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**CENTRAL ADMINISTRATIVE TRIBUNAL,
JODHPUR BENCH, JODHPUR**

ORIGINAL APPLICATION NOS: 25/2006 & 26/2006

DATE OF ORDER: 01 - 03 - 2007

Harish Kumar and anr. : Applicants

Mr. Vijay Mehta : Advocate for the Petitioners

VERSUS

Union of India and ors. : Respondents

Mr. Salil Trivedi : Counsel for the Respondents

CORAM:

**Hon'ble Dr. K.B.S.Rajan, Judicial Member
Hon'ble Mr. Tarsem Lal, Administrative Member.**

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. Whether it needs to be circulated to other Benches of the Tribunal ?

Tarsem Lal
(Tarsem Lal)
Administrative Member

Dr. K.B.S. Rajan
(Dr. K.B.S. Rajan)
Judicial Member

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH; JODHPUR.**

Original Application Nos. 25/2006

&

Original Application Nos. 26/2006

Date of decision: 01-03-2007

**Hon'ble Dr. K B.S. Rajan, Judicial Member.
Hon'ble Mr. Tarsem Lal, Administrative Member.**

O. A. No. 25/2006

Harish Kumar B, S/o of Shri Babu Lal aged 45 years, Senior Clerk in the office of the Senior DME,(D) North Western Railway, Abu Road, District Sirohi, R/o 149 E, Railway Colony, Abu Road, District, Sirohi.



: Applicant

Mr. Vijay Mehta : Counsel for the applicant.

VERSUS

1. Union of India through the General Manager, North Western Railway, Jaipur.
2. The Divisional Railway Manager, North Western Railway, Ajmer.
3. Senior Divisional Mechanical Engineer (Diesel) North Western Railway, Abu Road, District Sirohi.

: Respondents

Rep. by Mr. Salil Trivedi : Counsel for the respondents.

O. A. No. 26/2006

Madan Mohan, S/o Shri Sohan Lal aged 56 years, Senior Clerk in the office of the Loco Foreman North Western Railway, Abu Road, District Sirohi, R/o 1380 A, Railway Colony, Abu Road, District, Sirohi.

: Applicant

Mr. Vijay Mehta : Counsel for the applicant.

VERSUS

1. Union of India through the General Manager, North Western Railway, Jaipur.
2. The Divisional Railway Manager, North Western Railway, Ajmer.
3. Loco Foreman, North Western Railway, Abu Road, District Sirohi.

: Respondents

Rep. by Mr. Salil Trivedi : Counsel for the respondents.

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ORDER**Per Dr. K.B.S.Rajan, Judicial Member.**

As the two O.As revolve round the same legal issue, this common order in both the O.As is passed.

1. The legal issue:

Whether the applicants in the O.As, who have admittedly, been functioning as ad hoc Sr. Clerk in the Railways, had crystallized any rights for continuance in the post of Sr. Clerk, even as they did not qualify in the written tests meant for regular promotees and when in the wake of restructuring, the posts of Sr. Clerks have been brought down from 43 to 34 and already there are adequate number of regular Sr. Clerks and there is no berth for the ad hoc Sr. Clerks, i.e the applicants, whether the claim of the applicants to be retained as Sr. Clerks is tenable..

2. The brief facts of the case as in the OA No. 25 of 2006 are as under:

The applicant has been continuously and uninterruptedly discharging his duties on the post of Senior Clerk for the last more than 20 years efficiently and honestly to the entire satisfaction of his superiors. The Railway Board vide its order dated 01.12.1960 has reaffirmed that any person who is permitted to officiate beyond 18 months cannot be reverted without following the procedure prescribed in the Disciplinary and Appeal Rules. Though the impugned order dated 31.01.2006 (Annexure A/1) has not been served on him, he has been able to get a copy of the order. Some of the persons like the applicant

who were promoted on adhoc basis as senior clerks have been retired from the post of Senior Clerk and are being paid pension according to the grade of Senior Clerk. It is obvious that the respondents have treated those persons as confirmed on the promoted post of Senior Clerk.

