

Central Administrative Tribunal
Calcutta Bench

OA No. 908/97

Present : Hon'ble Mr. Justice B. Panigrahi, Vice-Chairman
Hon'ble Mr.N.D. Dayal, Member(A)

- 1) Alak Pal, S/o Sri Birendra Chandra Pal aged about 36 years working as JE/II/(P.Way) Andul
- 2) Sumanta Kr. Kirtania, S/o Late Matilal Kirtania, aged about 38 years, working as JE/II/(P. Way) Panskura

-Vs-

- 1) Union of India through Secretary, Ministry of Railways, Rail Bhawan, New Delhi – 1
- 2) The General Manager, South Eastern Rly, Garden Reach, Calcutta-43
- 3) The Chief Personnel Officer (Eng), South Eastern Rly, Garden Reach, Calcutta-43
- 4) The Dy.Chief Personnel Officer, -do-
- 5) The Sr.DEN (Co-ordination) Kharagpur Dn., S.E. Rly, Kharagpur

For the applicants : Mr.R.K. De, Counsel
Ms B. Banerjee, Counsel

For the respondents : Ms S. Banerjee, Counsel

Date of Order : 02-05-95

ORDER

Mr.N.D. Dayal, Member(A)

Both the applicants in this case are holding the posts of Engineering Inspectors(Way and Works), S.E. Rly at GRC since 7-4-86 and are designated as JE/II(P.Way)/SRC and posted at Andul.. On 12-11-95 a written test was held for promotion to the post of Asstt. Engineer (Group B) under LDCE for filling up 23 vacancies (15 Unreserved, 5 SC & 3 ST) in Civil Engineering Department. A selected

panel of 22 candidates was published on 5-2-96 wherein the names of the applicants appeared at Sl.Nos 14 and 15.

2. Thereafter, the applicants were asked to appear at the viva voce to be held on 7-3-96 in the Chamber of CE/GRC. This was earlier fixed for 19-2-96 but was postponed. The applicants had in the meanwhile undergone their medical tests on 14-2-96 and 16-2-96 respectively. Since only one SC candidate was available among those who had passed in the written test held on 12-11-95, as such only 15 unreserved and 1 SC vacancy could be filled. Therefore only 16 candidates (15 UR & 1 SC) were given promotion provisionally to the post of Assistant Engineer by order dated 12-8-96 issued by Dy.CPO under the authority of CPO, GRC.

3. The applicants have annexed a copy of establishment SL No.167/91 dated 6-9-91 which indicates the revised procedure to be followed for the written test, viva voce test and evaluation of record of service. It is seen therefrom that for the written test only two Question Papers, Viz. Professional Paper-I (including General Knowledge) and Professional Paper-II (including Estt. Rules and Financial Rules) were to be set with each consisting of 150 marks out of which the candidates had to secure 60% qualifying marks(i.e. 90 marks) in each of the two papers separately. With regard to record of service and viva voce test it is laid down that the maximum marks allocated for record of service is 25 and viva voce also 25, making a total of 50, but to qualify a candidate has to secure 30 marks in viva voce and records of service taken together including at least 15 marks out of 25 in the record of service. While the applicants had succeeded in the written examination it is their submission that they should have succeeded in the viva voce as well because they were asked their name, where they were posted and about the

area under control which were the same question asked to all the candidates and none of these questions could be answered incorrectly. The applicants believe that the candidate at Sl.16 of the panel dated 12-8-96 by which promotion was given to the post of Asstt. Engineer did not do better than them at the written test. Also since they have no adverse remarks their juniors could not have got more than them. It is therefore alleged that the panel dated 12-8-96 has been prepared by malafide intention.

4. It is further contended that as per Railway Board letter dated 21-6-80 reserved vacancies can be dereserved and vacancies can be carried forward. As such the applicants made representation dated 18-9-96 and 25-4-97 wherein they have interalia made clear that they did not dispute the decision taken by the administration but seek dereservation of the seven posts which remained unfilled by taking up a proposal with the Department of Personnel in accordance with the procedure contained in Railway Board letter so that those U/R candidates who had qualified but got less marks could also look forward to promotion against such additional vacancies. In this background the applicants have come before the Tribunal seeking a declaration that they are eligible for being promoted to the post of Asstt. Engineer in view of their position in the merit list following written test and their experience and they should be given the promotion by dereserving the seven vacancies from the date of promotion of their juniors vide the provisional select list, because non-promotion of the applicants to the vacant posts either by dereservation or carry forward of the vacancies is arbitrary, wrongful and violative of Articles 14 and 16 of the Constitution of India, and also that the respondents be directed to pay arrears as admissible due to their promotion from the date their juniors got promotion.

