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Central Administrative Tribunal Lucknow Bench Lucknow

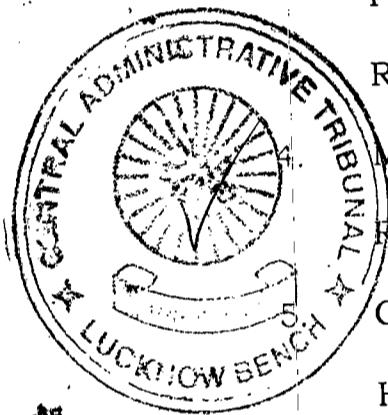
Original Application No. 67/2006 A.W. 60/2007 and 297/2007

This, the 21st day of May, 2009

**HON'BLE MR. M. KANTHAIAH, MEMBER (J)
HON'BLE DR. A.K. MISHRA, MEMBER (A)**

(O.A. No. 67/2006)

1. Shahid Riaz aged about 52 years son of late Inamul Hasan r/o II 96 E, Church Railway Colony, Alambagh, Lucknow.
2. Shakeel Ahmad Khan aged about 49 years son of late Abdul Waheed Khan r/o Sheikhpur, Habibpur Road, Khinni Chauraha, Rajajipuram, Lucknow.
3. Bhuwan Mohan Shukla aged about 47 years son of Badri Prasad Shukla R/o 752 D, Mantrikripa, New Colony, Rajajipuram, Lucknow.
4. Mohd. Naseem aged about 50 years son of Mohd. Yameen R/o T-39, A Haider Canal Railway Colony, Charbagh, Lucknow. Girish Mohan Bajpai, aged about 47 years son of late H.D.Bajpai, r/o 63/33, Hatha Rasool Khan, Guru Gobind Singh Marg, Lucknow.
5. Sunil Kumar Pathak aged about 51 years son of late Chandra Narayn Pathak r/o T-36D, Church Road, Fateh Ali Charbagh, Lucknow.
6. Mohd Shoaib Lari aged about 49 years son of Mohd. Mustafa Lari r/o 536/52/1 Khadra, Lucknow.
7. Shashi Shankar Awastrhi aged about 47 years son of late Daya Shankar Awastrhi r/o 7 Govt. press Colony, Aishbagh, Lucknow.
8. Ashok Kumar Pandey aged about 48 years son of Kanhaiya Prasad r/o II 48/C Multistory Railway Colony, Charbagh, Lucknow.



10. Nirmal Kumar Srivastava aged about 50 years son of R.S. Srivastava R/o 55 Baroda Khana, Lucknow.

11. Prabhat Kumar Kulsheshtra aged about 57 years son of P.V. Kulsheshtra r/o 64, Durvijaiganj, Lucknow.

12. Onkarnath Singh aged about 51 years son of Rajeshwar Prasad Singh, R/o III A shantipuram Railway Colony, Alambagh, Lucknow.

13. Mohd. Ashfaq Khan, aged about 49 years son of H.A.H. Khan r/o 37/1-7, Gangotri Bihar Colony.

14. Ram Murti Yadav aged about 52 years son of Krishna Lal Yadav, R/o 110, Khujanpur Faizabad.

15. Kamlesh Kumar Pal, aged about 43 years son of B. Lal. r/o 3/A, Railway Colony, Faizabad.

16. Kameshwar Singh aged about 48 years son of Salik Ram Singh, r/o A1/12, Imlock Colony, Nandsar Varanasi.

17. Syed Alam Ansari aged abou 41 years son of Mohd. Moiz Alam r/o 151 Old Goods Shed Road, Pratapgarh.

18. Balkeshwar Singh aged about 49 years son of Radha Mohan Singh r/o A1/11, Imlock Colony Nandsar, Varanasi.

19. Ashok Kumar Sharma aged about 50 years son of U.S. Sharma, R/o 86/1-7 M, Gangotri Bihar Colony, Shivpur.

20. Prem Narain Pandey aged about 47 years son of Lal Bahadur Pandey, r/o Sarju Nagar Deva Kali Faizabad.

21. Javed Alam aged about 47 years son of late Moinullah r/o H.N. 638, Lalbagh, Faizabad.

22. Yogendra Nath Srivastava aged about 48 yeas son of Jamuna Prasad Srivastava r/o H.No. 2378, Vivek Nagar, Sultanpur.

23. Ram Bharat Verma aged about 48 years son of Ram Autar Verma r/o village Anapur Naraganj, Sultanpur.

.....Applicants.

