

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 121/2003

WEDNESDAY THIS THE 29th DAY OF MARCH, 2006.

C O R A M

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

- 1 P. Rajendran S/o Ponnusamy
Section Engineer, Permanent Way West
Southern Railway, Palghat
residing at Railway Quarters No 14-A Railway Colony
Palakkad Junction, Palakkad
- 2 R. Gopinath S/o P.B. RUKmangathan
senior Section Engineer
Permanent Way/ Southern Railway
residing at No. 48, Railway Quarters
Coonoor Nilgiris District. Tamil Nadu
- 3 K.K. Salim S/o Karthikeyan
section Engineer/ Permanent Way
Palghat
residing at Railway Quarters, Old colony
Palakkad PO, Palakkad.

Applicants

By Advocate Mr. TCG Swamy

Vs

- 1 Union of India represented by the
Secretary to Government of India
Ministry of Railway, New Delhi.
- 2 The General Manager
Southern Railway Headquarters Office
Park Town PO, Chennai-3
- 3 The Chief Personnel Officer
Southern Railway, Headquarters Office
Park Town PO,
Chennai-3

4 The Senior Divisional Personnel Officer
Southern Railway, Palghat Division,
Palghat.

5 G. Ramani, Assistant Divisional Engineer,
Metropolitan Transport Project Southern Railway
Egmore, Chennai-8

6 R.Srinivasan, Assistant Divisional Engineer
Metropolitan Transport Project,
Southern Railway, Egmore, Chennai-8

7 R.Manivasagam, Section Engineer (Works)
Construction Southern Railway, Egmore
Chennai-8

8 E.S. Selvaraj, Senior Section Engineer (Bridges)
Southern Railwahy, Construction, Egmore
Chennai-8

9 K. Rjendran, Assistant Divisional Engineer
Construction Southern Railway,
Podanur Junction.

10 K. Rajendran, Section Engineer (Bridges)
Southern Railway, Construction, Egmore
Chennai-8

11 M. Velayudhan, Assistant Divisional Engineer
Construction, Southern Railway
Calicut.

12 S. Alagarsamy
Assistant Executive Engineer (Machines)
Southern Railway, Chennai

13 S. Srinivasan, Assistant Divisional Engineer,
Construction, Southern Railway,
Chennai-8

14 P.P.Mandal Assistant Executive Engineer (Railway Electrification)
Southern Railway, Egmore
Chennai

15 P. Pandurangan,
Assistant Divisional Engineer,
Southern Railway, Katpadi
Velur District

Respondents.

By Advocate Mrs. Sumathi Dandapani for R 1-4
By Advocate Mr.A. Prabhu Arumugham for R 7 & 9 to 15

ORDER**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN**

The applicants in this O.A. who are working as Section Engineer / Senior Section Engineer in Permanent Way in Group-C service of the Palghat Division of Southern Railway, are aggrieved by their non-inclusion in the panel of selected candidates to the Group- B Service of Assistant Divisional Engineers in the Civil Engineering Department of Southern Railway. According to the factual position submitted by them, a list of eligible candidates in the order of seniority was communicated by the 4th respondent by Annexure A-1 and the applicants' names figured at Sl. No. 203, 199 and 205 respectively. The total vacancies notified was 48 (UR -41, SC- 5 and ST- 2), the written examination was notified to be held on 24.11.2001 with supplementary examination fixed on 15.12.2001. The applicants appeared in the written examination and they were called for the viva voce. only 68 persons qualified in the written examination as per Annexure A-4 list and the applicants were at Sl. Nos. 50, 53 and 55 respectively. The applicants were under the bonafide belief that they would be included in the panel as they had performed well in the interview. No final select list was published in the Palghat Division but a panel of selected candidates was published by the third respondent by Annexure A-5 dated 5.7.2002 and 46 persons were included therein of which 12 belonged to SC community and 1 to ST and the remaining 33 belonged to the general category. It is the case of the applicants that persons who are arrayed as party respondents herein and found in the above list at S.Nos. 38, 29, 40, 14, 39, 17, 25, 30, 36 and 37 respectively

were ineligible to be placed in the panel. The last person selected and placed in the panel was just above the second applicant in the order of seniority and if only the persons who were otherwise ineligible were to be excluded, all applicants would have found place in the panel.

2 It is further averred that respondents No.5 and 6 are persons who were unauthorisedly absent for over one year and had left the country without permission of the Railway authorities and they were facing major penalty proceedings and later the same were dropped and their inclusion in preference to the applicants is not on merit but on extraneous consideration. Similarly respondent No. 7 who was facing disciplinary proceedings, had one vacancy being kept for him and he should not have been included in the list and in his place the second applicant should have been placed in the panel at least provisionally. Further, respondents 9 to 15 are members of the SC community and they have no right to be charged against general category vacancies in terms of Railway Board order No. RBE 114/97 dated 21.8.1997 and inclusion of this respondent is clearly illegal. The 8th respondent was also facing major penalty proceeding and therefore he had also no right to be placed in the panel. The applicants have also alleged that assessment of vacancies had not been done properly and vacancies likely to arise on account of promotion to Senior Scale during the interregnum had not been taken into account.

