

## CENTRAL ADMINISTRATIVE TRIBUNAL LUCKNOW BENCH LUCKNOW

Transferred Application No. 12 of 1991(L)

M.K. Sinha . . . . . Applicant

Versus

Union of India &amp; Others . . . . . Respondents

Hon'ble Mr. Justice U.C.Srivastava,V.C.

Hon'ble Mr. K. Obayya, Member (A)

( By Hon'ble Mr. Justice U.C.Srivastava,VC)

By means of this application, the applicant has challenged the order dated 29.1.1991 terminating his services as clerk grade -I(Accounts) under the financial and Chief Accounts Officer Northern Railway Baroda<sup>house</sup> and has further prayed that the respondents may be restrained from applying appendix 2 in the case of the applicant and declare the condition of termination of service on failure of passing the examination test as prescribed in Appendix II, as ultravires of the Appendix II where it is not so laid down and the respondents may be directed to appoint the applicant as Senior Clerk(Administration) with consequential benefits.

2. In response to notification issued by the Railway recruitment Board,Allahabad for recruitment of several categories of posts for Northern Railways, including that of category 4,( 414 posts of Accounts-clerk grade-I in the pay scale of Rs. 330-560, 247 General,92 S.C., 26 S.T. and 49 Ex-service man. Category 5 (525 posts of senior clerks/ in Administration in the pay scale of Rs. 330-560(Rs.) 341 General,105 S.C. , 27 S.T. and 52 Ex-service man). The applicant also applied for the same. He appeared in the

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written test, which took place on 19.9.1982 and thereafter appeared for the interview which was held between 11.6.1985 to 19.7.1985. The applicant was intimated by the Railway Recruitment Board on 4.12.1985 that he has been selected for the post of Senior Clerk Administration Category 5 in the pay scale of Rs. 330-560 and the applicant was further intimated that out of 525 candidates for the post who appeared, the position of the applicant on the merit list is 104th position. The applicant was offered the post of clerk Grade-I in the Accounts Dept, in the pay scale of Rs. 1200-2400(New) , on the completion of medical check-up formalities, he was posted in the office of Accounts Officer Signal Workshop, N.Rly, Ghaziabad. The applicant expressed a surprise of his posting as clerk grade-I although he was selected for the post of Senior Clerk in the same pay-scale and requested the Financial & Chief Accounts Officer, to accommodate him as a senior clerk(admin.). The contention of the applicant is that the recruitment of the clerk-grade-I is governed by Rule 167 of the Indian Rly. Establishment Manual, according to which the incumbent for the confirmation has to pass the test within 3 years in maximum 2 attempts and 3rd on special request , 4th & 5th are to be given to pass the examination at the discretion of the higher authorities. The same was not applicable in the case of Senior Clerks for which the applicant was selected. The applicant's position being 104, he was to be absorbed as Senior Clerk(Administration) only and he appeared in the two tests and again had to take third attempt in August

but he could not do so because of illness of his father in Lucknow. On knowing the result of the third test, the applicant requested for a fourth chance as special case, but instead of giving him chance, his services were terminated.

3. According to the respondents, the applicant had ever written any letter dated 4.7.1987 regarding his posting. It has been stated that in 1987, the vacancies of the senior clerks were not available and then the General Manager had approved the conversion of panel for operation in A/Cs deptt. in the interest of Railway Administration. The applicant having ~~—~~ accepted the offer of appointment, had continued to work for three years, the applicant is estopped from saying that he has applied for Senior clerk or has requested to accommodate him as senior clerk. According to the respondents, Rule 167 of Indian Railway Establishment Manual is applicable only to the promotional categories of C.G.-II, who become eligible for promotion as C.G.-I after passing the appendix II examination. C.G.-II are confirmed in the service after passing the necessary tests. The C.G.-I, Appendix IIA examination is not a promotional examination but it is for the purposes of confirmation in the grade of Rs. 1200-2040/-. According to the Railway Board letter dated 24.6.1986, the employees who did not qualify in the examination even after availing of chance referred to this letter, their services as C.G.-I should be terminated. The chances provided are only two. The applicant had admittedly availed all three chances and inspite of that he could not go through the Appendix-II A examination and that's why his services were terminated. Similar matter came for consideration before us

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in the case of Raj Kumar Gupta & another Vs. Union of India and others, O.A. No. 115 of 1990 decided on 31.7.1991 in the said case it was provided that :-

"Para 167 provides that normally no railway servant will be provided to take the examination more than thrice but the F.A. and C.A.J. may, in deserving cases permit a candidate to take examination fourth time and in every exceptional cases, the General Manager may permit a candidate to take the examination for the fifth and the last time. In the instant case the applicants were not given the opportunity and even if they would have availed the third opportunity there was no application of mind whether it was a case which required permission for fourth and fifth time also to appear in the examination in view of the fact that examination of two categories took place simultaneously and the applicant moved in the past for change of categories, the same has also been done. The question whether they can be given more of chance and giving the chance is illegal, is not supportable by any law. It is in the Railway Board circular dated 24.6.86 that in case where the employees do not qualify in the examination even after availing of chances referred to in para above (extracted) the services would be terminated in case however, the employee requests for, their case for appointment as C.G.II as fresh entrant in Accounts Department will be considered by the Board on merit on receipt of duly recommended letter by the General Manager in a vacancy available. The Railway Board, in this manner, cannot add a condition for termination of service which does not find place in the advertisement or in the appointment letter or in para 167 of the I.R.E.M. under which the examinations took place. The Railway Board, by such letter cannot vary the terms for the contract or statutory rules which were not simultaneously amended. Even otherwise, if it could be said that the Railway Board's letter

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is also part of the contract then such contract will be hit by section 23 of the Indian Contract Act, being unconscionable against public policy and public interest and will be hit by Article 14 of the Constitution and Section 23 of the Indian Contract Act, as has been held by the Supreme Court in Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly (1986) 3 C.C., 489). Accordingly, the order of termination being arbitrary and illegal and without any legal sanction or authority is quashed and the applicants will be deemed to be in continuous service and if any action for examination is taken, then the respondents shall also consider the case of the applicants before the change of category taking into consideration that it has done so for persons belonging to same service."

