one). In view of this clear admission of the Railways-Respondents, we conclude that there is only one post of Asst.Pharmacy Officer in Group B/Medical which was sought to be filled up by the Railways-

Ans.

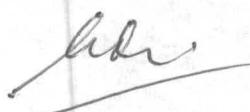
Respondents by way of selection as notified in their circular dated 4.4.2005.

12.1 The other plank of submission of the applicant is that the Railways-Respondents, with a view to illegally deprive the applicant of promotion, issued the circular dated 18.10.2006 for formation of a panel for the post of Asst.Pharmacy Officer Group B on ad hoc basis whereas by the circular dated 4.4.2005 the Railways-Respondents notified that the selection was to take place for formation of the panel for the post of Assistant Pharmacy Officer Group B on regular basis. In reply the Railways-Respondents submitted that as per Railway Board's letter No. E(GP)99/69 dated 30.11.1999 communicated by Chief Personnel Officer, S.E.Railway vide his letter No. DCPO(G)/CON/SB/1/VII, dated 13.8.2005, the post of Asst.Pharmacy Officer/Gr.B is to be filled up on ad hoc basis till such time the Recruitment Rules for filling up the said post on regular basis are notified in consultation with UPSC. It is pertinent to mention here that the Railway Board's letter dated 30.11.1999 has not been produced before us. The letter dated 13.8.2005 was issued by the Chief Personnel Officer, South Eastern Railway, after the circular dated 4.4.2005 was issued by the Chief Personnel Officer notifying selection for formation of the panel for the post of



Asst. Pharmacy Officer Group B on ad hoc basis. Whatever may be the mode of filling up the post of Asst. Pharmacy Officer Group B in the East Coast Railway, the fact remains that the cadre strength of the Asst. Pharmacy Officer Group B is only one. The Railways-Respondents have utterly failed to explain as to what happened to the vacancy in the post of Asst. Pharmacy Officer Group B which was sought to be filled up by the selection notified by their circular dated 4.4.2005. In view of this, we have no hesitation to hold that the Railways-Respondents have issued the circular dated 18.10.2006 for filling up the solitary vacancy which was sought to be filled up by the circular dated 4.4.2005.

13. So far as issue no. (v) is concerned, the Respondents have submitted that pursuant to the circular dated 18.10.2006 the applicant, Respondent No.5 and three others had appeared at the written examination held on 24.12.2006 and the result of the written test was declared on 08.01.2007. The applicant did not qualify in the written examination whereas Respondent No.5 and Sri A. Gopinathan qualified in the written examination. By office order dated 8.1.2007 the Respondent No.5 and Shri A. Gopinathan have been asked to be in readiness to appear at the viva voce. It is the contention of the Respondents that the applicant having failed



to implead Shri A.Gopinathan a party-Respondent, the O.A. should be rejected. In reply, the learned counsel for the applicant submitted that in so far as his prayer for quashing the Memorandum dated 4.8.2006 cancelling the selection pursuant to circular dated 4.4.2005 is concerned, Shri A.Gopinathan is in no way concerned. As regards the prayer to quash the circular dated 18.10.2006, there is no necessity to make Shri A.Gopinathan a party-Respondent in as much as the O.A. was filed on 2.3.2007 and the result declaring Shri Gopinathan was published only by order dated 8.1.2007. In any event, when the Railways-Respondents are found to have acted arbitrarily and mala fide in canceling the selection conducted pursuant to letter 4.4.2005 and in issuing the circular dated 18.10.2006 for the very same post, the non-joinder of Shri A.Gopinathan as a party-Respondent to the O.A. cannot be said to be fatal. We have considered the rival submissions of the parties. As held by us in the preceding paragraphs, the Memorandum dated 4.8.2006 is not sustainable and is liable to be set aside and therefore, the Railways-Respondents are liable to conclude the selection pursuant to the circular dated 4.4.2005. In view of this, we hold that Shri A.Gopinathan, the other candidate who qualified in the written examination along with Respondent

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No.5, is not a necessary party and that in any event the applicant's O.A. will not fail for non-joinder of Shri A.Gopinathan.