3 On the above grounds the applicants have sought for the following reliefs:

- (i) Call for the records leading to the issue of Annexure A5 and quash the same to the extent it excludes the applicants

and includes the respondents 5 to 15

(ii) Direct the respondents 1 to 4 to include the names of the applicants in A5 at the appropriate place and grant them the consequential benefits thereof on par with those who are included in the A5 panel.

(iii) Award costs of and incidental to this Application.

(iv) Pass such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case

4 In the first reply statement filed on behalf of the official respondents 1 to 4 they denied the allegation that ineligible persons have been included in the panel and averred that instructions contained in Para 204(8) of Section A, Chapter-II of IREM Vol. I had been scrupulously followed and those who had secured 80% marks and above had been graded as 'Outstanding' and those who had secured below 80% but above 60% had been graded as 'Good'. For qualifying for inclusion one has to secure 90/150 in the written examination and 30/50 in the record service and viva voce put together with at least 15 marks in the record of Service. The applicants having not secured the same have no right to claim for inclusion of their names in the panel. Regarding the party respondents it has been submitted that the 5th respondent was charge-sheeted for imposition of a major penalty but the Disciplinary Authority had decided to impose the penalty of cut of one set of privilege pass and two sets of PTOs for the year 2002 and therefore he was free from major penalty proceedings and eligible to be considered for empanelment for Group-B service. The 6th respondent was sanctioned leave for a period of five years but he had cancelled his leave and reported for duty on 14.8.2000. Respondent No. 7 was not included as a major penalty proceeding under Discipline &

for

Appeal Rules was pending against him and one vacancy was set apart for him subject to the outcome of the major penalty proceeding pending against him. As regards respondents 9 to 15 it was averred that as per the law laid down in the cases of R.K. Sbarwal and Vir Pal Singh Choudhari, an SC/ST employee is entitled to compete against unreserved posts and the empanelment of SC/ST employees against non-reserved posts in a particular cadre/grade will not be counted against the reserved posts. Since the reservation is applicable to each cadre/grade separately the averment that the respondents have got accelerated promotion and as such they are not entitled for promotion to group-B service is not maintainable. As regards the 8th respondent, even though there were criminal cases pending against him, he was empanelled in terms of Railway Board's letter dated 21.1.1993.

5 The applicants strongly denied the averments and contentions raised by the respondents in the rejoinder that they had not secured the required minimum marks in comparison to respondents 5 to 8. They maintained that respondents 5 & 6 were unauthorisedly absent from service for long periods. As regards the 5th respondent the conversion of major penalty into a minor penalty showed that there was an element of misconduct and there was conscious effort on the part of the respondents to consider him by reducing the major penalty proceedings to that of withholding of increment only. The applicants maintained that the 6th respondent had proceeded to Malaysia and was employed there. From the records and passport available with respondents it would be evident that he was very much employed there. The applicants asserted that files

of the entire proceedings may be called for by the Tribunal for perusal. They further submitted that there was no necessity for keeping one post for the 7th respondent when a major penalty proceeding was pending against him. Regarding respondents 9 to 15 they were all persons who had reached their position in the feeder category not by virtue of their merit but by virtue of their community status. Since they were not placed above the applicants in the order of seniority they could be placed only against reserved posts and not otherwise. It was also reiterated that the 8th respondent who was under trial in a criminal case could not have been included in the panel and his inclusion was arbitrary and for extraneous consideration.

6 On the submission made in the rejoinder the selection records were called for and the learned counsel for applicants perused the same and on a comparison made on the marks obtained by the applicants and the party respondents it was found that the contention of the respondents that the applicants had not secured the qualifying marks was not correct. The respondents thereafter filed a second reply statement regretting the error and stating that all the applicants had secured the minimum qualifying marks of 90 out of 150 in the written examination and also 30 out of 50 in viva voce and record of service put together and were declared fit. But they could not be empanelled as there were enough candidates above them available on the basis of seniority and suitability to fill up the assessed vacancies. They further averred that the order of empanelment was done by a Committee consisting of three Heads of the Departments namely Chief Engineer, Chief Personnel Officer, Chief Signal and

Telecommunication Engineering and it has been done in terms of Para 204.8 and 204.9 of IREM Vol. I. The applicants cannot claim any absolute right to be empanelled on the basis of fitness, as empanelment is done to the extent of vacancies assessed. Sixty two candidates were found fit out of 68 who had attended the viva voce. The position of the applicants were at 50, 53 and 55 and the last person who was empanelled was at SI. NO. 49. They also refuted the allegation in the rejoinder regarding the inclusion of the respondents 5 to 8 and averred that their inclusion were strictly according to the Railway Board orders vide letter dated 21.1.93. Since only 48 vacancies were available and the applicants were at SI Nos. 53, 50 and 55 they could not be included for want of vacancies and no malafides could be attributed against the mode of selection adopted by the Selection Committee and hence prayed that Annexure A1 may not be interfered with and the OA may be dismissed.