By Advocate: Sri Praveen Kumar and Sri Raj Singh

Versus

1. Union of India through General Manager, Northern Railway , Baroda House, New Delhi.
2. Divisional Railway Manager, Northern Railway, Hazratganj, Lucknow.
3. S.K. Shukla aged about 50 years son of Sri B.M. Shukla r/o T-62 B, Sevagram , Railway Colony, Lucknow.
4. G.K. Verma aged about 37 years son of Sri Ram Milan r/o 33, Tulsi Bihar , Jalalpur, Rajajipuram , Lucknow.
5. B.B. Sinha aged about 52 years son of Sri J.P.Sinha, r/o Behind C, Gurudwari, Deep Nagar, Lucknow.

6. T.K.Ghosh, aged about 48 years son of Sri S.R. Ghosh r/o 3/9-C, Geepapalli, Lucknow.

Respondents.

By Advocate Sri Arvind Kumar and Sri R.C.Singh.

(O.A. NO. 60/2007)

1. Jai Ram Singh aged about 51 years resident of 1-4/6,Sahadatganj, Faizabad, U.P.
2. B.B.Sinha
3. K.P.Shukla
4. S.K. Singh
5. S.K. Shukla
6. Ashok Chaubey
7. A.K.Sharma II
8. M.L.Saroj

Applicants

By Advocate: Sri Hari Ram

Versus

1. Union of India through General Manager, Northern Railway , Baroda House, New Delhi.

2. Divisional Railway Manager, 'P' Northern Railway, Hazratganj,
Lucknow.

Respondents.

By Advocate Sri Arvind Kumar

(O.A. NO. 297/2007)

1. U. K. Singh, aged about 50 years, son of Sri R.A. Singh, resident fo
T/1-B,East Railway Colony, Sultanpur U.P.
2. U. K. Singh, Senior Goods Guard
3. R. K. Tewari, Senior Goods Guard
4. F.a. Siddiqui. Senior Goods Guard
5. D.K. Srivastava. Senior Goods Guard
6. R.K.Srivastava. Senior Goods Guard



7. A.Ahmad. Senior Goods Guard
8. S. K. Dhanuk. Senior Goods Guard
9. G. K. Verma Senior Goods Guard
10. U.C. Singh. Senior Goods Guard
11. Lal Chand. Senior Goods Guard
12. Gopal Jee Senior Goods Guard
13. Punwasi singh. Senior Goods Guard
14. N.A. Ansari Senior Goods Guard
15. Ashok Chaubey
16. A. K. Tewari, Senior Goods Guard
17. S. K. Srivastava. Senior Goods Guard
18. A. K. SharmalI Senior Goods Guard
19. S. N. Verma. Senior Goods Guard
20. P.K. Chaterjee Senior Goods Guard
21. B.K. Mishra. Senior Goods Guard
22. Shyam Karan Singh. Senior Goods Guard
23. K.L. Yadav. Senior Goods Guard
24. R.S. Yadav Senior Goods Guard
25. Anil Kumar Gupta. Senior Goods Guard

26. A. K. Dixit. Senior Goods Guard

Applicants

By Advocate: Sri Hari Ram

Versus

1. Union of India through General Manager, Northern Railway , Baroda House, New Delhi.

2. Divisional Railway Manager, 'P' Northern Railway, Hazratganj,

Lucknow

Respondents.

By Advocate Sri Arvind Kumar

ORDER

BY HON'BLE DR. A.K. MISHRA, MEMBER (A)

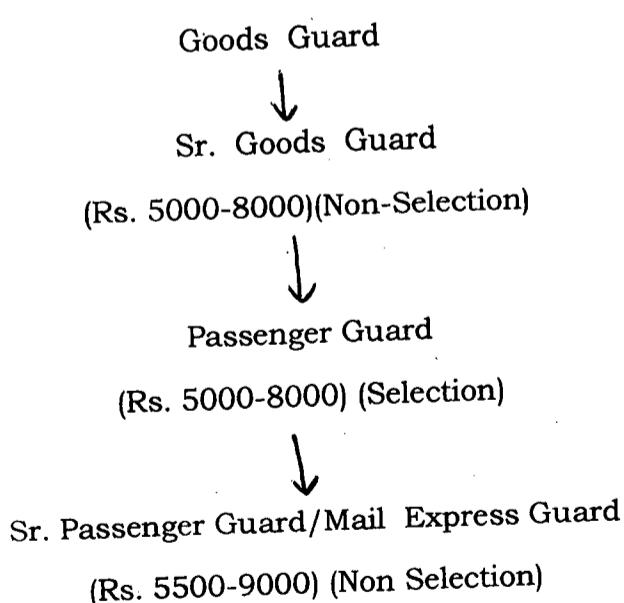
In O.A.No.67/2006, the prayer is for quashing the impugned notification dated 3.1.2006 meant for holding the written examination and also for a direction for promotion of the applicants to the post of Passenger Guards (Grade 5000-8000) from amongst Guards Senior Goods (Grade Rs. 5000-8000) on the basis of seniority -cum-suitability without holding any written examination . The applicants in O.A. No. 60/2007 and O.A. No. 297/2007 have prayed for issue of direction to the respondent No. 2 to promote the applicants to the posts of Passenger Guard in the scale of Rs. 5000-8000 after declaring the panel of successful candidates which includes the name of the applicants, who have passed the written examination held on 8.7.2006, 15.7.2006 and 22.7.2006. Since the issues requiring adjudication in all these O.As are the same, the following judgment passed in respect of O.A. No. 67/2006 would be applicable mutatis mutandis to O.A. No. 60/2007 and 297/2007.