14. As regards issue no.(vi), we would like to observe that as we have already concluded that the Railways-Respondents were not justified in canceling the selection conducted pursuant to circular dated 4.4.2005 and that the memorandum dated 4.8.2006 is liable to be quashed, it is not necessary to deal with this issue and discuss the case-laws cited by the parties.

15. *to be* The last issue is what relief the applicant is entitled. In view of our conclusions that the Memorandum dated 4.8.2006 cancelling the selection conducted pursuant to the circular dated 4.4.2005 is not sustainable and is liable to be quashed; that there exists only one post of Asst.Pharmacy Officer Group B in the Medical Department of East Coast Railway; and that the Railways-Respondents have created confusion in issuing the circular dated 18.10.2006 for formation of panel to fill up the same post on ad hoc basis, we hereby quash the memorandum dated 4.8.2006 (Annexure A/4) and the circular dated 18.10.2006 (Annexure A/7) and direct the Railways-Respondents to hold viva voce test pursuant to the circular dated 4.4.2005 (Annexure A/1), if the same had not been held on 7.10.2005, and publish the result of the



selection. If the applicant would come out successful, then he should be promoted to the said post of Assistant Pharmacy Officer, Group B. This exercise shall be done within a period of one month from the date of receipt of copy of this order.

16. In the result, the O.A. is allowed and the MA No. 261 of 2007 filed by the Railways-Respondents for vacation of the interim order of stay becomes infructuous consequently. No costs.

The Registry of the Bench is directed to send a copy of this order to the Chairman, Railway Board, New Delhi (Respondent No.2), who has not appeared in this case despite notice, for compliance with the direction contained in this order.

(B.B.MISHRA)
ADMINISTRATIVE MEMBER

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(N.D.RAGHAVAN)
VICE-CHAIRMAN

MR.B.B.MISHRA, MEMBER(A):

17. I have had the opportunity of going through the orders prepared by my learned brother Hon'ble Vice-Chairman in the above case. While disagreeing with the conclusion reached by my learned brother, my respectful view in the matter is as under.

18. Fact of the matter is that the Chief Personnel Officer, E. Co. Railway, Bhubaneswar issued a Memorandum dated 04.04.2005 (Annexure-A/1) for formation of a panel of Group B Assistant Pharmacy Officer in the Pay scale of Rs. 7500-1200/- in the Medical Department of East Coast Railways against 70% vacancies for the assessment period from 01.04.2003 to 31.03.2005. Applicant was one of the candidates for the said post. Written examination and supplementary examination were held on 17.06.2005 and 28.06.2005. Result of the aforesaid examinations was published on 05.10.2005 (Annexure-A/3) wherein the name of applicant found place at Sl. No. 1. Accordingly, three qualified candidates, including applicant and Respondent No.5 were asked to face the viva-voce test held on 07.10.2005. But the viva-voce test could not be conducted as some procedural irregularities in allowing standby candidates for the written test was noticed . Hence the selection was

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cancelled with the approval of the General Manager, East Coast Railway vide Office Memorandum dated 04.08.2006.

19. Thereafter, fresh selection for the assessment period from 01.04.2005 to 31.03.2007 was notified vide office letter No. E Co R/Pers/Gaz/Med/A.Ph.O/Select dated 18.10.2006 (Annexure-A/7) for filling up of the said vacancy of Assistant Pharmacy Officer (Ad-hoc). Five candidates including Applicant and Respondent No.5 offered their willingness to appear in the selection test. Accordingly, written test was held on 24.12.2006 and in the written test only two candidates including Respondent No.5 came out successful and accordingly, they were asked to face the viva voce test scheduled to be held on 20.03.2007. When applicant could not come out successful in the written test held on 14.12.2006 by filing representation under Annexure-A/9 dated 10.01.2007 he prayed for cancellation of the second selection due to procedural irregularities and for holding fresh selection according to Rules. Since no action was taken on his said request, by filing this OA on 2nd March, 2007 he has sought for the following directions:

“to admit the Original Application and issue notice to the Respondents as to why the Original application will not be allowed and upon hearing the parties allow the application and direct the Respondents to produce the selection proceedings which was conducted in response to Memorandum dated 04.04.2005 (Annexure-A/1) and to quash and set aside the LetterNo.EcoR/Pers/Gaz/Med/A/Ph.O/Selection

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dated 04.08.2006 (Annexure-A/4) and Circular No.EcoR/Pers/Gaz/Medl/AphO>Select dated.18.10.2006 (Annexure-A/7) issued by the Chief Personnel Officer, E.Co. Railways, Bhubaneswar.”