7 The party respondents R-7 and R 9 -15 have also filed a reply statement and no statement has been filed by R-8. They have submitted that they have been selected only on general merit applicable to the last general candidate and also that they are much above the last general candidate in the integrated seniority and therefore they were rightly empanelled not on any relaxation or concession. The law laid down in Indra Sahwney & Others Vs. Union of India and Others (JT 1992(6)SC 273) and R.K. Sabharwal's cases is well settled and the general principle followed is that the general posts are to be filled up by candidates including SC/ST on general merit and seniority. In the Railways there are four types of service Group-A to Group-D and reservation is available for



SC/ST and OBC in different cadres and grades in each category Reservation rosters are to be prepared separately for each cadre and in the category of Permanent Way Inspectors there are four cadres namely Senior Section Engineer, Section Engineer, Junior Engineer Grade-I and Junior Engineer Grade-II and seven reservation rosters have been operated for each grade. For entry into Group-B reservation roster of Group-B service is to be followed for assessment of vacancies and not the Reservation roster of Group-C cadres from which candidates have been appointed. The CAT Madras Bench in O.A. 988/94 in A.V. Raj Vs. Union of India and others (O.A. No. 988/2004) has clearly enunciated this position. The Railway Board by their letter dated 24.6.1999 (RPE / 147/99) have clarified that if SC/ST candidates who have fulfilled the conditions are coming within the zone of eligibility, they have to be considered for promotion for the general category posts also. Therefore the contentions of the applicants are totally against the law laid down by the Hon'ble Supreme Court and against the reservation policy of the Government of India and the constitutional safeguards under Article 16 of the Constitution of India.

8 We have heard the learned counsel Shri T.C. Govindaswamy appearing for the applicants, Smt. Sumathi Dandapani for Respondents 1 to 4 and Shri Prabhu Arumugham for Respondents 7 and 9 to 15. The learned counsel for the party respondents 7 and 9 to 15 extensively argued the matter relating to placement of SC/ST candidates against the unreserved vacancies and filed a Compilation of the various Supreme Court judgments and the Railway Board circulars on reservation in support

of his arguments. The counsel strongly refuted the contentions of the applicants that assessment of vacancies had not been done properly and that the respondents 9 to 15 were ineligible for placement against the unreserved vacancies. It was submitted that the applicants have no locus standi to put forward this argument after taking part in the selection in view of the Doctrine of Law that a person cannot approbate and reprobate. He argued that the Application was more in the nature of a Public Interest Litigation . The law relating to reservation is well set out and settled by the judgment of the Hon'ble Supreme Court in Indra Sawhney and Others Vs. UOI and Others (JT 1992 (6)SC 273), R.K. Sabharwal's case, Virpal Singh Chauhan's case etc. The recent judgment of the Madras Bench of the Tribunal in A.V.Raj and Others Vs. Union of India and Others in O.A. 988 of 2004 dated 27.9.2005 in which identical issue has come up, the Tribunal held that the Railway Board order dated 7.8.2002 had clarified the matter unambiguously and had to be necessarily followed. The learned counsel for the official respondents maintained that the selection has been made strictly under the rules prescribed in Para 204(8) of the IREM and the instructions of the Railway Board dated 21.1.1993. On behalf of the 7th respondent it was argued that minor penalties are not a bar for promotion and such cases are governed by the instructions of the Railway Board and it is not the case of the applicants that he was not qualified for promotion.

9 We have considered the arguments of the learned counsel and meticulously perused the judgments and instructions produced by the parties. We have also perused the selection file produced by the official respondents.

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10 Since the applicants have challenged the inclusion of the party respondents 5 to 15 on different grounds we proceed to examine the grounds raised one by one. We shall first take up the challenge raised against the selection of respondents 9 to 15 who belong to SC community and the main ground raised against their inclusion is that they have no right to be selected against general category vacancies. The applicants have relied on the Railway Board order No. RBE 114/97 dated 21.8.1997 (Annexure A-6). The applicants also contend that these persons were recruited to the initial cadre much later than the applicants and they reached the scale of pay of Rs. 2000-3200/6500-10500 earlier than the applicants only by virtue of accelerated promotions granted to them on account of their communal status and therefore they can be accommodated only against the vacancies meant for the SC community and not against the general category vacancies. The respondents have contended that there is no legal bar for empanelling the party respondents against non-reserved posts and that the averment that the respondents 7 and 9 to 15 had accelerated promotion and as such they are not entitled for promotion to Group-B service is not maintainable since reservation is applicable in each cadre/grade. The applicants in the rejoinder submitted that once a person is identified as a member of SC/ST they can be promoted only against SC/ST vacancy and that will be very much against A-6 orders of the Railway Board. They are not entitled to be placed above the applicants in the matter of seniority as they were promoted prior to 85th and 87th amendment of the Constitution and that in view of the directions of the Hon'ble Supreme Court in Civil Appeal No. 5629/97 in E.A. Sathyanesan Vs. V.K. Agnihotri and Others the respondents are bound to

recast the seniority and reassess the persons who were eligible to be considered for promotion. The respondents 9 to 15 in their reply statement have contended that the rule of reservation for SC/ST candidates in appointment and promotions are based on the following principles:

(a) SC/ST reserved posts are intended to be filled up only by the eligible respective community candidates

(b) General (unreserved) posts are open to be filled up by all the eligible candidates including the SC/ST candidates on general merits and seniority and

(c) Reserved posts are reserved for SC/ST candidates and the Unreserved/General posts are not reserved for the candidates belonged to the communities other than SC/ST communities.

11 All the SC/ST candidates herein have qualified on their own merits and according to their inter-se seniority they are above the applicants in the inter-se seniority and the last general candidate and that reliance of the applicants in the Railway Board's letter NO. RBE/114/97 dated 21.8.1997 is totally misconceived.

