

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.603/07 & 614/07

Friday this the 11 th day of July, 2008.

CORAM:

**HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Dr.K.S.SUGATHAN, ADMINISTRATIVE MEMBER**

O.A.603/07:

G.Vijayakumar,
S/o A.K.Gopinathan Nair,
Technician Gr.II (Brick Layer),
Southern Railway/Kottayam/
Residing at : Akathootu Puthen Veedu,
Muttom P.O., HARIPPAD,
Alleppey District. Applicant

(By Advocate Shri TC Govindaswamy)

Ys.

(By Advocate Shri Thomas Mathew Nellimoottil)

O.A.614/07:

C.K.Surjith, S/o E.K.Karunakaran,
Technical Mate, Southern Railway,
Office of the Section Engineer, Works,
Ernakulam, Residing at: Karuna,
CC XIV/271-A, Indira Lane,
Chullickal, KOCHI -5. Applicant

(By Advocate Shri TC Govindaswamy)

V_S

1. Union of India represented by
General Manager, Southern Railway,
Headquarters Office, Park Town P.O.,
CHENNAI-3.
2. The Chief Personnel Officer,
Southern Railway,
Headquarters Office, Park Town P.O.,
CHENNAI-3.
3. The Divisional Personnel officer,
Southern Railway, Trivandrum Division,
THIRUVANANTHAPURAM -14.
4. The Railway Board through its Secretary,
Rail Bhavan, NEW DELHI. Respondents

(By Advocate Shri Sunil Jose)

The applications having been heard on 4.7.2007,
the Tribunal on 11-07-08. delivered the following:

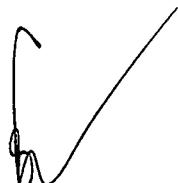
ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

As identical law points are involved in these two cases, these are dealt with in this common order.

2. The applicant in OA 603/07 joined as a Technical Mate on 06-08-1981 and was granted temporary status w.e.f. 01-10-1982 in the then pay scale of Rs 260 – 400(R.P. Rs 950-1500 = Rs 3050 – 4590). He was posted as Technician Gr. III to the open line organization in terms of order dated 07-09-2004. At present he is working as Technician Gr. II in the scale of Rs 4,000 – 6000.
3. Provision exists for competing in 10% Limited Departmental Competitive examination for the post of J.E.(Works) and the eligibility conditions for the same as contained in Para 145 of the I.R.E.M. Vol. I as amended vide Advance Correction Slip No. 174, are as under:-

- (i) 65% by direct recruitment through Railway Recruitment Boards;
- (ii) 10% by Limited Departmental Competitive Examination (LDCE) from amongst Skilled Artisans with three years' service in Skilled grades



and having the minimum educational qualification prescribed for direct recruitment as JE (Works) II; the short fall, if any, being added to (i) above;

4. The applicant having been in the skilled grade for a number of years, considered himself eligible to appear for the competitive examination and vide Annexure A-2 order dated 02-05-2006, when the respondents had notified 19 vacancies of J.E. in the scale of pay of Rs 5,000 – 8,000 to be filled up under the aforesaid 10% quota, the applicant applied for the same, vide Annexure A-3. The conditions attached to the same are as under:-

“The employees working on regular measure as Skilled Artisans in scale Rs.5000-8000, Rs.4500-7000, Rs.4000-6000 and 3050-4590 in works wing of Civil Engineering Department and who fulfill the following conditions are only eligible to volunteer for the above selection.”

1. They should have the Educational Qualification of Diploma in Civil Engineering.

2. They should have completed three years of service as Skilled Artisans on regular measure (the period of apprenticeship training will also be taken into account for the purpose of counting of 3 years of service in terms of Railway Board's letter No. E(NG) I- 81/PMI-76 dated, 25-04-1981).”

5. Vide Annexure A-6 order Advance Correction Slip No. 186, a further amendment has been made in respect of eligibility conditions for being considered for the post of J.E. and the same reads as under:-

“Chapter-1, Section 'B' Sub-section-III, Rules Governing Recruitment, Training, etc.

