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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No. 179 of 2009
Cuttack, this the 28th day of June, 2011


Somnath Mishra Applicant

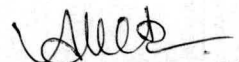
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Union of India & Others Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not?
2. Whether it be circulated to Principal Bench, Central Administrative Tribunal or not?


(C. R. MOHAPATRA)
Member(Admn.)


(A.K. PATNAIK)
Member (Judl.)

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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

O.A.No. 179 of 2009

Cuttack, this the 28th day of June, 2011

CORAM:

THE HON'BLE MR.C.R.MOHAPATRA, MEMEBR (A)

AND

THE HON'BLE MR.A.K.PATNAIK, MEMBER (JUDL.)

Shri Somnath Mishra, Aged about 42 years, Son of Late Gajendra Mishra, resident of Village-Kusungpur, PO-Chandol, Dist. Cuttack, at present working as Section Engineer (Estimate) in the Office of the Senior Divisional Engineer (Coordination), East Coast Railway, PO/Dist.Sambalpur.

....Applicant

By Legal Practitioner : Mr.Subrat Kumar Nayak, Counsel

-Versus-

1. Union of India represented through General Manager, East Coast Railway, At-Rail Vihar, Chandrasekharpur, Bhubaneswar-23, Dist.Khurda.
2. The Chief Personnel Officer, East Coast Railway, At-Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist. Khurda.
3. The Chief Engineer, East Coast Railway, At-Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist.Khurda.
4. The Divisional Railway Manager, At/Po-Modipara, Dist. Sambalpur.
5. Sri S.K.Das, ADENJ/Kirandal, At/Po-Kirndal, Waltair Division, East Coast Railway, Chhatisgarh.
6. Sri R.K.Biswa, ADENJ/JJKR (Keonjhar), At/Po. Jajpur Road, Dist. Jajpur, E.Co.Railway.

.....Respondents

By legal practitioner: Mr.M.K.Das, Counsel

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O R D E R

Per-MR.A.K.PATNAIK, MEMBER (JUDL.):-

In brief, the case of the Applicant is that he had earlier approached this Tribunal in OA No. 167 of 2006 questioning the legality of the action of the Respondents in depriving him from appearing at the viva voce test on the ground of physical disability (visually handicapped & Medically unfit), for placement in the Group B/Engg. Panel for promotion to AEN against 70% quota of vacancies for the assessment period 2003-2005. The said OA No.167 of 2006 was disposed of by this Tribunal on 26.6.2007 in favour of the Applicant.

The Respondents challenged the order of this Tribunal dated 26-06-2007 passed in OA No. 167 of 2006, before the Hon'ble High Court of Orissa in WP (C) No. 15445 of 2007 but the Hon'ble High Court of Orissa, in order dated 21.08.2008 dismissed the Writ Petition filed by the Respondents thereby upholding the order of this Tribunal dated 26.6.2007.

In compliance of the order of this Tribunal dated 26.06.2007 upheld by the Hon'ble High Court Orissa on 21.08.2008, the Respondents, allowed the Applicant to appear at the viva-voce test on 12.01.2009 and according to him he

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appeared at the viva voce and did well. But vide letter under Annexure-A/5 the Respondents intimated the Applicant as under:

“....Based on the marks obtained in the written test, record of service and viva voce, the Selection Committee concluded that Shri Somnath Mishra, SE (Estimator)/SBP (now SSE/Estimator/SBP) is not found suitable for placement in the Group B/Engg. Panel for promotion to AEN against 70% quota for assessment period of 2003-2005 as **he could not secure the required pass marks in the viva voce and record of service taken together.**”

Being aggrieved by the order under Annexure-A/5, the Applicant has approached this Tribunal for the second time seeking the following reliefs:

- “(i) The Original Application be allowed and the impugned order vide Annexure-A/5 i.e. declaring the applicant unsuccessful in the viva-voce test be quashed and at the same time the Respondents 5 to 6 be declared as junior to the Applicant in the promoted post;
- (ii) The Respondents be directed to promote the Applicant to the post of AEN, Gr.B retrospectively i.e., from the assessment year 2004-05;
- (iii) All other consequential service benefits may also be provided to the Applicant as this Hon'ble Tribunal may deem just and proper in the facts and circumstances of the case.”

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2. Respondents have filed their counter in which it has been stated that a candidate in order to be declared successful has to secure the required pass marks 40 i.e. 60% of total marks of 50 including minimum 15 marks in record of service as per Rule prescribed in Railway Boards letter dated under Annexure-R/5 dated 20.8.1991. The Viva voce test contains two parts i.e. 25 marks for Record of Service which is obtained out of the confidential report of last five years and the relevant service record and integrity of the character of the concerned candidate and the other 25 marks is based on personality, address and quality of leadership of the candidate. Based on the marks obtained in the written test, record of service and viva-voce, the Selection Committee found the Applicant unsuitable for promotion to AEN in the Group B/Engg. Panel against 70% quota for assessment period of 2003-2005, as he could not secure the required pass marks in the viva voce and record of service taken together.