12 The applicants have mainly relied on Annexure A-6 Railway Board's order dated 21.8.97. We find that this order is relating to maintenance of rosters which were converted into post based rosters from the existing vacancy based rosters as a consequence of the Constitution Bench judgment in R.K. Sabharwals case that reservation should apply to posts and not vacancies. These orders contain instructions on initial operation of the roster to determine the actual percentage of representation of the reserved categories in each cadre and it has been clearly stated therein that the roster is not a running account and once all the sanctioned posts

are filled by appointment of persons of reserved categories the replacement of the incumbents shall be by category. These instructions have nothing to do with the contentions of the applicants in this O.A. as the roster is for the assessment of the vacancies and once the vacancies are assessed as belonging to each category the roster becomes irrelevant. In this case, out of 48 vacancies 5 vacancies were assessed for SCs and 2 for ST and the rest as general ~~as~~^{is} the basis of the roster. Once the assessment of the vacancies is completed the procedure for filling up those vacancies ~~are~~^{is} governed by the relevant instructions of the Railway Board and the general instructions in this regard issued by the Department of Personnel which we will come to later. The applicants have at one stage contended that the assessment of the vacancies had not been properly undertaken. This contention of the applicants has to be rejected in view of the fact that they have raised the issue after participation in the selection process and also they have not produced any material to show that the roster had not been prepared in accordance with the rules in force.

13 The other contention is that the respondents 9 to 15 were recruited much later than the applicants and they reached the pay scale of the feeder cadre earlier than the applicants only by virtue of accelerated promotion. It is seen from the records and the reply filed by the party respondents that for a vacancy in the cadre of Group-B service the eligible categories from various feeder cadres in the same Department are being called for and their integrated seniority prepared as the basis for selection. For example, for selection to the post of AXEN/ADEN a Group-B cadre of

the Civil Engineering Department, three categories of Group-C service in the cadre of Section Engineers and Senior Section Engineers belonging to categories of Permanent Way Engineers, Works Engineers and Project Engineers are eligible. Based on the inter-se seniority arising after amalgamation of the three categories, candidates are called for selection. The applicants have not been able to put forward any case that their inter-se seniority was not assigned properly vis-a-vis the respondents in the feeder category and they have not produced any seniority list or other records to prove this averment. Merely contending that these persons had come to the grade much earlier than the applicants due to accelerated promotion is not sufficient. They have not made any representation regarding their seniority at the appropriate time and therefore the stand of the learned counsel for the respondents that they have waived their rights to raise such issue at this stage is accepted. Even if it is conceded that these respondents had reached their position by virtue of accelerated promotion, the claim of the applicants that they can continue to be placed only against reserved post does not have any merit in view of the judgments of the Principal Bench and the Madras Bench of the Tribunal, and also the various Railway Board instructions on the subject referred to below.

14 The above question has been repeatedly considered and answered by several juridical forums as well as by the Railway Board. To narrate the history chronologically, the first mile stone in the determination of the policy of reservation was Indra Sawhney's case followed by R. K. Sabharwal's case. The issues arising out of the implementation of the

policy laid down further came up for consideration before the Apex Court and the Constitution Bench of the Hon'ble Supreme Court in R.K. Sabharwal Vs. State of Punjab (AIR 1995 SC 1371) held as follows:

"6. The expressions "posts" and "vacancies" often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relating to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

7. When all the roster points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Schedule Castes/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong. Jeevan Reddy, J speaking for the majority in Indra Sawhney V. Union of India , AIR 1993 SC 477 observed as under (Para 96):-

" Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by Other Backward Classes, 150 by Scheduled castes and 80 by Scheduled Tribes. At a given point of time, lest us say the number of members of OBCs in the unit service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e. Till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the number of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be."

15 In Veerpal Singh Chauhan's case (1995 (6) SCC 684) which was also referred to by the parties the main question decided was seniority between the general and reserved categories in the promoted category. The Railway Board in a series of circulars have issued instructions based on the law laid down in R.K. Sabharwal's case. The first circular which has been issued is RB 145/97 on which the applicants are relying and the one which we have already stated relates to preparation of roster at the initial stage and its operation thereafter which is not relevant to the issue raised in the instant case. The next circular is that of 1999 NO. RBE 147/99 dated 24.6.1999 in which the points raised by certain Railways were clarified. The points raised at (i), (ii) and (iv) in this connection and the replies furnished therein are relevant in this context.

(i) Whether SCs/STs are required to be considered against the reserved posts only

(i) It is clarified that SCs/STs can only be considered against the reserved posts, unless such posts have been temporarily or permanently de-reserved as per extant rules. However SCs/STs fulfilling the eligibility conditions as general candidates can also be considered against the unreserved posts.

(In this connection, attention is drawn to the instructions contained in para 3 of Board's letter No. E(SCT)68 CM 15/10 dated 23.10.69, which stipulates that the quota prescribed is the minimum and not the maximum inter alia meaning thereby that SCs/STs fulfilling the eligibility conditions have to be considered against the non-reserved posts too)

(ii) Whether all the eligible SCs/STs who are coming within the zone of consideration and fulfilling the eligibility conditions can be considered for selection against non-reserved posts if there are no reserved posts earmarked for them?

