

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PATNA BENCH, PATNA
O.A. No. 402 of 2006
with
OA 293 of 2008

Date of Order: 17.08.2012

C O R A M

HON'BLE MR. AKHIL KUMAR JAIN, MEMBER[A]
HON'BLE MR. BIDISHA BANERJEE, MEMBER[J]

A. O.A. No. 402 of 2006

1. Kedar Nath Singh, Son of Late Hirdya Singh resident of Village-Devhgaon, District – Rohtas (Bihar).

Presently working under DRM, Cell, Sonpur hand of DRM (Mech.) EC Railway, Sonpur (Saran).

2. Girija Nandan, Son of Shri Nehala Rai, resident of Haripur Colony at / P.O. Digha (Patna) working as Head Clerk under DRM (Mech.), EC Railway, Sonpur (Saran).

..... Applicants.

By Advocate: - Shri Sudama Pandey

-Versus-

1. The Union of India through the General Manager, East Central Railway, Hazipur.
2. The Divisional Railway Manager, East central Railway, Sonpur.
3. The Divisional Rail Manager (Mech.), EC Railway At/PO, Sonpur, District- Saran.
4. Sushil Kumar Office superintendent – I Office of the Sr. DME (C&W), EC Railway, Sonpur.
5. Krishna Kumar Gupta, Office Superintendent – I Office of the Sr. DME (C&W), EC Railway, Sonpur.
6. Ranjan Kumar Sinha, Office Superintendent – II Office of the Sr. DME (C&W), EC Railway, Sonpur.
7. Vinay Kumar, Officer Superintendent- II, Office of the CDO, EC Railway, Muzaffarpur.

..... Respondents.

By Advocate: - Shri A.K. Singh

B. O.A. No. 293/2008

1. Kedar Nath Singh, Son of Late Hirdya Singh resident of Village-Devhgaon, District – Rohtas (Bihar).

Presently working under DRM, Cell, Sonpur hand of DRM (Mech.) E. C . Railway, Sonpur (Saran).



2. Girija Nandan, Son of Shri Nehala Rai, resident of Haripur Colony at / P.O. Digha (Patna) working as Head Clerk under DRM (Mech.), EC Railway, Sonpur (Saran).

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By Advocate: - Shri Sudama Pandey

-Versus-

1. The Union of India through General Manager, EC Railway, Hazipur.
2. The Divisional Rail Manager, EC Railway, Sonpur.
3. Shri Surya Narayan, DPO, EC Railway, Sonpur.

..... Respondents.

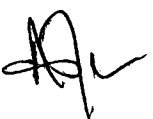
By Advocate: - Shri A.K. Singh

ORDER

Akhil Kumar Jain, Member [Administrative] :- These OAs have been jointly filed by same two applicants having common cause of action. In both the OAs, the basic issue involved is the same and relief sought interlinked. Hence, with the consent of the parties, both the OAs have been heard together.

2. In OA No. 402 of 2006, the applicants have sought for direction upon the respondents to affect promotion/proforma proforma and fixation of their pay in the posts of Head Clerk (H.C.) (Rs. 1400-3000/ 5000-8000) and Office Superintendent Grade II (OS-II) (Rs. 5500-9000) as well as Office Superintendent Grade I (OS-I) in the scale of Rs. 6500-10,500/- from the date of promotion of their juniors Shri Krishna Kumar Gupta, Ranjan Kumar Sinha, Sushil Kumar and Vinay Kumar, who were earlier promoted as HC, OS-II and OS-I, with all consequential benefits and arrears of pay.

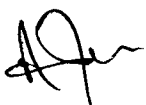
3. In OA No. 293 of 2008, the applicants have prayed for quashing and setting aside orders dated 22.1.2007, 16.12.2007 and 24/25.01.2008 (Annexure A/1 series in OA 293/2008) whereby their pay from 1984 to 2007 in different grades has been re-fixed on the ground of correction of their seniority and



recovery of excess amount of Rs. 1,66,765/- has been ordered from the applicants. They have also prayed for direction upon the respondents not to recover amount of Rs. 1,6,765/- from the applicants, to refund the amount recovered, and also not to disturb the seniority and promotions made earlier.