3. By placing reliance on the decision of the Hon'ble Apex Court in the case of **K. Prabhakara Rao v UOI and others**, AIR 2002 SC 205 it was contended by the Learned Counsel for the Applicant that imposition of the condition of

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fixing minimum percentage of marks in the viva voce test being bad in law, the Applicant is entitled to the relief claimed in this OA. By placing reliance on the relevant instructions of the Railway Board, Shri M.K.Das, Learned Counsel appearing for the Respondents has contended that the applicant was under misconception that there was any condition provided in the rules that one has to secure 50% marks in the viva voce. His contention is that as per the instruction of the Railway Board in the viva voce test out of total 50 marks 25 marks are allotted for record of service and 25 marks allotted for viva voce. The candidates who had secured 60 marks i.e. 30 marks out of 50 (including at least 15 marks in the record of service became eligible for final empanelment in order of their integrated seniority against 70% quota vacancies. As the Applicant did not secure the required percentage of marks he was not declared qualified. He has further contended that similar matter came up for consideration before this Tribunal in OA No. 623 of 2006 filed by Shri Puspak Ranjan Nayak who was also aggrieved by his non-selection for not securing the required percentage of marks. But after taking note of various contentions of the respective parties and the relevant Rules, this Tribunal upheld

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the decision of the Railway. It was further contended by Mr. Das, Learned Counsel for the Respondents that the decision relied on by the Applicant has no application to the present case rather this case is covered by the earlier decision of this Bench and, therefore, he has prayed that by applying the earlier decision of this Tribunal this OA is liable to be dismissed.

4. Having considered the rival submissions of the parties, we have perused the materials placed on record including the decision relied upon by the Learned Counsel for the Applicant as well as by the Learned Counsel for the Respondents. At first blush, it may seem that the fact situation in the case and the case before the Hon'ble Apex Court is alike but closer scrutiny reveals otherwise as to support the rebuttal of the respondents. When once we notice that these two cases are not based on similar facts and issues involved in both the cases are different and distinct, it is difficult for us to uphold the contention of the applicant that by applying the law laid down by the Hon'ble Apex Court in the case of K.Prabhakara Rao (supra), he is entitled to the relief as claimed in this OA. In the case of K.Prabhakara Rao (supra) the Applicant has challenged his non-selection for the post of Assistant Personnel Officer due

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to fixation of the condition for securing minimum percentage of marks in the viva voce whereas in the present case there is no such stringent condition provided for selection to the post in question. Hence the case of K.Prabhakara Rao(supra) has hardly of any help to the Applicant. It is found that the present case is fully covered by the decision of this Tribunal in the case of Puspak Ranjan Nayak (supra). The Full text of the order is quoted herein below:

“Applicant is working as a Senior Section Engineer (Estimate), Office of the XEN/T&A/C, Bhubaneswar under the Deputy Chief Engineer (Con.), East Coast Railway, Bhubaneswar. He appeared at the selection conducted for formation of a Group B panel of AENs against 70% vacancies, 2004 in ECoR. While others, according to Applicant, even juniors to him were empanelled for such promotion, he having not been empanelled has approached this Tribunal in the present Original Application filed u/s.19 of the A.T. Act, 1985 seeking direction to Respondents 2 to 4 to promote him to the post of Group B/Engg(AEN) from the date Respondent Nos.5 to 12 were promoted vide Annexure-A/5 with all consequential service and financial benefits retrospectively.

2. In the counter it has been stated by the Respondents that to fill up 30 posts (both 70% selection quota and 30% LDCE) of Group B AEN in the Civil Engineering Department of East Coast Railway notification was issued inviting options from intending eligible engineering personnel working under the Railway. Out of 30 posts 21 posts (UR 16, SC 03 and ST02) were meant to be filled up under 70% selection quota and 09 posts (UR 07, SC-01 and ST01) were meant to be filled up under 30% LDCE. According to the schedule, the selection was conducted. Applicant along with others appeared at the test under 70% quota of Group B AEN. Candidates securing 60% marks in the written examination i.e. 90 marks out of 150 qualify for viva-voce test and were sent for medical examination before the viva-voce test as per Rules. Accordingly, those who come

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out successful both in the written test as well as the medical test, they were called upon to face the viva-voce test. In the viva-voce test out of total 50 marks, 25 marks are allotted for record of service and 25 marks allotted for viva voce as per the instructions issued by the Railway Board. Candidates who had secured 60 marks i.e. 30 marks out of 50 (including at least 15 marks in the Record of service) became eligible for final empanelment in order of their integrated seniority against 70% quota vacancies whereas as per rules 30% LDCE quota vacancies are different and distinct from that of 70% quota vacancies in Group B engineering and the post being safety category no relaxation is permissible even to SC/ST candidates. Based on the result, final panel was published on 09.03.2006 and all of the empanelled candidates have been posted. As the Applicant could not be empanelled for having failed in the selection at the viva voce test, the Respondents have also objected to the allegation of infirmities in the matter of conducting the examination raised in the OA. It has been stated by the Respondents that after having participated in the selection and failed, the Applicant is estopped under law to challenge his non-selection by alleging that the selection was not conducted in accordance with the Rules. Accordingly, the Respondents have prayed for dismissal of this OA.