2. In this application, the notification dated 3-1-2006 of the respondent authorities for selection to the post of Guard Passenger (Rs. 5000-8000) declaring that a written test, as a part of selection, will be held has been challenged. A prayer has been made to quash this notification issued by respondent No. 2 and to direct the respondents to induct Passenger Guards from amongst Goods Sr. Guards on

the basis of seniority-cum-suitability without holding any written examination for the post. The grounds taken by applicants are as follows:-

- i) that the applicants who were working as Goods Guards Senior in the grade of Rs. 5000-8000 cannot be legally forced to participate in a selection process including written test for the post of Passenger Guard in the same scale of Rs. 5000-8000, as there is no element of promotion in this selection which should be treated as a lateral induction;
- ii) that the issue whether there is any element of promotion involved in this selection and whether the requirement of holding a written test is mandatory has already been settled by the decision of Allahabad Bench of this Tribunal in the case of Gulam Mustafa Vs. UOI and confirmed by the decision dated 9.4.2003 of the Allahabad High Court and the judgment dated 1.12.2006 in O.A. No. 1268/2004 by the Allahabad Bench, where it was held that it was a case of lateral induction not requiring any written test;
- iii) that in view of such a categorical finding by the Allahabad High Court, this Bench should follow the ratio of that judgment and allow the same benefit to the applicants who are similarly circumstanced.

3. According to the respondents, the promotional channel of running staff (Guard) is as follows:-



It is contended that though the pay scale of Sr. Goods Guards and Passenger Guards are the same, yet the Passenger Guard post is on a higher echelon having a better status. Further, it is categorized as a safety post as the safety of thousands

of passengers traveling in passenger train is in the hands of passenger guard. Therefore, the railway Board/Ministry have taken a conscious decision to declare Passenger Guard as a Selection Post. Any post declared as Selection Post in the AVC (Channel of promotion) notified by the Railway Board has to be filled up on the basis of instructions issued regarding recruitment/selection for these posts. The Railway Board in its circular dated 7.8.2003 instructed the procedure to be adopted for selection to the posts declared as 'Selection'. It was clarified in this circular that there would not be any viva voce test except for specified categories, but the selection process must include a written test. As per paragraph 212 of the Indian Railway Establishment Manual, the Passenger Guard posts is declared as Selection Post. In view of the policy decision conveyed in the Railway Board's circular dated 7.8.2003, the selection post has to be filled up by a positive act of selection involving the written test to assess the professional ability of the candidates.

4. The impugned notification for selection to the post of Guards Passenger has followed the policy instructions of the Railway Board, which have statutory force in the Railways. The applicants cannot take shelter of a court of law to bend the policy decision of the Railway Board in the matter of recruitment to a selection post; neither can any Tribunal give a direction which is contrary to such policy decision having statutory force.

5. They have also contended that all the applicants have participated in the written examination. Some of them have cleared the test, but those who have failed have now taken recourse, through the present O.A., to challenge the very process of selection. When they have participated in an examination, it does not lie with them to challenge the process only because they could not make the grade. They are estopped from challenging the selection process in view of the recognized principles of estoppel and waiver. The learned counsel for private respondents placed before us the judgment of the Bombay Bench in ***Vinod G. Joshi and others Vs. Union of India and others reported at 2007 (2) CAT page 117*** where the full gamut of case laws have been discussed threadbare. The Bombay bench held that the policy decision of the Railway Board conveyed in their letter dated 7.8.2003 and the Board's letter dated 9.10.2003 were not placed before Allahabad Bench. It further held that the policy decision of the Railway Board's has statutory force and further that the post of Passenger Guard having been

categorized as a selection post, the Railway authorities were duty bound to select candidates for the post by a positive act of selection, which consists of a written test of assessing the professional ability of the candidate. Further, the Bench took the view that if the candidates took their chance and appeared at a selection test, they could not challenge the results of selection just because they were not suitable in their own interest. The Ruling of the Supreme Court in the case of **Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others reported at AIR 1986 SC 1043** was cited to the effect that the petitioners who appeared at an examination without protest could not challenge the results when it was found that he could not succeed in that examination.