Substitute the following for the existing clauses (i), (ii) and (iii) under sub-para (1) of para 145:--

(i) 60% plus shortfall, if any, against Inter-Apprentice quota at (ii) below by direct recruitment through the Railway Recruitment Boards;

(ii) 15% by induction of Intermediate Apprentices from amongst staff in skilled grades in Works Branch having the qualification of ITI/Act Apprenticeship pass or 10+2 in Science Stream with three years service in skilled grades and upper age limit not exceeding 45 years; and



(iii) 25% by promotion/selection from amongst Sr. Technicians including Technicians Gr.I who may be senior to Sr. Technical by virtue of operation of earlier scheme in which the post of Sr. Technician(erstwhile MCM) was treated as personal to incumbent. In the event of adequate number not being found from amongst these staff eligibility may be extended to cover other Technicians Gr.I also.

[Authority: Railway Board's letter No.E(NG)I-2004/PM/8, dated 14.7.2005 dated 28.6.2006 (Bahri's 117/205, p 113)]"

6. The respondents, have, however, vide Annexure A-5 communication dated 22-08-2006 cancelled the above said notification and by Annexure A-4 communication dated 21-08-2007 again called for applications for filling up of 24 posts of J.E. and this time, the conditions are as under:-

1. They should have the Educational Qualification of ITI/Act apprenticeship pass of 1+2 in Science stream.
2. They should have completed 3 years of service in Skilled grades on regular measure as on 14.8.2007 in terms of Board's letter No.E(NG) I/2005/PM/I/52 dt. 22.8.2006 (the period of Apprenticeship training will also be taken into account for the purpose of counting of 3 years of service in terms of Railway Board's letter no. E(NG)1-81/PM1-76 dt: 25-04-1981).
3. They should not exceed 45 years of age as on 14.08.2007.

7. In view of the fact that this time, there has been a stipulation of age limit of 45 years, the applicant having crossed the said age limit, he could not apply for the post. He has, through this OA challenged the very issue of the aforesaid notification of Annexure A-4 and has prayed for the following reliefs:-

- "b) declare that the 19 of the 31 vacancies indicated in Annexure A4, which were in existence prior to Annexure A6 and for which the process of selection had already been initiated is to be filled under the pre-amended rules (Annexure A1);
- c) Direct the respondents to fill up the vacancies in the cadre of Junior Engineer (Works) Gr.II in scale Rs.5000-8000 notified in terms of Annexure A2, by applying Annexure A1 Recruitment Rules;
- d) Direct the respondents to consider the applicant for promotion against the vacancies, in the cadre of Junior Engineer (Works) Gr.II in the scale of Rs.5000-8000, notified in terms of Annexure A2, and direct the respondents further to grant the applicant all consequential benefits thereof;
- f) Pass such other orders or directions as found just, fit and necessary in



the interest of justice."

8. In so far as the applicant in OA No. 614/07 is concerned, he had joined as Technical Mate on 21-08-1982 and was granted temporary status w.e.f. 19-12-1982 and is in the pay scale of Rs 3,050 – 4,590 as Technical Mate, in the scale of Rs 3,050 – 4,590/-. He was one of the applicants in OA No. 616/97 whereby the applicants had claimed absorption in Group C posts instead of Group C posts as proposed by the respondents. The said application along with other connected applications was disposed of with a direction to the General Manager to consider the case of the applicants in appropriate Grade in Group C for absorption in accordance with the directions contained in the Railway Board Circular dated 08-07-1993 as also the Board's order dated 09-04-1997 and the ruling of the Supreme Court in V.M. Chandra's case. No final orders have been passed by the G.M. in these cases and the applicant continues as Mate. Other facts as contained in the other O.A. are the same and the claim of the applicant in this OA is also the same as in the other.

9. Respondents have contested the O.A. According to them, the applicants have not completed the requisite three years of regular service as required and further they are over aged.

10. During the pendency of the O.A., a submission was made by the counsel for the applicant that since age restriction had been made only the Instructions dated 28-06-2006, and as such, vacancies upto that date should be filled up only as per the pre-amendment rules. Hence, the following order was passed on 28-04-2008:-

"For adjudication of this case, it is essential to ascertain number of vacancies that existed prior to 28-06-2006 when amendment to the recruitment rule came into effect. Only against vacancies anterior to 28-06-2006 that the applicants would be eligible, subject to their fulfilling conditions in Annexure A-2 notification. Respondents are directed to file an affidavit indicating the total number of vacancies that

existed prior to 28-06-2006 and break up thereof in the 10% quota."