3. Brief facts of the case as in OA No. 26/06 are as under:-

Applicant No. 1 was appointed on Group D post on 24.10.73. He was promoted to the post of Clerk in the pay scale of Rs. 950-1500 on 14.05.1984 and thereafter he was promoted on adhoc basis in accordance with the prevailing rules as Senior Clerk in the pay scale of Rs.1200-2040, which has since been revised to Rs.4500-7000 vide order dated 23.09.1988.

Applicant No. 2 was appointed on the post of Clerk on 23.05.1975. She was promoted to the post of Senior clerk in the year 1982 on adhoc basis.

4. Both the applicants have been continuously and uninterruptedly discharging their duties on the post of Senior Clerk for the last more than 20 years and 25 years respectively. However, their promotion orders on the post of senior clerk does not indicate that the applicants and others who were promoted along with the applicants were promoted to a particular period. The Railway Board vide its order dated 21.05.56 has laid down that "any person who is permitted to continue to officiate beyond 18 months cannot in future be reverted without following the procedure prescribed in the Disciplinary and Appeal Rules." Thereafter, the Railway Board vide its orders dated 12.08.71 and

05.02.72 have again directed that none should be kept in officiating appointment for a long period and confirmation should follow at least on completion of two years. Thus it is clear that 18 months rule confers a right to the applicants to be retained on the post of senior clerk. All of a sudden the applicants have been ordered to be reverted and demoted to the post of Clerk from the post of Senior Clerk vide Annex.A/1 order dated 31.01.2006, without disclosing any reasons, save, stating that the applicants and others named in the order are demoted to the post of clerk in the pay scale of Rs.3050-4590. A number of employees like one Shri Ram Bharose etc were promoted on adhoc basis as senior clerk and paid pension according to the grade of senior clerk. The respondents have treated them as confirmed on the promoted post of senior clerk. Thus, the applicants have been singled out and meted hostile discrimination.



Respondents have contested the O.A. Their common contention, as contained in their reply to the aforesaid O.As is as under:-

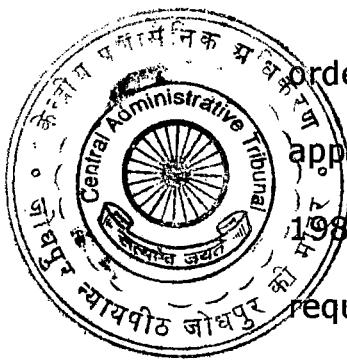
5. O.A. No. 25/06

Applicant was promoted to the post of Sr. Clerk vide order dated 23.09.1988 purely on adhoc basis. It is submitted that the applicant is guilty of concealing the material fact from this Hon'ble Tribunal inasmuch as admittedly the applicant appeared in the selection for regular promotion on the post of Sr. Clerk not once but as many as in 4 chances. It is settled proposition of law that an adhoc employee does not have any prospective right to be retained permanently without passing the selection. The cadre

strength of Sr. Clerk which was 43 upto 30.10.2003 was reduced 34 under cadre restructuring scheme and therefore adhoc employees(applicant and 3 others) were rightly reverted back to the lower grade . Further it is submitted that the 18 months' rule on which reliance has been placed by the applicant, is applicable in case of regular promotee and it is not applicable on adhoc promotees It has also been stated that Sr. Clerk is a selection post.

6. O.A. No. 26/2006

Applicant No. 1 was promoted to the post of Senior Clerk vide order dated 23.09.1988 purely on adhoc basis. Likewise, the applicant No.2 was also promoted on the post of Senior Clerk in 1982. Admittedly the post of Sr. Clerk is a selection post and is required to be filled in by positive act of selection. The promotion accorded to the applicants does not create any prospective right in their favour and they cannot be retained as such without selection. The applicants are guilty of concealing the material fact from this Hon'ble Tribunal inasmuch as admittedly the applicants appeared in the selection for regular promotion on the post Sr.Clerk not once but as many as 6 chances. Every time the applicants could not pass the selection as they failed in the written test on every occasion. Long adhoc appointment of any employee does not create any legal right in his favour to retain him on the adhoc post permanently. The cadre strength of Sr. Clerk was 43 upto 30.10.2003, but after that, the cadre of Sr. Clerk was reduced to 34 posts under the cadre restructuring scheme. Out of 34 posts Sr. Clerks 38 employees (34 regular senior clerks and 4