5. A perusal of the list of names dated 5-2-96 for the post of Asstt. Engineer issued by the respondents after written test shows the names of the two applicants at Sl. Nos 14 and 15. It is stated therein that the candidates have qualified in both the papers and the viva-voce test will be held on 19-2-96 in the Chamber of CE. It is further indicated therein that the ACRs of these persons for the last five years along with the D&A clearance should be sent and the candidates ^{should} _{have} themselves medically checked up. Thus, it is seen that the names of the candidates successful in the written test were not indicated therein in the order of merit. Another list dated 12-8-96 shows a provisional panel of 16 staff for promotion to the post of Asstt. Engineer as a result of written examination dated 12-11-95 and viva voce test of 8-3-96. It is mentioned therein that the names have been arranged according to merit position and appointment would be made as Asstt. Engineer according to availability of vacancies subject to passing of medical examination. This merit list of 16 candidates does not include the names of the two applicants. No other list or panel has been annexed with the application and as such it is not clear as to which is the merit list to which they are alluding on the strength of which they are claiming the relief. The selection process ^{which} comprised of not only a written examination but also viva-voce as well as marks for record of service and a junior, if eligible to appear for such selection, could very well succeed on merit leaving behind his senior. As such it appears that the relief claimed by the applicants does not get adequate support from the material produced by them.

6. The respondents have filed a reply wherein they have contested the claim of the applicants. It is stated that the panel was formed strictly on the basis of marks in the written examination, viva-voce test and record of service. As the applicants and other

candidates were lower in merit they could not be empanelled. It is submitted that as a result of the examination for promotion to the post of Asstt. Engineer there is a shortfall of 4 SC and 3 ST, total 7 posts which had been carried forward in accordance with Railway Board instructions dated 5-5-82. These instructions require that such vacancies are to be carried forward to three subsequent recruitment years. It is stated that one has a right to be considered if eligible, but no one has a right to be selected.

7. In their rejoinder the applicants have disputed the reply filed by the respondents and by and large reiterated their earlier stand indicating also the details of those selected candidates who were juniors to them. They have stated that the minimum qualifying mark in the record of service is 50% of 25 i.e. 12 $\frac{1}{2}$ marks which is at variance with the Sl No.167/91 that has been produced by the applicants themselves. They have insisted that the records of examination should be produced before the Court so that the irregular selection may be exposed and the applicants may receive their proper marks. It is stated that further action initiated to hold exam. for vacancies of Asstt. Engineer on 3-11-97 and also 4-6-99 did not mention about carry forward of reserved vacancies. An OA 128/96 was filed before the Cuttack Bench of this Tribunal by 12 of the examinees of the same selection in which the present applicants had appeared because they had not been called for viva voce as per the list dated 5-2-96 after the written examination. The respondents took the view before the Cuttack Bench that they were not eligible. But by interim order of the Tribunal they were called for viva voce along with others and later their result was also declared. The Hon'ble High Court of Cuttack upheld the order of the Tribunal. Accordingly, 9 of those applicants were promoted as Asstt. Engineer by order dated 5-5-2000 against existing vacancies. This shows that there were in fact many more

vacancies in 1996 and hence the applicants if qualified in the selection should have been promoted in 1996 itself against those additional vacancies. Some details of vacancies have been submitted in support of their case.

8. The respondents have taken the opportunity to file a further reply to the rejoinder and disputed the arguments advanced. It is stated that seniority is not relevant as there are no marks or weightage assigned for it. It is only when two or more candidates secure the same marks that their placement is decided depending upon the number of vacancies and their interse seniority. With regard to the judgement of Cuttack Bench in OA 128/96 upheld by the High Court it is stated that 9 of the applicants in OA 128/96 were granted the benefit of promotion to Asstt. Engineer against LDCE 1996 by orders dated 5-5-2000 keeping in view that they should have received more marks than the last candidate A.R. Jana, on the panel list of 16 published on 12-8-96 and it was therefore strictly in order of merit and only done because of the directions of the Court after approval of Rly Board. It is explained that one particular selection is restricted to the number of vacancies notified and panel would not last more than 2 years but in this case the panel had to be extended and enlarged in view of the directions of the Tribunal/Court. It is denied that many more vacancies were available for the 1995-96 selection and the present applicants could have been accommodated even though they had secured lower merit position than A.R. Jana, the last candidate at Sl.No.16 of the panel dated 12-8-96. The applicants too have submitted a supplementary rejoinder reiterating date wise developments in the case and also how the vacancies arose and remained unfilled over the years since 95-96. Written arguments have also been prepared on behalf of the respondents delineating the actions taken in the aftermath of the order of the Cuttack Bench.