6. In reply, the applicants have mentioned that prior to participation in the examination, they filed the present application (in the month of January 2000) challenging the selection process before the examinations were held. Further, the applicant, aggrieved by the order dated 2.2.2006 of this Tribunal, preferred a writ petition No. 168/2006 before the Allahabad High Court, Lucknow Bench which held that the examination for the post shall be subject to the outcome of the present application. Therefore, it is not proper for the respondents to invoke the doctrine of estoppel. Further, it was contended that the views of Allahabad High Court would override the decision of Bombay Bench.

7. It was argued on behalf of the official respondents and private respondents that the decision of the Allahabad High Court on this subject is now subjudice before the Supreme Court, which in its order dated 12.7.2007 in SLP (Civil) No. 11639/2007 has issued notices to the parties and stayed the contempt proceedings which have been initiated against the official respondents by the petitioners. It was urged that this stay order amounted to stay of the judgment which could be implemented so long as the SLP was not decided by the Supreme Court. When the subject matter is subjudice before the Apex Court, a definitive contrary view cannot be taken by any subordinate court.

8. The official respondents have also cited a number of case law on the subject to explain the correct meaning of 'ratio of a judgment' and to what extent a judgment is binding as a precedent on all subordinate courts. The ruling of Supreme Court in **Prasar Bharti Vs. Amarjeet Singh 2007(9) SCC 539** says that

any decision which is contrary to law and rules, cannot have the force of precedent. The judgment in ***Municipal Corporation, Delhi Vs. Gurnam Kaur (3 judges) 1989 (1) SCC 101*** says that any decision which is given in ignorance of provisions of a statute or of a rule having the force of statute on the subject will be treated as per incurium. The Supreme Court judgment in ***Khem Chand Vs. Union of India (5 Judges) 1958 AIR 300 SC*** is to the effect that Railway Manual being amalgam of various circulars issued from time to time, it would have the status of statutory rules. Similar view that the Tribunal cannot nullify the Railway Board instruction has been expressed by the Supreme Court in ***K. Manikraj Vs. Union of India 1997 (4) SCC 342.***

9. In other words, their main contention is that the instructions conveyed by the Railway Board circular dated 3.8.2009 and the provisions of paragraph 212 of IREM have the statutory force and cannot be interfered with. Since the post of passenger Guard has been categorized as a selection post, there could not be any lateral induction into such a post, and the recruitment process must conform to the selection procedure outlined in the circulars of the Railway Board for a 'selection' post. The decisions of the Allahabad Bench and the Allahabad High Court to the contrary could not have precedent value. A similar matter was considered by the full bench of this Tribunal constituted by the Hon'ble Chairman of the CAT in his order dated 13/13/93 dated 10.4.2008 on a reference from Patna Bench. The full bench in its order relating to O.A. No. 42/2005 CW 331 of 2005 and 338/2005 took the following decision:-

"Since the decision of the Allahabad Bench of the Tribunal in O.A. 1268 of 2004 and another has not been interfered with by the Hon'ble High Court of Allahabad, is now before the Hon'ble Apex Court, who have condoned the delay and issued notice in the SLP, while also staying the contempt proceedings in the meantime, we are of the view that it may not be appropriate at this stage to consider the aforesaid questions relating to the decision taken by the Allahabad Bench in O.A. 1268 of 2004 and another."

10. Admittedly, a special leave petition is pending before the Supreme Court which has directed status quo to be maintained on the subject. In the circumstances, no decision could be taken on the subject which is pending

consideration of the Supreme Court and on which the interim order of the Supreme Court to maintain status quo is holding the field.

11. As a result, these applications are rejected at the present stage with a liberty being given to the applicants to file fresh applications in the event the decision of the Allahabad High Court is confirmed by the Supreme Court in the pending SLP. No

costs.

(Dr. A.K. Mishra)

Member (A)

HLS/-

(1) Date of Order 21-5-2009
(2) Date of Preparation 22-5-2009
(3) Date of Receipt 22-5-2009

21/05/09 Certified Copy

Section Officer (Judicial)
Central Administrative Tribunal
Lucknow Bench, Lucknow

22-5-2009

Sd/
(M. Kanthaiah)

Member (J)