4. It is clear from the relief sought in both the OAs, that the basic issue and genesis of cause of action is seniority of the applicants is different grades. As such, we first proceed to discuss issues raised in OA No. 402 of 2006. In discussing the same facts and averments made in OA 293/2008 have also been taken into consideration to the extent required. The references to Annexures are of OA 402/2006 unless specifically mentioned otherwise.

5. As claimed by the applicants, applicant no. 1 was initially appointed as substitute Khalasi on 01.09.1974 under Dy. CME (Marine), Mahendrughat, Patna in time scale of pay and was promoted as Junior Clerk w.e.f. 03.03.1983 (Rs. 260-400) after passing selection test. He was promoted as Senior Clerk w.e.f. 01.01.1984 (Rs. 330-560/- / 1200-2400), Head Clerk w.e.f. 01.11.1996 (Rs. 1400-2300/ 5000-8000) and Office superintendent II w.e.f. 27.08.2003 (Rs. 5500-9000) after facing Selection Board in first attempt. . Similarly, as per applicants' claim, applicant no. 2 was initially appointed as substitute Khalasi under CME (Marine), Mahendrughat, Patna on 16.04.1973 and granted temporary status after completion of 4 months of continuous service. His service was regularised against Group 'D' post after screening test and medical examination. He was subsequently promoted as Junior Clerk w.e.f. 03.03.1983, as Senior Clerk w.e.f. 01.01.1984 and Head Clerk since 07.02.1997. He became eligible from promotion to the post of Office Superintendent II but was erroneously overlooked and superseded by his juniors , namely, Shri Krishna Kumar Gupta, Ranjan Kumar Sinha, Sushil Kumar and Vinay Kumar who were promoted as OS-II vide office order no. 299 dated 06.12.2001 issued by DRM, Sonapur. Later, he was promoted as OS-II vide DRM (P), Sonpur Office order no. 452/04 dated 21.09.2004.



6. It is the contention of the applicants that their seniority as Junior Clerks viz-a-viz Vijay Kumar Rai, recorded in the provisional seniority list as on 01.04.1991 published on 14.07.1991 (Annexure A/2), was subsequently modified vide letter dated 28.07.1992 (Annexure A/3) placing them at sl. 4 and 5 respectively, above Vijay Kumar Rai placed at sl. 6. and their date of promotion was fixed as 03.03.1983 on proforma basis, i.e. the date on which Shri Vijay Kumar Rai was so promoted. In the said letter, seniority of Shri Ramji Prasad Rai, then Senior Clerk was also amended in the erstwhile grade of Junior Clerk fixing it w.e.f. 22.09.1983. This amendment letter was issued with the approval of Divisional Railway Manager, Sonapur.

7. The applicants have also claimed that they were promoted as Senior Clerk w.e.f. 01.01.1984 under restructuring scheme on the basis of their own seniority and not vice their junior Shri Ramji Prasad Rai. There were total 78 posts out of which 40 posts were filled up and 38 were restructured posts. The private respondent no. 4 to 6, namely Shri Krishna Kumar Gupta (5), Ranjan Kumar Sinha (6) and Sushil Kumar (4), were promoted as Senior Clerk from 15.04.1986, 18.11.86 and 16.10.87 respectively. Though these private respondents were promoted as senior Clerks from a later date compared to that of applicants, they were promoted as Head Clerk earlier than the applicants vide DRM(P), ECR, Sonpur Office Order no. 303 dated 14.06.196 (Annexure A/6) and OS-II w.e.f. 06.12.2001 (Annexure A/1) superseding the applicants. The applicants were promoted as HC vide order dated 27.04.2001 (Annexure A/6 series) and OS – II vide order dated 27.08.2003 and 21.09.2004 respectively (Annexure A/5 and A/4). It has been submitted by the applicants that though they became eligible for promotion much earlier, they were overlooked erroneously and not called to appear in selection for OS-II even after repeated representations, the last one being dated 21.09.2002 (Annexure A/7). It has also been stated that subsequently their juniors respondents no. 4,5 & 7 were promoted as OS-I vide order dated 04.02.2005,



13.05.2005, 27.06.2006 and 8/13.11.2006 (Annexure A/8 in OA 402/2006 A/13 series in 3rd Supplementary Rejoinder).