9. We have heard the learned counsel for both parties and given our careful consideration to the copies of original records produced and pleadings of the case. There were 23 vacancies of Asstt. Engineer that were advertised to be filled for 95-96. Out of a large number of candidates who appeared for the written test only 39 qualified. Out of these 22 were called for viva-voce as the balance were found to have been ineligible. The two applicants were at Sl.14 and 15 of the list of 22 candidates. However, before the viva-voce could be held 12 of the candidates, approached the Cuttack Bench of this Tribunal in OA 128/96 and by Interim Order they were allowed to appear in the viva-voce but their result was not to be declared. As such a total of 34 (22 + 12) candidates appeared for viva-voce. With approval of the Tribunal the respondents published on 12-8-96 a provisional panel of 16 candidates (15 UR + 1 SC) leaving 7 reserved vacancies unfilled which were to be processed for carry forward & dereservation, the progress of which however is not known. Should any vacancy be dereserved in a subsequent year such possibility could hardly be taken as the basis for seeking any relief at present.

10. Later on, after decision of the Cuttack Bench of the Tribunal which was upheld by the High Court of Orissa, the 12 candidates in OA 128/96 had to be accommodated because along with others they had qualified and were high in merit. But one of them had failed the written test, which left 11 as well as 6 others who had not been earlier called for viva-voce. Therefore, by letter dated 15-9-99 the CPO, S.E. Railway wrote to the Railway Board pointing out that for implementation of judgement in OA 129/96, 6 more candidates were required to be interviewed in a supplementary viva-voce & sought approval alongwith enlargement of panel from 16 to 33 by addition of 17 (11+6). It was stated that such enlargement of 95-96 panel would not cause any problem of adjustment because subsequently a large number of additional vacancies had become available which

were unfilled and only nominal dereservation may be required. By another letter on 4-4-2000 to the Rly Board it was clarified that the panel would be enlarged on merit keeping in view the marks of the last candidate on the published panel of 12-8-96, i.e. A.R. Jana at Sl.16 thereof. This would also be the bench mark for holding the supplementary viva-voce test of 6 candidates who had qualified the written test but had yet to be interviewed. As per approval of Rly Board the 6 candidates were interviewed on 15-3-2000 and all were recommended by the Selection Board since they also secured more marks than A.R. Jana who had got a total of 221.5 marks in the written and viva-voce tests together. In the meanwhile it had been found that one more candidate, i.e K. Ravi Chandran who was amongst the 22 initially called for Viva-voce but declared ineligible was actually eligible in terms of Tribunal decision in OA 128/96. As such the panel was sought to be enlarged to 34 (16+1+11+6) comprising of 33 UR and 1 SC vacancy.

11. It seems that an OA 168/2000 filed against notice calling for supplementary viva-voce on the ground that it will affect seniority of others already on the panel was dismissed as premature. But in OA 474/2000 the Calcutta Bench of the Tribunal on 4-5-2000 allowed further action on letter dated 4-4-2000 but without affecting the original seniority position of the petitioners till final disposal of the application about which no information is provided.

12. We have gone through the attested copies of mark-sheets placed by the respondents in respect of 22 candidates initially called for viva-voce. It is observed that the 16 candidates who were promoted as per the panel list dated 12-8-96 had qualified and secured higher total marks than the applicants. K. Ravindran who was initially considered to be ineligible has been included lateron following the decision of the

Cuttack Bench of this Tribunal. It is seen that he had not only qualified but also secured higher marks than A.R. Jana. Further, one candidate had failed to qualify and another was deleted leaving behind a balance of three candidates out of 22, i.e. S. Mohanta who had qualified with a total of 220 marks and the two applicants, Alok Pal & S.K. Kirtania who had also qualified in the written and viva-voce test but had secured total marks of only 216.5 and 214 respectively.

13. The Hon'ble Supreme Court in the case of *N. Mohanan v. State of Kerala & Ors* reported in 1997(1) SC SLJ 193 was dealing with a matter wherein the petitioner who was No.13 in the Merit List was not appointed even though vacancies existed, but was given appointment by an interim order of the Court. Even though another notification calling for applications was issued, it was contended that the earlier list was still in operation and the petitioner's appointment should be regularized. While not accepting the contention, the Apex Court observed –