(ii) All the SCs/STs who are fulfilling the eligibility conditions and coming within the zone of consideration shall be considered against the non-reserved posts, even if there are no reserved posts earmarked for them.

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(iv) Whether SCs/STs who are occupying the present position in the feeder cadre due to application of reservation rules are eligible to be considered for General posts if

(iv) It is not necessary that, for being considered for general posts, an SC/ST candidate must progress all along as a general candidate. If SC/ST candidates are fulfilling the eligibility conditions and

they are coming within the zone of consideration and fulfilling the eligibility conditions.

coming within the zone of consideration, they have to be considered for promotion Against the general posts too.

16 Further in the letter dated 1.7.2002 the position stated in the circular issued vide para (iv) was clarified by stating that "it is not necessary that for being considered for general posts, an SC/ST candidate must have progressed all along with the general candidates. It is hoped that this clarifies the position".

17 The next circular NO. 128/2002 dated 7.8.2002 deals specifically with the subject matter of treatment of SC/ST candidates promoted on their own merit. Sub paras (i), (ii) and (iii) reproduced below clarify and confirm this point further that SC/ST candidates when appointed on their own merit will not be adjusted against the reserved points but would be adjusted against under reserved points.

(Railway Board letter No.128/2002 dated 7.8.2002)

Subject: Reservation in promotion-Treatment of SC/ST candidates promoted on their own merit.

The Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training vide their OM NO. 36028/17/20010-Estt (Res) dated 11.7.2002 have considered the reference from various Ministries regarding adjustment of SC/St candidates promoted on their own merit in post based reservation rosters and clarified as under:-

(i)The SC/ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against unreserved points.

(ii)If an unreserved vacancy arises in a cadre and there is any SC/ST candidate within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on the plea that the post is not reserved. Such a candidate will be considered for promotion

alongwith other candidates treating him as if he belongs to general category. In case he is selected, he will be appointed to the post and will be adjusted against the unreserved point.

(iii)SC/ST candidates appointed on their own merit (by direct recruitment promotion)and adjusted against unreserved points will retain their status of SC/St and will be eligible to get benefit of reservation in future/further promotions, if any.

(iv)50% limit on reservation will be computed by excluding such reserved category candidates who are appointed/promoted on their own merit.

18 On certain doubts being raised against (i) of para 1 of the above quoted letter, the Railway Board again issued RB 103/2003 dated 20.6.2003 clarifying that SC/ST candidates selected by applying general standard will be adjusted against unreserved vacancies and that the Board letter dated 7.8.2002 should be followed in all promotions held after its issue.

19 The sum and substance of the Board 's letters and the general instructions of the Department of Personnel & Training and the law laid down by the Hon'ble Supreme Court all affirm the position conclusively that SC/ST candidates who are selected by applying general standard i.e. on merit and falling within the zone of consideration and possessing all other eligibility conditions have to be considered against the general posts also irrespective of the fact whether they hold the position of SC/ST in the feeder cadre and that it is not necessary that for such consideration an SC/ST should have progressed all along as a general candidate in their whole career. Hence the claims of such candidates cannot be denied and the contentions of the applicants in this regard have to be rejected. It is however, observed that the applicants have made a feeble attempt to contend that their seniority against SC/ST candidates in the feeder cadre

should have been governed by the judgement in Virpal Singh Chauhan's case and also Annexure A-8 judgment of the Hon'ble Supreme Court in Civil Appeal No. 5629 of 1997 in E.A. Sathyanesan Vs. V.K.Agnihotri and Ors. It was mentioned during arguments that this judgment has been appealed against and the outcome is not known. In this case, the feeder cadres are distributed among different categories in Group-B service and promotions are based on integrated seniority determined on the basis of entry in the grade and hence it is not possible to decide seniority of the selected candidates vis-a-vis the others. Moreover the seniority of the feeder cadre is not at all an issue under challenge in this O.A. and was not seriously contested by the applicants and if at all they were aggrieved by such seniority in the feeder cadre they should have represented at the right time and it is now too late to contest this issue. Therefore the challenge against the respondents 9 to 15 fails. The judgment of the Madras Bench of the Tribunal in O.A. 988/2004 challenging the same selection has settled the matter beyond doubt.

20 Next we proceed to examine the challenge to the selection of respondents 5 to 8 on the ground of procedural irregularities and the ineligibility of the 7th respondent on the ground of pendency of disciplinary proceedings as well as absence of confidential records for the years when on leave. In the reply statement filed by the official respondents, it has been stated that the 5th respondent figures at Sl. No. 42 in the selection panel, he was unauthorisedly absent from duty from 15.6.2000 to 29.11.2000. The Disciplinary Authority found that the absence was due to an unexpected accident. Taking note of his sincerity hard work and also