8. The applicants have submitted that as they are much senior to private respondents, they are legally entitled to promotion to HC, OS-II and even OS-I w.e.f the dates their juniors, i.e the date on which private respondents were so promoted. They were overlooked for their promotion as HC, OS-II and OS-1 as per their seniority due to administrative error. They have also been discriminated and not treated on equal footing in violation of Article 14 and 16 of the Constitution.

9. It is further contention of the applicants that earlier they filed OA 734/2003 which was disposed of on 10.05.2004 with direction to respondents to consider the OA as representation of the applicants and to pass reasoned and speaking order. No such order was passed by the respondents in the OA in compliance of the Tribunal's order. However, Senior DPO, Sonpur who was not a respondent, passed order on 18.10.2004 rejecting the prayer of the applicant quoting the case of Ramji Prasad Rai which had no concern with the case of the applicant (Annexure A/9 series).

10. In their written statement, respondents have submitted that the applicants who were initially appointed as substitute Khalasi and were subsequently promoted as Coal Issuer/Junior Clerk on 13.03.1985 and 24.07.84 respectively. However, they were given proforma promotion as Junior Clerk w.e.f. 03.03.1983 on the basis of position of their seniority above Shri Vijay Kumar Rai, Jr. Clerk who was wrongly given outstanding position above Shri K.N. Singh and was promoted on 03.03.1983. Similarly, they were given proforma promotion on the post of Sr. Clerk w.e.f. 01.01.1984 vice Ramjee Prasad Rai, their junior and were granted actual benefit w.e.f. the date of taking over charge. In this connection, the respondents have annexed office order dated 09.09.1999 issued in respect of applicant no. 2 (Annexure R/1). They were promoted as Head Clerk



with effect from 1.11.1996 and 7.2.1997 respectively. As OS-II post is a selection post, the applicants were not called for selection because Court cases were pending before CAT, Patna Bench in OA No. 204/193 (Ramjee Prasad Rai Vs. UOI & Ors.) and further in CWJC No. 9909 of 2000 (Ramjee Prasad Rai Vs. UOI & Ors) in which the applicants were also party. During the selection period, no representation was given by the applicants regarding allowing them to appear in the examination for the post of OS-II. In compliance of the order passed by the Hon'ble Patna High Court in CWJC No. 9909 of 2000 and SLP 6518/2003 and 6519/03, the seniority of Shri Ramjee Prasad Rai was re-fixed as Junior Clerk w.e.f. 22.03.1982 vide No. E/PC/R.P. Rai/Clerk/Mech./SEE (loose) dated 16.03.2005 (Annexure R/2) and consequently seniority of the applicants was also required to be revised.

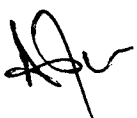
11. It is further contention of the respondents that the applicants were not entitled for promotion to the post of Head Clerk/OS-II or OS-I from the dates of their alleged juniors, namely, respondent no. 4 to 7 in the OA as they were made senior to the private respondents only because of parity in seniority viz-a-viz Ramjee Prasad Rai in view of the order dated 4.8.1992 as contained in Annexure A/3. However, when Ramjee Prasad Rai's seniority was revised on the basis of his date of promotion as material checker w.e.f. 22.3.1982 and he was placed below sl. 3 Brijnandan Choudhary and above sl. no. 4 Shri K.N. Singh in the seniority list of Junior Clerks as on 01.04.1991 and also below sl. 6 Laxmi Narayan Yadav and above sl. 7 Phulendra Kumar Singh in the seniority list of Senior Clerks as on 01.04.1995, consequently the seniority of the applicants as Senior Clerks was also restored to their position as per their date of joining. The respondents have reiterated that the private respondents are not junior to applicants and that they were promoted to OS-I grade as per his seniority in OS-II grade.

12. The applicants have filed several rejoinders and supplementary applications. It has been submitted by the applicants that their seniority w.e.f.