20. Respondents have filed counter raising the objection of very maintainability of this OA as also the *locus standi* of the Applicant to challenge the process of selection after having participated and failed in the examination conducted by the Respondents. Respondent No.5 has also raised the same objection as has been raised by the Respondent-Department. Besides, the Respondents have clarified the reason of cancellation of the first selection.

21. It is seen from the record that in this OA, the Applicant has questioned the legality of the cancellation of the first selection without putting any representation to his authorities prior to filing this OA. Similarly, he has alleged irregularities in the matter of conduction of the process of second selection, after coming out unsuccessful in the written examination conducted on 24.12.2006. Therefore, before proceeding to the merit of the matter, it is necessary to deal with regard to the objection raised by the Respondents with regard to the maintainability of this OA and *locus standi* of the Applicant after being participated and failed in the selection. This point was formed part of the issue No.(iv) of the order of my learned brother Hon'ble Vice-Chairman. But it was held that this

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point is not necessary to deal in view of the irregularities in the matter of cancellation of the first selection.

22. Question of locus standi of the candidates to challenge the process of selection after being declared unsuccessful came up for consideration before the Hon'ble Apex Court in the case of **Om Prakash Shukla vs. Akhilesh Kumar Shukla**, AIR 1986 SC 1043 and Their Lordships was pleased to hold 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”.

23. Similar is the observations of the Hon'ble Supreme Court in the case of **Madan Lal & Ors v. State of Jammu and Kashmir and Ors**, AIR 1995 SC 1088 which reads as under:

“It is now well settled that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or selection committee was not properly constituted.”

24. In the light of the decisions of the Hon'ble Apex Court, the Division Bench of this Tribunal in its order dated 31.05.2007

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passed in OA Nos. 639 & 658-851 of 2004 did not incline to interfere in the process of selection conducted by the Railways.

25. Law is well settled that no Government servant has any right to claim promotion. Equally law is well settled that none can claim promotion/appointment even if he/she has come out successful in the examination nor one has acquired any right to claim filling up of the vacancy available in the Department. Authorities have every right to cancel the selection if it is noticed that the same suffers from breach of the rules/procedure prescribed in this regard.

26. In this case, the Applicant has also accepted the cancellation of the selection and exposed himself to be a candidate in the second selection conducted by the Respondents. When he did not come out successful in the written examination, he has raised his voice alleging that proper procedure was not maintained by the Respondents in the matter of selection. By exposing himself to the process of second selection, he has lost his right either to challenge the first order of cancellation or the process of selection. Doctrine of Acquiesces, estopped the applicant to challenge the action of the Respondents in any manner. As noticed, the Applicant has also not brought the order of rejection of his representation dated 06.03.2006 to the purview of the judicial scrutiny of this Tribunal.

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27. 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 Applicant has ever approached the departmental authorities ventilating his grievances as against the order of cancellation of the first selection. Thus, this OA virtually is not maintainable on this count also.

28. I have, therefore, no hesitation to hold that this OA being devoid of any merit is liable to be dismissed and the same stands dismissed. There shall be no order as to costs.

B.B.M
(B.B.MISHRA)
MEMBER (A)

ORDER DATED: _____.

In view of the above difference in opinion, we refer the matter to the Hon'ble Chairman under Section 26 of the Administrative Tribunals Act, 1985 for deciding on the following points:

- (a) As to whether the Applicant has any right to challenge the process of selection after he being declared unsuccessful in the examination conducted by the authorities;
- (b) As to whether the Applicant has any right to maintain the OA without being exhausted of departmental remedies provided in the Act as in the present case;

SEE PAGE 32.