“In *Shankarasan Dash v. Union of India* [(1991) 2 SCR 567], Constitution Bench had held that mere inclusion of the name in the list of selected candidates does not confer any right upon any candidate to be selected unless the relevant rules so indicate. In *Babita Prasad and Ors. V. State of Bihar & Ors.* [1993 Supp.(3) SCC 268] though the life of the panel was not prescribed, it was directed to be confined to a reasonable time. A long waiting list cannot be kept in infinitum in view of the principle “infinitum in jure reporbatur”. A distinction made for the purpose of appointment between those who have already been appointed and those who are in the waiting list or had undergone training and waiting for appointment. It cannot be treated as arbitrary. The Court has held that the panel was too long and was intended to last indefinitely barring the future generations for decades for being considered for the vacancies arising much later. In fact, the future generations would have been kept out for a very long period, if the panel would have been permitted to remain effective till it got exhausted. A panel of that type cannot be equated with a panel which is prepared having co-relation to the existing vacancies or anticipated vacancies arising in the near future. In *Union Territory of Chandigarh v. Dilbagh Singh & Ors.* [{1993} 1 SCC 154], it was held that a candidate whose name finds place in the select list for appointment to a civil post does not acquire an indefeasible right to be appointed in such post in the absence of any specific rule entitling him for such appointment and he could be

aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no bonafide or valid reason. In *Nagar Mahapalika, Kanpur v. Vinod Kumar Srivastava* [AIR 1987 SC 847] it was observed that the reason underlying the limitation of the period of life of waiting list for one year is obviously to ensure that other qualified persons are not deprived of their chances of applying for the posts in the succeeding years and being selected for appointment. In *State of Haryana v. Subash Chander Narwaha & Ors.* [(1974) 1 SCR 165], this Court had held that though vacancies were existing selected candidates had no right to the appointment. It would be open to the Government not to appoint the candidates from the list for valid reasons. In *State of Bihar & Ors. v. Secretariat Assistant Successful Examinees Union 1986 and Ors.* [(1994) 1 SCC 126], this Court had held that a person having been selected, does not, on account of being empanelled alone, acquire any indefeasible right to appointment. Empanelment is, at the best, a condition of eligibility for purposes of appointment and by itself does not amount to selection or creating right to be appointed unless relevant rules state to the contrary".

Further the Apex Court while referring to their Judgement in *Ashok Kumar & Others v. Chairman, Banking Service Recruitment Board and Others* (AIR 1996 SC 976) noted that in this case appointment to vacancies arising subsequently without being notified, was held to be violative of Articles 14 and 16 since everyone is entitled to claim consideration for appointment to a post under the State. The vacant posts arising or expected should be notified and no one can be appointed without due notification of the vacancies and selection according to rules and prescribed procedures.

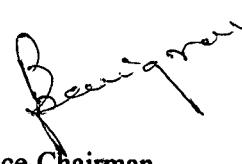
14. It is well settled that a decision as to how many vacancies are to be advertised or to be actually filled is a matter of policy which lies entirely within the domain of the executive authorities. The respondents were therefore within their rights to advertise only 23 vacancies to be filled up. It is also stated by them that there were no more vacancies of 95-96 against which the applicants could have been further adjusted. If all the candidates who were successful in written test had been invited for viva voce in the first instance itself, the merit list for 95-96 selection would have been limited to 16 (15 UR + 1 SC)

only and the rest of candidates being lower in merit would have, in the normal course, taken their chance in subsequent selections. Since a provisional panel of 16 had already been published with clearance of the Tribunal, which later also allowed declaration of result of applicants in OA 128/96, additional available vacancies were utilised for the purpose. It is however clear from a perusal of the attested copies of the mark-sheets submitted by the respondents that the 9 applicants of OA 128/96 who were promoted had qualified in the selection and had higher marks than A.R. Jana, the candidate at Sl.16 in the provisional panel. Thus the applicants remained lower in merit and could not be offered appointment. Evidently, the additional 9 candidates got the benefit of promotion due to intervention of the Tribunal as they were found eligible and high enough in order of merit. In the peculiar facts of the case the yardstick adopted of higher marks than the last candidate in panel of 16 does not *prima facie* strike us as being unreasonable or arbitrary. We therefore find that the promotion of 16 candidates by order dated 12-8-96 and of 9 more by order dated 5-5-2000 cannot be faulted being based upon merits and in compliance of the orders of the Cuttack Bench of the Tribunal. In so far as a further group of six candidates is concerned who had appeared for supplementary *viva voce* on 15-3-2000, we refrain from making any comments in their case which it appears forms part of the subject matter in OA 474/2000.

15. In view of the above, the prayer of the applicants does not succeed and the application is dismissed without costs. It is not known whether they have appeared in any subsequent examination and what has been the outcome thereof. It would however be open to them to seek promotion if otherwise eligible as and when vacancies are advertised along with others in due course.



Member(A)



Vice-Chairman