11. Respondents have confirmed that the total number of vacancies required to be filled up prior to 28-06-2006 against the 10% quota was 19, the break up being UR 15, SC 3 and ST 1.

12. Counsel for the applicant submitted that admittedly, the applicants are skilled artisans and in so far as service of three years is concerned, in the impugned notification the respondents have indicated three years of 'regular service' whereas the Railway Board's instructions specify only service. And, since even prior to their regularization, the applicants had been working as skilled artisans, albeit on a temporary status skilled artisans, that part of experience too should be considered, at least 50% thereof, as available in respect of ACP benefits. As regards age limit, the counsel submitted that for the vacancies arisen anterior to 28-06-2006, there is no question of prescribing age restriction.

13. Counsel for the respondents submitted that since the latest rules provide for 3 years regular service and age restrictions and the vacancies as per the pre-amended rules have not been filled up, the present eligibility conditions shall have to apply.

14. Arguments have been heard and documents perused. Two questions are to be answered here:-

- a) Whether for the vacancies arisen anterior to 28-06-2006, whether the age restriction is applicable.
- b) Whether the term 'service' means 'regular service' as claimed by the respondents in their Annexure A-4 impugned order or it could be otherwise too.

As regards (a) above, vide the decision in the case of *Y.V. Rangaiah vs J. Sreenivasa Rao* (1983) 3 SCC 284, this question arose and the Apex Court has held

that vacancies prior to the amendment should be filled up by pre-amended recruitment rules only. However, where a conscious decision has been taken not to fill up the vacancies on the basis of unamended rules, and the vacancies were kept unfilled till the amendment took place, then these vacancies could be filled up as per the revised recruitment rules. In this connection, reference is invited to the case of K. Ramulu (Dr) v. S. Suryaprakash Rao (Dr), (1997) 3 SCC 59, wherein, the Apex Court, referring to Rangaiah's case (supra) held as under:-

"When the vacancies were not being filled up in accordance with the existing Rules, this Court had pointed out that prior to the amendment of the Rules, the vacancies were existing and that the eligible candidates were required to be considered in accordance with the prevailing Rules. Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As a proposition of law, there is no dispute and cannot be disputed. But the question is whether the ratio in Rangaiah case⁷ would apply to the facts of this case. The Government therein merely amended the Rules, applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. It is true, as contended by Mr H.S. Gururaja Rao, that this Court has followed the ratio therein in many a decision and those cited by him are P. Ganeshwar Rao v. State of A.P , P. Mahendran v. State of Karnataka , A.A. Calton v. Director of Education¹⁰, N.T. Devin Katti v. Karnataka Public Service Commission, Ramesh Kumar Choudha v. State of M.P. In none of these decisions, a situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the respondent for the reason that Rule 3 contemplates making of an appointment in accordance with the existing Rules.

13. It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the Rules, Rule 3 of the General Rules is not of any help to the respondent. The ratio in the case of Ramesh Kumar Choudha v. State of M.P.-is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by this Court. As stated earlier, the Government was right in taking a decision not to operate Rule 4 of the General Rules due to their policy decision to amend the Rules."

15. In the instant case, it is not disputed that there was earlier a notification (Annexure A-2) calling for applications, which did not have any age restrictions. Thus, there has been no intention on the part of the respondents not to fill up as per the pre-amended recruitment rules. Thus, it is the case Y.V. Rangaiah (supra) that would apply. Hence, age restriction does not apply to fill up those vacancies which

arose prior to 28-06-2006.