on humanitarian consideration that he had met with an accident, the Disciplinary Authority had only imposed a minor penalty by cutting one set of privilege pass and two sets of PTO for the year 2002. Hence when the selection was conducted, he was not facing any major penalty proceedings. While appraising the records of service for the five years commencing from 1997-98 up to 2000-01 since he was absent only for six months, only 3 marks have been awarded for record of service. Regarding the 6th respondent it has been submitted that since his wife was at Singapore he was granted ex-India leave from 21.1.91 to 31.12.2004 to join his wife. Though the leave was sanctioned due to personal reasons he cancelled the leave and reported for duty on 14.8.2000. Hence he had effectively availed leave from 1.1.1998 to 13.8.2000. Since five years period is taken for appraisal as far as this respondent is concerned rating was done w.e.f. 1995-96 two years preceding the five years' assessment period. This respondent was also figuring as the 10th respondent in OA 30/2003 which was filed by one Shri S. Sasi challenging the same selection before this Tribunal and the Tribunal taking into consideration all these facts came to the conclusion that the procedure for awarding of marks has been on the basis of the Board's letter dated 16.1.2001 and that the procedure has been followed in the instant case as well. The applicants in their rejoinder has reiterated that it was clear from the reply of the respondents that a major penalty proceeding against the 5th respondent was converted into a minor penalty proceedings and that the very fact that they have been imposed with penalty proves that there was a finding of guilt. The applicants also reiterated the allegations that the 5th and 6th respondents were employed in Malaysia and that the respondents

5 & 6 were favoured by extraneous consideration and ulterior motives.

21 The case against Respondent No. 7 is that he was not eligible to be included in the panel on account of the pendency of the disciplinary proceedings and one vacancy has been kept apart for him rendering the sealed cover procedure a mockery. If that vacancy was available the second applicant would have been placed in the panel at least provisionally. The respondents have contended that the 7th respondent who is figuring at Sl. No. 25 in the panel was included in the final panel and at the time of approving the provisional panel a vacancy was reserved for him as per the conditions stipulated in the Board's letter dated 21.1.1993. The provisional panel was prepared on 3.7.2002. He was imposed the minor penalty of withholding of increment w.e.f. 1.5.2003 for 40 months with non-cumulative effect. Since the imposition of minor penalty was not a bar for being considered in empanelment for selection, the General Manager has approved inclusion of his name in the final panel on 20.12.2002.

22 As regards the 8th respondent it was alleged that he was also facing only a minor penalty charge and that was why his name was included in the panel. The sealed cover procedure ought to have been adopted and the next junior who had been found qualified should have been placed in the panel as it is admitted by the respondents that a criminal case is pending trial. The respondents have conceded that a criminal case is pending trial against the 8th respondent under the Railway Properties (unlawful Possession) Act but he was empanelled in terms of Railway

Banks letter dated 21.1.1993

23 In general, the respondents have contended that empanelment has been done by a Committee consisting of three heads of Departments and in terms of Para 204.8 and 204.9 of the IREM Vol.I. and that the further action taken to include some of the respondents in the final panel is purported to have been taken under the conditions stipulated in the Railway Board's letter dated 21.1.1993. Therefore, It would be relevant to extract the relevant Rule of IREM and the Board's letter of 1993.

Para 204.8 The successful candidates shall be arranged as follows:-

- (1) Those securing 80% marks and above graded as Outstanding
- (2) Those securing between 60% marks and 79% marks grades as Good.

Para 204.9:- The panel should consist of employees who had qualified in the selection corresponding to the number of vacancies for which the selection was held. Employees securing the gradation 'Outstanding' will be placed on top followed by those securing the gradation "good" interse seniority within each group being maintained.

(Railway Boards letter dated 21.1.1993)

Subject Promotion of Railway servants who are under suspension or against whom departmental proceedings/prosecutions have been initiated- Procedure and guidelines to be followed – Cases of promotion of Group-D and Group-C Railway servants.

In supersession of earlier instructions on the subject, Railway Board's letter No. E(D&A)88RG 6-21 dated 21.09.1988 (Bahri's RBO 1988 -II, 244 (RBE No. 211/88), it has been decided that the procedure laid down below shall be followed in the matter of promotion of Group-D and Group-C Railway servants against whom disciplinary/court proceedings are pending. These instructions shall apply to-

- (a) promotions from group-D to Group-C within Group-C and from Group-C to Group-B to selection posts and

(b) promotions within group-D from Group-D to Group-C and within Group-C to non-selection posts.

2 Cases of Railway servants to whom the procedure will be applicable- The procedure given below shall be applicable to:-

- (i) Railway servants under suspension
- (ii) Railway servants in respect of whom a chargesheet for major penalty has been issued and the disciplinary proceedings are pending and
- (iii) Railway servants in respect of whom prosecution for a criminal charge is pending.

3.1-Procedure to be followed- Such a Railway servant shall not be promoted even if already borne on a selection panel/ suitability list till after the results of the proceeding against him are known. There is, however, no objection to promote him if he is not under suspension and the proceedings already initiated are for the imposition of only a minor penalty.

3.2-Such a Railway servant as aforesaid, if not, already borne on a selection panel suitability list, should be called along with other eligible candidates to appear at the written trade/suitability test before the selection committee or the selection boards. His suitability for promotion as also his position in the selection panel/suitability list should be assessed as in the ordinary course.

3.3-On the basis of position assigned in the selection panel/suitability list, a list of qualified persons should be prepared keeping in view of the following:-

(a) It should exclude the names of those mentioned in terms (i) to (iii) of para 2 above

(b) It should include the names of those who are not under suspension and against whom disciplinary proceedings for the imposition of only a minor penalty; have been initiated.

3.3.1-In the case of promotion to selection posts. from the list of persons prepared on the above basis, a panel of the prescribed size as per extent orders less the number of persons excluded from the list vide para 3.3(a) above, who but for their suspension etc. would have figured in the selection panel should be prepared and announced as provisional selection panel.