3.3.1983 as Junior Clerk was accepted by the Government vide letter dated 28.07.1992 and placed before the Hon'ble High Court which was accepted by Hon'ble Court in CWJC No. 9909 of 2000 decided on 02.07.2007 as there was no protest from any quarters . The seniority of the applicants in the grade of Sr. Clerks w.e.f. 01.01.1984 and in the grade of Head Clerk and OS-II as accepted by the Union of India and circulated and published and placed before the Hon'ble High Court in CWJC No. 5466 of 2000 in the matter of Madan Mohan Rai Vs. Union of India & Others and was accepted by the Hon'ble Court as there had been no protest from any quarter. Accordingly, CWJC No. 546/2003 was finally decided on 24.07.2006. Therefore, the seniority and promotion of the applicants in the grade of Sr. Clerk, Head Clerk and OS-II is not disputed as finally decided in case of Madan Mohan Rai Vs. UOI & Ors. Now the question of seniority and promotion of the applicants is not open for challenge except by the applicant in view of settled principles of law laid down by the Hon'ble Supreme Court in many cases, namely , (1) 1998 SCC (L&S) 611 B.S. Bazama Vs. State of Punjab, (2) SLR 975(2) SC page 225 Malcom Lawrence Vs. UOI . The SLP was not filed by Ramjee Prasad Rai. The case of applicants in the present OA had nothing to do with Ramjee Prasad Rai but it was for their promotion viz-a-viz private respondents. The applicants had protested earlier and also during pendency of CWJC No. 5466/2000 the SLP referred to by respondents were dismissed.

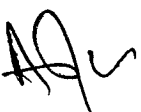
13. In the supplementary rejoinder the applicants have submitted that there was no direction by the Hon'ble High Court in CWJC No. 9909 of 2000 as well as in the order of the Hon'ble Supreme court in SLP No. 6518/2003 and 6519/2003 to alter the date of appointment of the applicants as Jr. Clerk which was already determined and fixed about two decades back. The Hon'ble High Court of Patna in the case of Ramjee Prasad Rai had upheld that date of promotion of the applicants as Jr. Clerks and accordingly the seniority. The SLPs were dismissed without passing any order. As held by the Hon'ble Supreme Court in Bata Rani



Gramin Bank Vs. Pallav Kumar & Others reported in 2004 SCC (L&S) 715 (DB), dismissal of SLP by non speaking order without assigning any reason did not amount to acceptance of correctness of order sought to be appealed. Due to the downgradation of seniority of the applicants as Clerk, their further promotions as Senior Clerk, Head Clerk, OS-II and OS-I were also revised and downgraded as was evident from the order at Annexure R/1 to the WS in OA 293/2008. Not only this many other juniors were given seniority and promotion. They have also drawn attention to seniority list published by DRM(P) vide letter dated 05.02.2010 in which a number of juniors who were promoted on different dates after the applicants have been shown as senior. The applicants have also alleged that the coercive action against them was taken by the Sr. DPO, ECR, Sonapur as they filed this OA. She allegedly threatened them to withdraw the OAs.

14. In the 2nd supplementary rejoinder, the applicants have mentioned about various dates of promotion given to Ramjee Prasad Rai in pursuance of Court's order. They have also indicated the dates of some others including private respondents and annexed orders/lists to substantiate their claim of seniority over them. In the 3rd supplementary rejoinder also, copies of promotion order of two of the private respondents from OS- II to OS-I and a statement prepared by applicant indicating dates of appointment/promotion of the private respondents have been filed. In the 4th supplementary rejoinder, indicating dates of promotion of some other persons, namely, M.M. Rai, Bhagwan Prasad Srivastava, Umesh Kumar Singh, Dayashankar Prasad, Deo Kumar Rai, Ramesh Prasad Ram and Rameshwar Rai promoted as OS-II on 30.03.2006, the applicants have stated that they had been wrongly shown as senior to them as the applicants passed selection test earlier than them and promoted on 27.08.2003 and 21.09.2004..

15. The applicants have drawn attention to Railway Board's instructions in E(NG) 167/PMI/47 dated 05.02.1969 which stipulates that normally a panel once approved should not be cancelled or amended and even if the same was



required due to procedural irregularities detected later, it would have to be done with the approval of the authority next higher than one who approved. It has been alleged that in their case, their seniority fixed earlier with the approval of DRM was altered by a junior authority, i.e. Sr. DPO contrary to Rules contained in IREM Vol. I, Rule 219 (k) (1)/63. Cancellation of panel by a lower authority was bad in law (ATJ 2003 (3) 70 CAT LKO). As per Rule 302 of IREM Vol. I page 67, criteria for determining seniority of promoted candidate was date of regular promotion after due process and date of joining in case of direct recruits. Applicants have added that as per Rule 306 IREM Vol. I page 68, candidates selected for appointment at an earlier selection would be senior to those selected later irrespective of dates of passing. Therefore, they have claimed that they were wrongly shown as junior to the persons named earlier in OS grades.