adhoc Sr. Clerks) were working, therefore the adhoc employees (applicants and 2 others) were rightly been reverted by the impugned order dated 31.01.2006. Further it is submitted that the 18 month rule, on which the reliance has been placed by the applicants is applicable in a case of regular promotee and it is not applicable on adhoc promotees as has been held by Full Bench of the Hon'ble Tribunal, wherein it has been categorically laid down that mere officiation of 18 months or more does not give rise to a right for regularisation and passing of selection is a must. Shri Ram Bharose etc were working as Sr. Clerk on adhoc basis against the vacancies as the applicants were working but as has been submitted supra that after cadre restructuring scheme, the cadre of Sr. Clerk was reduced to 34 posts and against which 38 employees(34 regular Sr. Clerks and 4 adhoc Sr. Clerks) were working.

Rejoinders have been filed in these O.As and by and large the contentions as raised in the O.As have been reiterated.

Arguments were advanced. First the contention of the Applicant's counsel. The following are the main contentions of the counsel advanced during the course of arguments:-

- (a) No reason has been reflected in the order of reversion and as such, the respondents cannot furnish reasons at a later stage (Annexure A-1).
- (b) No tenure had been stipulated in the initial order of promotion (Annexure A-2).
- (c) Though reduction in the number of vacancies has been spelt out in the reply, there is no documentary proof to substantiate the

same and mere averment cannot be taken for granted. The applicants deny the veracity of the statement made by the respondents in this regard.

(d) Certain employees who were so serving like the applicants as ad hoc Sr. Clerks, were, even till superannuation retained as Sr. Clerks and treated as permanent notwithstanding the fact that they too did not qualify in the examination, while the applicants have been singled out.

(e) If the applicants could not clear the written test, some more opportunities would be more appropriate as these have put in decades of services on ad hoc basis and their long ad hoc services cannot be allowed to be wasted.

(f) Since reversion involved civil consequences, due show cause notice is a must which, in this case, has been conspicuously missing.

The following decisions of the Apex Court and other Courts are in support of the case of the applicants:-



- (i) **M.S. Gill and another vs Chief Election Commissioner** (AIR 1978 SC 851) in support of (a) above.
- (ii) **Vijay Narain Singh vs Supdt of Police, Bijnore & Ors** (1994) Supp 2 SCC 56
- (iii) **Budhi Ram & Ors vs Union of India and Others** (Order dated January 1, 1988 in OA No. 185/87 (wherein it has been held that Ad hoc promotion for a substantial period cannot be ignored as 18 months' rule would apply).
- (iv) **Jetha Nand and Others vs Union of India**, Full Bench Judgment dated 5-6-1989 in TA No. 844/86 wherein it has been held that Employees who have rendered more than 18 months' service on ad hoc basis cannot be removed from the post save by following the DA Rules.
- (v) **M.K. Birbar Deo vs Union of India and others** (Swamy's News L Digest, 1993 at page 253).

Per contra, counsel for the respondents has stated that-

- (a) Concealment of the material facts disqualifies the applicants from seeking any relief from this Tribunal as held in the case of **Ramjas Foundation v. Union of India**, 1993 Supp (2) SCC 20
- (b) By any length of ad hoc promotion, there is no indefeasible

right that has been crystallized by the applicants for regularization.

(c) No reason need be adduced for reversion of an ad hoc promotoee.

(d) No show cause notice be also required under the facts and circumstances of the case. Reliance was placed in the case of **Punjab SEB v. Baldev Singh, (1998) 5 SCC 450**.

(e) Respondents are well within their rights to revert the applicants on plausible reasons.