3. By filing MA No. 299 of 2008, Applicant sought direction to the Respondents to produce the marks obtained by the Applicant in various events. Accordingly, vide letter dated 08.01.2009 the Respondents furnished the marks secured by the Applicant which are quoted herein below:

- (i) Total marks for written examination :150
- (ii) Pass marks for written test :90
- (iii) Marks secured in written examination :94
- (iv) Total marks for viva voce test :50
- (v) Pass marks for viva voce test :30
- (vi) Marks secured in records of service :16.6
- (vii) Marks secured in viva voce test :10
- (viii) Total marks secured in viva voce test :26.6

REMARKS : Not suitable.

4. Heard the rival submissions of the parties and perused the materials placed on record. The main contention of the Applicant in support of his prayer in this Original Application is that as per the rules the merit of the applicant ought to have been judged on the basis of the total marks he secured in the selection and not on

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segregation as has been done in the case of the Applicant. The applicant has received meritorious certificate in the shape of commendation for his good work besides there being no adverse remarks in his CCR, he should have been awarded full marks in the record of service. Having not done so, it cannot be said that awarding of marks was free from doubts and suspicion. When no qualifying marks in the viva voce test were prescribed in the advertisement declaring him failed in the said events is a nullity and, as such the final selection list is liable to be struck down. His next contention is that as the selection committee was not constituted as per rules the preparation of the panel is non-est in the eyes of law. Further contention of the Applicant is that award of lesser marks in the service record itself pre-supposes that entries adversely affecting the interest of applicant were taken into consideration without giving opportunity to the Applicant. As such, by applying the ratio of the decision of the Hon'ble Apex Court in the case of **Dev Dutt v Union of India and others**, (2008) 2 SCC (L&S) 771, the applicant is entitled to full marks in the record of service and accordingly is entitled to be promoted along with others. On the other hand, Learned Counsel for the Respondents strongly opposed the above contentions of the applicant by stating that record of service does not mean the recording made in the CCRs. It covers so many factors one has achieved during his service career. However, when marks were awarded by a duly constituted committee who are experts on the subject, there is hardly any scope for this Tribunal to interfere. Further it has been contended by the Learned Counsel for the Respondents that it is completely a myth to say that the constitution of committee was not in accordance with rules. He has submitted that even conceding for a moment that there was no proper constitution of the committee yet the Applicant is estopped to challenge the constitution after having participated and failed in the selection. Accordingly, Respondents counsel reiterated that this OA being devoid of any merit is liable to be dismissed.

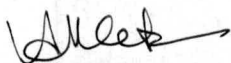
5. We have given our thoughtful consideration to various points raised by the parties but we do not see any grounds in the submission of the applicant to quash the panel list prepared on the basis of the result of the selection test conducted as per rules. The Applicant has placed no material to convince us that the selection committee constituted was not in accordance with Rules. Similarly, the decision relied on by him in support of his stand is of no help to him because the said decision deals with regard to remarks given in the CCRs of a Government servant. The Applicant was denied promotion as some of the remarks available in his CCRs were below

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the Bench mark required for promotion and in that event the Hon'ble Apex Court held that when below grading adversely affects his promotion, it cannot be taken into consideration in absence of any proof of communication to the applicant. But in the instant case, as stated by the Respondents' counsel record of service does not mean the grading only as given in the CCRs. Hence, the said decision, in our considered view, is of no use to the case in hand. Besides the posts come under safety category as such the rule making authority consciously framed rules for filling up of such posts, in question by way of selection on merit. Since the applicant failed to achieve the marks, he was not declared to have been selected and as such, this Tribunal has hardly any power to interfere in it."

5. We find no additional materials to differ from the view already taken by the Division Bench of this Tribunal. It is settled law in the case of **Sub Inspector Rooplal and others vrs. Lt. Governor through Chief Secretary Delhi and others**, (2000) 1 SCC 644 that the precedents are to be followed by the Tribunal. In view of the above, we find no merit in this OA. Hence the OA stands dismissed. No costs.


(C.R. MOHAPATRA)
Member (Admn.)


(A.K. PATNAIK)
Member (Judicial)