16. It is the further contention of the applicants that in view of the pending cases, they were not allowed to appear in the selection of OS-II whereas private respondents were given promotion. They protested against the same with prayer for promotion at par with juniors. The applicants have annexed reply to letters written by one M.P. in which it was mentioned the matter of promotion of applicant no. 1 (who was apparently Senior Clerk at that time) would be considered after decision in Court case. Similar reply was given to applicant (Annexure A/22 and A/23). The judgment of Hon'ble High Court was in personom and not in ram because other similarly situated persons promoted on adhoc basis who were not party to the case were not given the benefits. The Hon'ble Courts did not declare Rule 302, 306 and 309 of IREM Vol. I as ultra vires . Hence, seniority of the applicants would not have been altered or downgraded in the circumstances and only Ramjee Prasad Rai could reap the benefit.

17. As regards the recovery, the applicants have submitted that based on revised seniority fixed in an illegal manner, the pay of the applicants had been



revised and recovery ordered. The pay could not be reduced without taking recourse to proceedings under Railway Servant's (Discipline and Appeal) Rules, 1968. Not even a show cause notice was given to applicants.

18. As per Court's order only the seniority of Ramjee Prasad Rai was to be fixed. In the order passed in compliance of the Court's order also, there was no mention of re-fixation of salary of the applicants. Since the applicants were promoted as Senior Clerks under restructuring w.e.f. 01.01.1984, they could not be treated as junior to private respondents. Moreover, the applicants cleared the selection and passed/promoted selection on 03.03.1983 and given benefit of promotion accordingly. Ramjee Prasad Rai appeared in selection/suitability test on 20.08.1983 and result declared on 24.08.1983 and promoted vide order dated 21.09.1983 along with other similarly situated persons Bhagwan Prasad Srivastava, Raghuvansh Singh, Ram Ashray Rai etc. As such, as per rules, he could not be senior to applicants as per statutory Rules. Moreover, only Ramjee Rai could get benefit of High Court order and in no case settled seniority position and promotion of others could be disturbed. They have also questioned their seniority as the Head Clerk and OS-II viz-a-viz Madan Mohan Rai, alleged to be their junior. It is further contention of the applicants that there was no misrepresentation by the applicants and their salary as fixed earlier was correct. Thus, on the ground of re-fixation, recovery is totally illegal. They have cited a number of judgments in support of their contention that if there is no misrepresentation or suppression of facts by a government servant, recovery can not be ordered on account of alleged wrong fixation.

19. The applicants have added that they were confirmed as JC/SC/HC/OS-II and promotion orders were issued by DRM himself. Therefore, under rules they could not be reverted by an order of lower authority. They have made allegation of malafide against the then Sr. DPO and DPO of whom only DPO has been made party in OA 293/2008.



20. The respondents have stated that date of promotion of applicants as Junior Clerks was 03.03.1984 which was wrongly shown in memorandum dated 22.11.2007 and 14.12.2007 due to clerical mistake. The same was rectified vide corrigendum dated 25.01.2008. They have, however, justified recovery on the ground of re-fixation.

21. Heard the learned counsel for both the sides.

22. The learned counsel for the applicants, reiterating the averments made in the OA, rejoinder, supplementary rejoinder stated that a seniority list of OS Grade-II under DRM (Mechanical) Sonapur was published on 05.02.2010 which was also not correct as per rules of seniority. Many persons junior to applicants were shown senior to applicants as Senior Clerks, Head Clerks and OS-II, instances of which had been pointed out in first supplementary rejoinder filed on 01.02.2011 and a copy of the list was also annexed as Annexure A/10 with the said supplementary rejoinder. In the said list, the date of seniority of applicants as OS-II was shown as 13.08.2006 though after successful completion of selection process they were duly promoted as OS-II w.e.f. 27.08.2003 and 21.09.2004 respectively and were shouldering higher duties and responsibilities of the post. These dates were shown in the seniority list as on 01.04.2005 published in July, 2005 against which applicant protested.