16. As regards (b) above, the stipulation as per the I.R.E.C. as amended by correction slip No. 174 extracted above, is three years service and nowhere the term 'regular service' is indicated in that rule. It is trite law that when statute contains a particular stipulation, the same cannot be varied through an administrative instructions. See DDA v. Joginder S. Monga, (2004) 2 SCC 297, wherein the apex Court has observed, "*....in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter.*" Thus, when the statutory provision does not refer to the term, 'regular' the same cannot be introduced by the executive instructions like Annexure A-2. However, the question that further crops up is whether the term 'service' obtaining in Rule 145 of the I.R.E.C. means only 'regular service' in which event, there would be no conflict. In order to ascertain the same it is to be seen as to whether the Code differentiates between 'service' on the one hand and 'regular service' on the other. If the term service is different from the term, 'regular service' and the Respondents meant regular service and not otherwise, then the latter term would have been used in the place of the term 'service'. For, '*when the same statute uses two different words then prima facie one has to construe that these different words must have been used to mean differently.*' (See Kanhaiyalal Vishindas Gidwani v. Arun Dattatray Mehta, (2001) 1 SCC 78) . In the very same code, in respect of other posts, the Code uses the term 'regular service' as for example –

In Rule 126 of the Manual, it has been prescribed as under:-

128. (1) The posts in the category of Commercial Clerks in the pay scale Rs. 3200-4900 will be filled as under:

(i) 50% by direct recruitment through Railway Recruitment Board;

(ii) 33- $\frac{1}{3}\%$ by promotion by a process of selection from eligible Group 'D' categories of staff as specified by the Zonal Railways as per procedure prescribed in para 189; and

(iii) 16- $\frac{2}{3}\%$ by promotion entirely on merit of Matriculate

Group 'D' employees from eligible categories, as specified by the Zonal Railways for (ii) above, with a minimum of 2 years regular service in the concerned seniority unit on the basis of a competitive examination consisting of Written Test and Record of Service of 85 and 15 marks respectively.

[Authority : Ministry of Railway's letter No. E(NG)I-2003/CFP/2 dated 22.9.2003]

Such a stipulation of regular service has been specified in Rule 127, 128, 143, and 160 of the Rule, while in respect of 145, relating to Junior Engineers, the stipulation is only 'service' and not 'regular service'. Hence, it could be safely held that when the Manual specified only service without the qualifying term 'regular' prescription of the same by the respondents in their notice vide Annexure A-2 is incorrect. The applicants do admittedly possess the requisite service of three years.

17. Viewed from the above, it is evident that the applicants fulfill the condition relating to the number of years of service as skilled artisans and by virtue of the fact that age restriction is not applicable to the vacancies prior to 28-06-2006, the respondents shall permit the applicant to take up the limited departmental competitive examination as and when held.

18. It is however, open to the respondents to modify the term 'service' in Rule 145 of the Establishment Manual as 'regular service', though the same would apply only prospectively and not retrospectively.

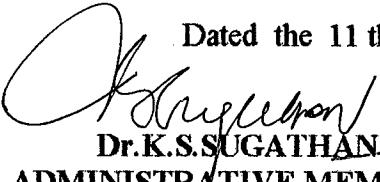
19. The respondents have filed an additional affidavit on 30th June, 2008 confirming the existence of vacancies prior to 38-06-2006 and have also reiterated their averment made in para 4 of the counter that the applicant, though in skilled grade is not a regular employee and he is yet to be absorbed as a regular employee. If the applicant is subjected to the Railways D & A Rules, in his existing status, notwithstanding the fact that he is yet to be absorbed as a regular employee, he



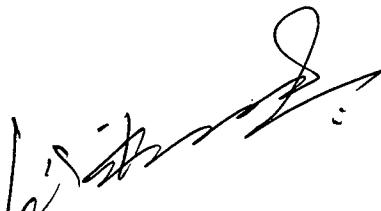
should be treated as having been in the skilled grade for a period of more than 3 years for the purpose of ascertaining his eligibility to participate in the examination in question.

20. The O.As. are, therefore, allowed subject to the condition that under the present status, the applicant is covered by the Railways Discipline and Service Rules. Respondents are directed to entertain the candidature of the applicants also in respect of pre-28-06-2006 vacancies of Junior Engineer and proceed further with the conducting of the examination, as and when they choose to hold the examination. No costs.

Dated the 11 th July 2008.


Dr. K.S. SUGATHAN

ADMINISTRATIVE MEMBER


Dr. K.B.S. RAJAN
JUDICIAL MEMBER