The same situation arises in this case. The applicants' case is at par with those cases, but Sri Ramesh Gautam learned counsel for the respondents contended that the judgement passed by this tribunal has been disented to by the Principal Bench without referring the matter to Larger Bench and he has produced before us a copy of the judgement given by Principal Bench. In the said case, we have taken the view, the Railway Board can not add a condition of termination of service, which does not find place in advertisement or the appointment letter in para 167 of the Indian Railway Establishment Manual. in the case of Atul Kumar Sharma Vs. Union of India & Others, J.A. No. 2146/90 decided on 31.1.1991. The case decided by the Allahabad Bench. The Principal Bench has distinguished, the case decided by us on the ground the case decided by the Allh. Bench is distinguishable as the applicants' ~~those cases~~ ~~XXXXXXXXXX~~

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were appointed in December, 1985, while the applicant in the case before the Principal Bench was appointed after the issue of instructions by the Railway Board in April, 1986 as such the revised instructions issued were applicable in their cases. The more cases were also cited in which reliance on Atul Sharma's case was placed as such it is not necessary to make reference to those cases.

4. In the instant case also, the appointments were made on 20.7.1987, meaning thereby after issuance of the instructions, the question is as to whether it is necessary to refer these matters to the Larger Bench when the reference has not been made by the Principal Bench itself to a larger Bench although the matter in issue was practically the same which was not necessarily dependent on the date of appointment. The question for consideration was as to whether these instructions could modify the other statutory rules etc. All the instructions can be made applicable in respect of those, who offered their candidature in pursuance of the advertisement in which no such condition was imposed, even if it could be said that after the advertisements which were issued as early as in the year 1983.

5. The facts of the instant case are distinguishable from the facts of the case, which was decided by the Principal Bench and in all those cases as it has not been stated those cases that it was also in pursuance of some notification of the year 1983 and the process of selection took place thereafter i.e. and rather was more completed if not only to that extent before the issuance of the said instructions. The respondents are bound by the terms of

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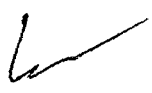
the advertisement, if there was no such conditions of the advertisement and obviously, advertisement was not amended obviously, the terms of the advertisement will cover, though it is a different matter that if it could be said that matter of fact, the same tantamount to amend the rule, that the rules were amended subsequently. In the case of Dr. Vinay Ram Pal Vs. State of Jammu and Kashmir, 1984 (1) SCC page 160, which was the case of admission in Medical college. The selection of an eligible candidate was refused merely on the ground of his failure to satisfy the government order while others were selected on the basis of advertisement. No reference to the subsequent order of the government was made in the advertisement and nor any corrigendum was issued, and in these circumstances, the court allowed the application holding that the applicant was to be admitted in next session without any further test or selection. In the case of N.T. Bevin Katti Vs. Karnataka Public Service Commission AIR. 1990 Supreme Court page 1233. " The selection was initiated by issue of the advertisement inviting the application. It was held that the selection normally was to be regulated by the rule and order then prevailing and while in the advertisement specifically stated that the appointment shall be made in accordance with existing rule and order subsequent amendment in the existing rule and order was not to affect the pending selection of process unless taken no doubt contrary intention." In the said case earlier decision was, including <sup>in</sup> the ~~xxxxxx~~ case of Y.V. Rangaiah Vs. J.Sreenivas Rao A.I.R. 1983 Supreme Court page 852 WHEREIN it was said:

That ~~xxxxxx~~ if the vacancies pertain to a particular period and the rules were subsequently amended and because of the delay, the candidates who were looking forward for their chance to the promotional post, could not be selected, their selection is to take place in the rules as it ~~is~~ existed, not by the subsequent amendment

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In this case, when the selection took place, the circular of 1986, which was not in existence. Even if it could be said that it has the statutory force and it was to be read along with para 167, the same does not affect the case of the applicants in the instant case also. The state of U.P. Vs. Kaushal Kishore Shukla(1991) 1 S.C.C. page 587, cited by the learned counsel for the respondents, which was the case of a temporary employee, whose services were terminated, has got no applicability in this case. In the instant case notwithstanding the fact that the appointment was made after 1986, i.e. after the issue of the circular of 1986, even if it could be applicable to some extent, it was applicable in other cases and it will not apply in the case of applicant and as such it is not necessary for us to decide its validity and as the applicants' process had started and rather completed before issuance of the said circular, the cases decided by the principal Bench are distinguishable and it is not necessary to refer the matter to a larger Bench. Accordingly, this application is also allowed and the termination order dated 28.1.91 is quashed and the applicant will be deemed to be ~~contd~~ continuing in service and action ~~for examination is taken~~. The respondents shall consider the case of the applicant before the change of category taking into consideration the fact that it has already <sup>been</sup> done for several persons belonging to the same service and there should be no policy of deviation which would discriminate between the similarly placed employees. No order as to costs.

  
Member (A)

  
Vice-Chairman

Lucknow Dated: 15th 3, 1993.

(RKA)