(f) The post of Senior Clerk being one of selection posts, promotion has to be made by a positive action of holding the examination and on qualifying in the exam only such promotion of regular basis could be made. Reliance has been placed on the decision of the Apex Court in the case of **Mukesh Bhai Chhotabhai Patel v. Jt. Agriculture & Marketing Advisor, (1994) 6 SCC 36**

(g) Indeed, since there are no vacancies in the posts of Sr. Clerks, as the posts were reduced from 43 to 34 in the restructuring, there was a compelling necessity to reduce the complement and retaining regular candidates others were reverted.

8. Arguments were heard and documents considered. First the arguments from the side of the applicant. It has first been contended that no reason has been given in the impugned order and the respondents are precluded from giving any reason by way of affidavit. In this regard, the applicant relied upon the decision of the Apex Court in the case of **M.S. Gill (supra)**. First, the reversion order need not contain any reason. If at all the applicant had represented against the same, perhaps the respondents would have given reasons for reversion. If those reasons are different from the one given in the counter or if those reasons are supplemented by the reasons in the counter, then only 'M.S. Gill' applies and not in this case.



9. It has been contended that no tenure had been specified in the initial promotion order and the duration of ad hoc services as Sr. Clerk continued for about 18 years. The question then is whether the applicants have by virtue of having served on ad hoc basis for more than 18 years, crystallized any right. While dealing with this issue, the contention of the applicant that the 18 months'

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rule applies in their case is also to be answered. The said 18 months' rule mandates the authorities not to be rigid in *viva voce* in case of those who have completed 18 months of service. In the instant case, the applicants having not faired well in the written test, they cannot claim any benefit of the 18 months rule. The decision of this Bench in O.A. No. 185/87 is of 1988 vintage, whereafter, the law enunciated by the Apex Court has changed the entire scenario.

10. As regards the next contention that certain employees who too, like the applicants, were on ad hoc basis, and were functioning as Sr. Clerks and superannuated, but they were not reverted, while the applicants have been, the fact remains that in their case, the situation of reverting them did not arise as obviously there were vacancies to accommodate them. But in the case of the applicants, due to reduction in the strength of Sr. Clerks, they were to be reverted. Applicants herein do not stand in the same footing as of those superannuated Sr. Clerks. Hence, this contention has to be rejected. (This view holds good only if the contention of the respondents about reduction in complement due to restructuring is accepted. See the next contention)

11. The next contention of the applicants is that there is no substantiating material to show that the number of posts of Sr. Clerks had been reduced to 34. And in support of this contention, the counsel for the applicants has relied upon the decision in the case of **Vijay Narain Singh** (*supra*). In that case, the Apex Court has held as under:-



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4. The appellant has expressly asserted that his appointment as a Constable was on probation in a clear vacancy. On behalf of the State of U.P., there is no denial of this assertion and no material has been produced by the State to indicate that the appellants appointment was not of this nature. There can be no doubt that the State which is in possession of the entire record was not in a position to show with reference to the record that the factual position was different. The failure of the State Government to produce any record in support of its submission is alone sufficient to reject its submission to this effect. The case has, therefore, to be examined on the basis that the appellants appointment was on probation in a clear vacancy which was governed by Regulation 541 of the U.P. Police Regulations.

This decision perhaps would have been of no assistance to the applicants, had the applicants not contended in the rejoinder that the contention of the respondents as contained in the reply that there had been a reduction in the total number of Sr. Clerks after restructuring is wrong. An assertive statement had been made in this regard in the rejoinder, denying the contention of the respondents. When the applicants have denied the fact of reduction in the complement, vide their rejoinder, it becomes essential to the respondents, with documentary evidence, to substantiate their contention as contained in the counter. This has not been done. Thus, it cannot be taken for granted that the total number of vacancies had been reduced to 34 as contended by the respondents in the counter. The applicants questioned in their rejoinder that had the posts been reduced to 34 in 2003, then how could all the 38 senior clerks be retained for a substantial period of more than 3 years. There is substance in the contention of the applicants and to this contention there has been no denial by way of production of records. No prayer was made by the respondents even at the time of hearing that they be permitted to produce the records. Even if their contention be based on records, no answer was forthcoming when the counsel for the applicants contended that if the number of posts of Senior



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Clerks has been reduced to 34 in 2003, how could the respondents retain the applicants since then without the posts. Thus, the argument of the counsel for the applicants in this regard cannot be ignored. However, to what extent this would assist their case would have to be seen only as a cumulative effect, as the very existence of posts alone cannot entitle the applicants, who have not qualified in the eligibility examination for the post of Sr. Clerk.