(N.D.Raghavan)
Vice-Chairman

B.B.M
(B.B.Mishra)
Member(A)

O.A.NO. 90 of 2007

While referring this case to the Hon'ble Chairman under Section 26 of the A.T.Act, 1985, since the difference of opinion pointed out by my erudite brother, with great respect to him, does not bring out the precise nature of difference, I am constrained to humbly differ even on such points in issue, as below :

- c) Whether, or not, on the facts and in the circumstances of the case, especially when the proposed order is concluded with the reasoning that the Railway Respondents were not justified in canceling the selection conducted pursuant to circular dated 4.4.2005 and that the Memorandum dated 4.8.2006 is liable to be quashed, the question that the applicant, having participated in the selection process and having become unsuccessful therein, is estopped from challenging the cancellation of selection process, pursuant to notification dated 4.4.2005(Annexure-A/1) as well as the selection process conducted in pursuance of the notification dated 18.10.2006(Annexure-A/7), has a bearing therewith ?
- d) Whether, or not, on the facts and in the circumstances of the case, any alternative remedy provided in any statute or any Rule made thereunder has not been exhausted by the applicant, for the verdict to be given that this O.A. is not maintainable, especially when Section 19 of the A.T.Act, 1985 clearly stipulates that "subject to the other provisions of this Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal may make an application to the Tribunal for the redressal of his grievance" ?

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(N.D.RAGHAVAN) 27/06/07
VICE-CHAIRMAN

O.A.NO.90 OF 2007

ORDER DATED 19.09.07

This case is referred to the Third Member under Section 26 of the Administrative Tribunal's Act as two differing opinions have been expressed by the Hon'ble Vice-Chairman and the Hon'ble Administrative Member vide order dated 27.06.07.

2. Briefly the crux of the matter is that the applicant, working as Chief Pharmacist Gr.II is one of the aspirants for selection to the post of Assistant Pharmacy Officer-Gr.B in the scale of Rs.7500-12000/- for which a test was scheduled to be held vide notification dated 04.04.2005(Annexure-A/1). Under the existing rules for one post, five persons from the cadre Grade under the 70% quota were to be subjected to written examination and viva-voce (on qualifying in written examination) and accordingly vide Annexure-A/2, five persons were included. This list did not contain the names of the private Respondents namely Shri S.K.Barik. The examination was scheduled on 17.06.05. On 10.06.05 itself, one of the persons for the zone of consideration, Shri Ch.Gandhi expressed his unwillingness to participate in the test. Thus the number of participants became less than the requisite number of the zone of consideration. It appears that there is no Rule to have any stand-by list. Nevertheless three persons were indicated in a stand-by list, the first of whom happens to be the private Respondent herein.

3. The test was no doubt conducted on 17.06.05 with reference to the initial four individuals, but the Resp.No.5 was given an opportunity to participate in the examination for which supplementary examination was conducted on 28.06.05. Vide Annexure-A/3, three persons were held qualified in the written test which included the applicant as well as the private Respondent and these persons were called for viva-voce. However, no selection was conducted and as late on 04.08.06, the Chief Personnel Officer issued a memorandum stating that with the approval of the General Manager, East Coast Railways, selection of Group-B Assistant Pharmacy Officer stood cancelled. Without any reference to this memorandum, the applicant had penned a representation dated 30.08.06 requesting the intervention of the General Manager and also requesting to publish the result of the selection. By a communication dated 04.09.06 vide Annexure-A/6, the Deputy Chief Personnel Officer informed the applicant that with the approval of the General Manager, East Coast Railway, the earlier selection stood cancelled. The immediate consequence of cancellation of earlier selection was to initiate fresh process of selection and accordingly by Annexure-A/7 notification dated 18.10.06 for the same post, applications were invited. In the zone of consideration, both the applicant as well as the private Respondent figured in. It is to be pointed out herein that according to the applicant even before the publication of the notification, he had sent a communication dated 04.09.06 to the General Manager for review of the cancellation (this information is available in the rejoinder though the date mentioned therein does not tally with 04.09.06). The said communication, however, did not evince any response from the Respondents. The applicant participated in the examination conducted,

in the wake of notification dated 18.10.06, held on 24.12.06. The results were published on 08.01.07. On 10.01.07 i.e. two days after publication of result, the applicant made a representation bringing out allegedly certain irregularities in conducting the examination on 24.12.06. The so called irregularities spelt out therein were mainly that the question was not in conformity with the guidelines prescribed. As the result of the written examination published on 08.01.07 did not contain the applicant's name, the applicant had moved this O.A. challenging the very cancellation of the earlier selection vide order dated 04.08.06 and has also prayed for quashing of subsequent notification dated 18.10.06.