3.3.2- In the case of promotion to non-selection posts, the list of persons prepared in terms of para 3.3 above equal to the number of actual vacancies plus anticipated vacancies should be announced as a provisional list.

3.4-The staff in the provisional selection panel/suitability list should be advised in clear terms that their position in the selection panel/suitability list is liable to be altered depending upon the

result of the proceedings against the staff referred to in para 3.3(a) above. Who but for their suspension, etc. would have been included in the panel. In the case of promotion to non-selection posts, posts in the promotion grade should be kept reserved for those referred to in para 3.3(a) above and only filled in an officiating capacity till finalisation of the proceedings against them.

24 It is seen from the Record that the respondents initiated a process of Selection to the posts of AXEN/ADEN and a total of 165 candidates attended the written examination against the assessed vacancies of 48, out of which 41 were for Unreserved, 5 for SC and 2 for ST. Based on the prescribed qualifying marks in the written examination 68 candidates qualified for viva voce except one who was declared medically unfit. Based on their performance in the written examination and viva voce, 62 candidates were found fit out of which 2 were declared as "Outstanding" in terms of Para 204.8 and they were placed on the top of the panel. One vacancy was kept unfilled against the ST short fall. The 7th respondent against who disciplinary proceedings were pending was not included in the panel and one post was kept vacant. Therefore excluding the above two vacancies, a provisional panel consisting of 46 persons was published and by the time final panel was published on 30.1.2003 the 7th respondent was cleared in the disciplinary proceedings and therefore he was included in the panel and hence against the assessed vacancies of 48, 47 candidates were empanelled.

25 There is no dispute regarding the written examination or viva voce or the placing of the two persons graded 'Outstanding' on top of the panel. As regards 5th and 6th respondents included in the panel at Sl. NO.

38 and 29 the question has been raised regarding the assessment of their records of service on the ground that they were unauthorisedly absent. It has been clarified that the 5th respondent was absent for 5 months for the period from 15.6.2000 to 29.11.2000 and that major penalty proceedings were initiated but had been considered sympathetically by the Disciplinary Authority and was imposed a minor penalty of cut of one set of privilege pass and two sets of PTOs for the year 2002 by penalty advice dated 30.5.2000. His record of service was assessed taking into account the period of absence of 5 months in the year 2000 to 2001 and against 5 marks he was awarded only 3 marks. All these contentions are borne out by the selection records. The minor penalty was also awarded before the conduct of the selection and therefore his inclusion in the panel is covered under proviso to Para 3.9 of Railway Board's letter referred to above. It states as under:

"Provided that where the penalty imposed is 'withholding of increment' and it becomes operative from a future date, the person concerned should be promoted in his turn and the penalty imposed in the promotional grade for a period which would not result in greater monetary loss. If the penalty imposed is 'Censure, recovery from pay, or stoppage of of Passes/PTOs. he may be promoted when due."

26 The case of the sixth respondent is more or less on the same lines but his effective period of absence on leave was for two and a half years period during the assessment period from 1.1.1998 to 13.8.2000. It is seen from the records that his rating was done therefore taking the two previous years in to account namely 1995-96, and 1996-97. This aspect was also looked into by this Tribunal in O.A. 38/2002 in which the same

panel was challenged by the applicant therein and it was held that duly constituted Selection Board had followed the procedure for awarding of marks. The contention of the applicants therefore are devoid of merit.

27 With reference to the challenge against the 7th respondent the position is different in as much as a major penalty proceeding was pending against him at the time of selection and this fact has been duly noticed by the Section Committee. He has been assessed on the basis of his records and his name has been mentioned in the order approving the panel keeping a vacancy reserved for him. The consideration of promotion of Railway servants who are facing disciplinary proceedings is covered by the procedure as prescribed in Railway Board's circular referred to above which provides^{date} the three classes of railway servants viz.(i) who are under suspension and (ii) against whom charge sheet for major penalty has been issued or (iii) criminal proceeding is pending should be assessed for their suitability and their position in the selection panel determined. But they should be excluded from the list of qualified persons on the basis of which the provisional panel has been prepared and the size of the panel will be as per the extant orders less the number of persons excluded and such persons for whom vacancies have been reserved would be promoted in their turn if the persons are fully exonerated. On a perusal of the Selection File it is seen that the respondents have prepared only one provisional panel dated 5.7.2002 consisting of 46 persons and a final panel issued ion 30.1.2003 consisting of 47 persons after including Shri R.Manivasagam, the 7th respondent. The instructions envisaged that a list of qualified persons should be prepared including the names of those who

are coming under any of the three categories referred to above. Admittedly, the respondents have prepared a list of qualified candidates as seen from para 2 of their additional reply statement i.e. 62 candidates were found fit. Out of this list the provisional panel of 46 candidates have been prepared. The list included the name of Shri Manivasagam who was facing a major penalty proceeding, in accordance with the above instructions his name should not have found place in the list of qualified persons or in the provisional list. There is thus a technical omission here that there should not have been any mention of Shri Manivasagam's name in the order approving the provisional panel. As he was not included in the panel as such, this omission does not vitiate the size of the panel as such. Subsequently, Shri Manivasagam was cleared in the disciplinary proceedings and he was imposed a minor penalty of withholding of increment for 40 months with non-cumulative effect. This order was issued on 20.11.2002 and it was followed by notice of appointment. In terms of the Board's orders para 3.6 that he has to be promoted in turn assigning position in the select panel. Para 3.6 reads:

"3.6 If the disciplinary proceedings against the person under suspension, etc. for whom a vacancy has been reserved, is finalised within a period of two years of the approval of the provisional panel in the case of promotions to selection posts or at any point of time in the case of promotion to non-selection posts and if such a person is inflicted only a minor penalty, he should automatically be assigned the position in the selection panel suitability list and his empanelment/enlistment announced and he may be promoted in his turn. If his junior has already been promoted before interpolation of his name in the selection/panel/suitability list, he should be promoted by reverting the junior-most person if necessary and his pay on promotion should be fixed under the normal rules.

If such a person as aforesaid is held guilty and awarded one of the major penalties of reduction to lower time scale of pay/grade etc. or reduction to lower stage in the time scale of pay, his case should be referred to the authority which approved the original selection panel/suitability list for consideration whether he is suitable for promotion in spite of the penalty imposed on him. If he is considered suitable for promotion, his case for promotion and fixation of pay etc. should be dealt with in the same manner as that of a person who is awarded a minor penalty as indicated above.

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28 Therefore ^{his} the subsequent inclusion in the panel cannot be faulted, in the light of Para 3.6 and and proviso therein which has already been extracted above by which also, he becomes eligible for promotion in his turn. An allegation has been made that the conversion of major penalty proceedings against him into a minor penalty becoming operative from a future date has been done to favour the individual and by virtue of inclusion in the panel he has been given an opportunity to make representation for inclusion in the future date. Since his case has already been decided in terms of the instructions in para 3.6 and read with the conditions in para 3.1 of the Board's circular we do not wish to make any comments on this and leave it there. However, we would observe that the mention of his name in the provisional panel order was in violation of the procedure prescribed for dealing with such cases and in fact defeats the very purpose of following a sealed cover procedure.

29 The case of the 8th respondent's ~~position~~ is much worse and his inclusion in the panel is a blatant violation of the procedural instructions on the subject. Admittedly he was facing criminal prosecution and strictly falls in the category (iii) of para 3 of the Railway Board's letter dated 21.1.1993. His name should also have been excluded from the list of qualified persons. The assessment made in the Selection Files and the other records go to show that the last column "Remarks" was left blank in his case whereas in other cases where penalty proceedings were pending it was specifically mentioned. Since there was no such mention, the Selection Committee included him in the provisional panel and whereas he should have been also similarly treated under the sealed cover procedure and one post reserved for him. In such an event the panel

would consist of only 45 persons and two vacancies will be excluded. If the 8th respondent is excluded from the list, the final panel would be reduced to 45, as a vacancy would have to be reserved for him as well. Thus the number of persons in the panel will remain the same. However, even though the inclusion of the 8th respondent was irregular, by exclusion of the 8th respondent the second applicant who is next in the list occupying the 50th position cannot get in to the panel in terms of Board's circular dated 21.1.1993.

30 Coming to the action taken subsequently for giving adhoc promotion to Shri Selvaraju, the 8th respondent, the respondents have produced the relevant file. It is seen from the file that Shri Selvararaju, represented that since he was empanelled for promotion and the case against him was filed in the year 1976 and that the prosecution was not able to muster evidence and as he is fully cooperating with the prosecution he may be considered for adhoc promotion as per the Railway Board letter dated 21.1.1993. The matter was therefore examined and it was considered that hat though the charges are grave since his case was pending for a long time and as some more time will be taken for recording proper evidence, under the provisions of the Railway Board's circular his case was considered for adhoc promotion. The procedure for adhoc promotion is prescribed in Para 5 of the circular ^{which} envisages review of such cases of prosecution not completed after expiry of two years. In this case 8 years had elapsed and the competent authority have taken a view that adhoc promotion can be given and he was promoted on adhoc basis by order dated 6.8.2004. This order of adhoc promotion has not been challenged in this O.A. and a mention has been made only as an off shoot

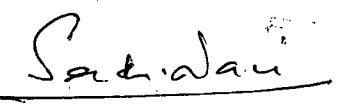
of the argument in this OA. The challenge is only against his inclusion in the panel which is found to be not in order. However, his inclusion as has been discussed above, will not confer any benefit on the applicants as already held. All that xxxx could be said in favour of the applicants is that since the 8th respondent was given adhoc promotion only after a period of two years, of inclusion in the panel the next eligible candidate in the list of qualified persons could have been accommodated in the vacancies reserved instead of keeping the vacancies unutilised. However, this is purely in the discretion of the respondents and there is no legal right accrued for the second applicant who is the next person to be included in the panel. The 8th respondent has not chosen to come before this Tribunal to defend his case.

31 In the light of the above discussions, the challenge against the selection fails and at this distance of time the only direction that can be given is to exclude the 8th respondent from the panel and to declare his selection/promotion subject to the finalisation of the criminal prosecution pending against him. To this extent Annexure A5 is to be modified by the respondents.

32 The O.A. is allowed partly to the extent mentioned above. No costs.

Dated 29.3.2006.


GEORGE PARACKEN
JUDICIAL MEMBER


SATHI NAIR
VICE CHAIRMAN

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