12. The next contention of the applicants is that they having rendered 18 years of services, should not have been reverted on the ground of non qualifying in the test but should have been granted some more chance for appearing in the examination. In this regard, reliance has been placed by the applicants upon the decision of the Full Bench judgment in the case of Jetha Nand (*Supra*) The relevant portions thereof is as under:-



56. *In regard to the last question as to when an adhoc employee can be reverted, the answer is that if he has been appointed in a stop-gap arrangement, he can be reverted at any time. If he has not qualified in the test and had continued in he can still be reverted. If he has qualified in the test and had continued in adhoc capacity for more than 18 months, he cannot be reverted except after following the discipline and Appeal Rules. Further We have also held that a person who has so far not qualified in the selection test and is holding an adhoc post in the promotional post, he should be given several chances to qualify in the selection test and if even after repeated chances given to him he fails, there would be no other alternative but to revert him. The cardinal principle is that he must have qualified in the selection test to become suitable for the post.*

57. *Coming to the facts of the present case, the applicants have been officiating for nearly 10 years or more now but they have not passed the selection test in the years 1973, 1975 and 1978. They filed a suit and obtained an injunction order from holding the test for them in 1981 and they have not appeared in any selection test thereafter. Now they claim regularisation*

without any selection test.

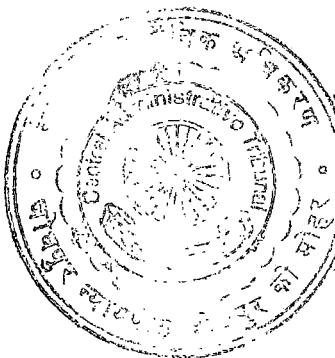
58. Our answer is that they cannot be regularised until they pass the selection test, for which they may be afforded some opportunities. They may appear in selection tests one in the year 1989 and in case any one no succeeding, he may then again appear in the year 1990. The 'Record Note' para 2.2. of the meeting dated 227.11.1975 quoted earlier in this order may be adhered to by the respondents. Meanwhile, the applicants may be reverted.

After the said judgment has been issued, no decision upsetting the ratio in the above order seems to have ever been there. As such, we may safely adopt the same. It is a well settled law of precedence that judicial propriety demands that the same cannot be lost sight of. In the case of *Sub-Inspector Rooplal v. Lt. Governor*, (2000) 1 SCC 644, the Apex Court has held as under:

"Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. Gajendragadkar, C.J., observed in *Bhagwan v. Ram Chand*:

'It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that inquiry sitting as a Single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.'"

13. In view of the above, we adopt the decision as given in the case of **Jetha Nand (Supra)**. As there is no limitation in the



number of times one can take up the qualifying examination, since the last examination took place prior to the restructuring, the applicants, subject to availability of vacancies, may have to be allowed to continue in the post on ad hoc basis and may have to be permitted to take up one more examination and subject to their qualifying in the same they may be accommodated in the said post on regular basis.

14. Now, coming to the arguments advanced by the counsel for respondents, it has first been contended that the applicants have not come up with clean hands inasmuch as they have concealed the relevant material of their non-qualifying in the examinations conducted in the past from 1991. Contention of the applicants in this regard is that their promotion order of 1988 did not contain the passing of exam as a condition precedent for permanency in the said post nor have the applicants been reverted on the ground of their non qualifying in the exam. According to them, non mentioning of the fact of their non qualifying in the exam cannot be taken as a 'concealment of material fact' to non-suit them. Generally concealment of facts for disentitling a party from seeking equitable remedies from the court should be such it goes into the root of the issue or the material facts, would, when disclosed, make them legally ineligible to prosecute the matter. For example, a second review is not permissible under the provisions of the Act and if a party conceals the fact of its earlier review application having been dismissed, then it becomes concealment of material fact. Or, if the terms of appointment specified that for continuance of the appointment in



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the ad hoc status or regularization qualifying in the exam is a sine-qua non, failure to mention about their failure in the exam may fall under such a category of concealment of fact and the same disentitles them from any relief from this court. Certainly non qualifying in the exam is a fact and the same related to the subject matter, and the applicants in the normal course, as a passing reference, should have made reference to the same, especially, when in a number of chances they could not qualify, but at the same time, non mentioning of the same cannot be taken that serious as to non suit the applicants. This contention is thus answered accordingly.