4. The officials as well as the private Respondent have contested the O.A.

5. After pleadings were complete when the case was heard as stated above, differing opinions have been recorded by the Hon'ble Vice-Chairman and the Hon'ble Administrative Member respectively. While the Hon'ble Vice-Chairman has held that cancellation of the earlier selection vide order dated 04.08.06 was illegal, the Hon'ble Administrative Member held that the applicant having participated in the subsequent selection had chosen not to come up before the results were out and as such he had taken a calculated chance by his selection in the subsequent examination and challenged on the basis of certain alleged irregularities and this cannot be allowed. Accordingly while Hon'ble Vice-Chairman has allowed the O.A., Hon'ble Administrative Member has dismissed the O.A.

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6. The Counsel for the applicant submitted that his representation dated 04.09.06 remained un-answered, he fairly admits that there is no provision for stand-by list. Overall, according to him, there is no justification at all in cancelling earlier examinations. The Counsel for the official Respondents submitted that the minimum number of persons for one post should be five and in the absence of the any one of them, the condition in this regard does not get fulfilled and, as such, there is a necessity to conduct a supplementary examination. However, the inclusion of fifth Respondent to participate the first examination itself was not in accordance with any provision and as such it became necessary for the Respondents to cancel earlier selection and conduct a fresh one.

7. The Counsel for the Private Respondent first submitted that entertaining the document dated 04.09.06 (produced at the time of hearing) is not proper as the same is not contemplated under the provisions of Section 26 of the Administrative Tribunals Act 1985. He has referred to certain dates and events in respect of this case and summarized his submission as under:

- a) The applicant had waived his earlier claim of selection in earlier exam, that the publication of results by participating in the second examination conducted.
- b) He had not challenged notification dated 18.10.06 at the earliest opportunity.

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c) His representation against so called irregularities in conducting the second examination is posterior to the declaration of the results.

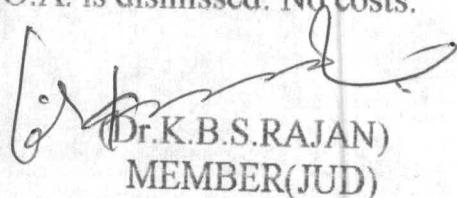
8. Arguments were heard and documents considered. If zone of consideration should have a minimum of five number of persons in the feeder grade is a condition precedent for selection for the post of Asst. Pharmacy officer Gr.B, it becomes a mandatory requirement to ensure that the minimum is adhered to. In the event of any one declining before the examination, the authorities would have been justified in permitting one from the stand-by to participate in the examination (which actually was done in this case) but it was later on observed by the time that there is no such provision. As a result, the earlier selection was necessarily to be cancelled, as has been done by the Respondents. It must be pointed out here that by simply qualifying in the written examination, no one has crystallized any right for appointment. The grievance of the applicant is that the selection was cancelled after he has been declared qualified in the written examination. Private Respondent who also stood qualified in the written test had also faced the same situation. The examination ahs been cancelled keeping in view the fact that there is no provision for mentioning any stand-by list. The applicant had been given due opportunity to show his mantel in the subsequent examination. Though he has certain grievances over the way in which the examination is conducted, the alleged irregularities were known to him on the same day of examination. But he chose not to bring out his

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grievances accordingly after the examination but submitted his representation after the declaration of the results. This clearly manifests that the applicant had waited for his chance and on his not been selected, he raised objection against the second selection and at this stage also under claimed for a declaration that the cancellation of the first selection was illegal. As spelt out in the Madan Lal and others Vrs. State of Jammu & Kashmir (referred to by the Hon'ble Administrative Member)

"It is now well settled that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted".

9. The challenge by the applicant i.e. the so called illegality in cancellation of the earlier selection should have been ventilated much earlier by approaching this Tribunal at the appropriate time. He has waived the same by his conduct by way of participating in the second examination. Thus he cannot turn around now by challenging the selection order dated 04.08.06 after the declaration of the second examination. Like wise so, he cannot also challenge notification dated 18.10.06 as he had zealously participated in the examination. As such, I respectfully agree with the views expressed by the Hon'ble Administrative Member and accordingly O.A. is dismissed. No costs.


Dr. K.B.S. RAJAN
MEMBER(JUD)