15. Next contention of the respondents is that the applicants have no indefeasible rights on the ground of long tenure of ad hoc promotion for regularization. This contention is absolutely correct as per the decision of the Apex Court in the case of ***Chanchal Goyal (Dr) v. State of Rajasthan, (2003) 3 SCC 485***, but the question is had the applicants claimed any regularization. Prayer column only shows that the impugned reversion order be quashed and the applicants be allowed to continue, which means, continuance as ad hoc senior Clerks and thus, their claim is not for regularization.



16. From the side of the respondents it has also been contended that the post of Sr. Clerk is a selection post. In fact, exact reverse is the truth as could be discerned from the judgment of the Apex Court in the case of **Swapan Kumar Pal v. Samitabhar Chakraborty, (2001) 5 SCC 581**, wherein the Apex Court has held as under:-

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"It is thus apparent that a promotion can be given only when the employee concerned is considered fit to perform the duties of the higher post and a person can be considered fit only after he passes the prescribed test held for the purpose. **The post of Senior Clerk being a non-selection post, it is required to be filled up by promotion of the seniormost suitable railway servant in the feeder cadre.**".

17. Yet another contention on behalf of the respondents, raised during the course of arguments is that no show cause need be issued nor reasons for reversion be specified. Reliance has been placed upon the decision of the Apex Court in the case of **Punjab SEB v. Baldev Singh, (1998) 5 SCC 450**, cited by the counsel for the respondents. There is substance in the said contention.



The sum and substance of our above discussion thus, is-

- (a) that the post of Sr. Clerk is not a selection post;
- (b) Ad hoc does not give any indefeasible right for regularization.
- (c) Reversion from ad hoc promotion to the regular post for plausible reasons could be made even without show cause notice.
- (d) It is not exactly clear whether the total number of posts in the grade of Sr. Clerks has been reduced in the wake of restructuring in 2003, from 43 to 34 and if so on what grounds, and in that event, it is not explained as to how the applicants have been retained and continued beyond 2003.
- (e) As there is no limitation in the number of chances, on the strength of the full Bench Judgment of Calcutta Bench in Jetha Nand (supra) applicants could be given one more opportunity to qualify in the examination.

18. In view of the above discussions, we are of the considered view that interest of justice would be met, if the respondents allow the applicants to continue in the post of Senior Clerks on ad hoc basis for some more time, conduct the examination and in case the applicants succeed, they be considered for regularization as Sr. Clerks from the date of their passing the test, subject to availability of vacancies. We direct continuance of the applicants in the same post, since the respondents themselves, have

continued to retained the applicants even after 2003. On whatever good grounds they could retain the applicants on ad hoc basis as Sr. Clerks for 3 years, on the same grounds, they should allow the applicants to continue in the post of Sr. Clerks on ad hoc basis and if the applicants qualify in the requisite examination, they may be considered for regular promotion to the post of Senior Clerks, subject to availability of regular vacancies. If there be no vacancies in the near future, ^(after declaration of result) the applicants may be reverted to the lower post, but in the event of vacancies arising subsequently, the past service as ad hoc senior clerks shall be taken into account while fixing their pay in the higher post of Senior Clerks on regular basis.

With the above directions, the O.As are disposed of.

Costs easy.

Tarsem Lal
(TARSEM LAL)

ADMINISTRATIVE MEMBER

K.B.S.Rajan
(Dr. K.B.S.RAJAN)

JUDICIAL MEMBER.

JSV.



Part II and III destroyed
in my presence on 26/6/14
under the supervision of
Section Officer (1) as per
order dated 26/3/14

Section Officer (Record)

etc
Renu
(for sale private)
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