23. The learned counsel for the applicants added that consequent to order of Hon'ble High Court and Hon'ble Supreme Court in the case of Ramjee Rai, the seniority position was revised with legal opinion of GM (Law) vide corrigendum dated 16.03.2005 (Annexure R/20) and thus chapter was closed. The subsequent revision of seniority and publication of lists altering the position of seniority of applicants was totally illegal and against rules as well as decision of Hon'ble High Court of Patna in the case of Madan Mohan Rai in CWJC No. 5466/2000 in which the claim of M.M. Rai above applicants as OS-II was rejected. The learned counsel for the applicant alleged that the seniority list filed by



respondents on 02.05.2011 was false, fake and fabricated in which M.M. Rai was shown as senior to the applicants. Similarly some others had been wrongly shown as senior in the said list. He stated that as per Railway Board's statutory provisions contained in E(NG)/167/PMI/47 dated 05.02.1969, a panel once approved should not normally be cancelled or amended. If it is to be done in view of some irregularities etc. as detected later, it should be with the approval of higher authority. The panel approved by DRM thus could have been altered by GM. In the instant case, the panel of promotion of applicant no. 1 was told to be cancelled by a lower authority. Hence, cancellation of panel/promotion of applicant no. 1 was in violation of rules. The learned counsel added that as per Rule 306 contained in IREM Vol. I page 68, candidates selected for appointment at an earlier selection would be senior to those who were selected later irrespective of date of passing. The applicant no. 1 was selected and promoted as OS-II on 27.08.2003 whereas Shri Suresh Kumar Singh, Phulendra Kumar Singh, Bhagwan Prasad Srivastava, Umesh Kumar Singh, Madan Mohan Rai, Daya Shankar Prasad, Deo Kumar Rai, Ramesh Prasad Rai, Rameshwar Prasad who could not pass selection were promoted on seniority under cadre restructuring scheme w.e.f. 01.11.2003. Similarly, Phulendra Kumar Singh was promoted with effect from 21.09.2004 and rest appeared in the selection in 2006 only and their promotion was w.e.f. 30.03.2006. Hence, they could not be treated senior to K.N. Singh, applicant no. 1 who passed selection test and promoted as OS-II on regular basis w.e.f. 27.08.2003. Thus, seniority list of OS-II filed by respondents was not according to seniority rules. The learned counsel for the applicant also stated that during the pendency of OA 204 of 1993 and CWJC No. 9909/2000, the respondents debarred the applicants from promotion on the plea of pending court cases as would be apparent from Annexure A/21 to supplementary rejoinder no. 4 whereas their juniors were promoted. It was mentioned that the matter would be considered after decision of the pending Court cases (Annexure A/23). After the decision in



these cases, the applicants should have been given promotion at par with their juniors as per rules which was not done. The judgment in the case of Ramjee Prasad Rai was in personam and not in rem.

24. The learned counsel for the applicant cited following judgments in support of applicant's case:-

(i) S.N. Basu Vs. UOI & Others : 1983(1) SLJ 669 DLI

Date of seniority will be regulated entirely by date of passing departmental examination. In case of different batches, officers in first batch will be senior to those who passed selection test later.

(ii) H.C. Sharma Vs. NCD reported in 1983 (2) SLJ 663 SC; R. Swaminathan reported in 1997 SCC (L&S) 198, Ajit Kumar reported in 1999 (9) SCC 596 wherein it was held that adhoc service rendered due to exigency of service shall not count towards seniority.

(iii) Sheo Dhar Vs. Nagar Palika , Jaipur & Ors. 1991 (15) SC 856 : Order setting aside appointment without giving notice or opportunity of hearing to the appointment is void.

(iv) High Court of Allahabad in the case of Satya Prakash Sharma Vs. State of UP: 2007(3) SLJ 174 wherein it was held that unless a promotion order was cancelled, it remained intact. The promotion orders of applicants were not cancelled and hence seniority could not be altered w.e.f. a later date.

(v) High Court of Patna in the case of Chandrama Sinha Vs. State of Bihar reported in 2006 (1) PLJR 31 in which it was held that the revision of seniority putting the applicants below without giving opportunity to the petitioners was violation of principle of natural justice.

The learned counsel for the applicant also cited a number of cases on the point that statutory rules which create enforceable rights can not be taken away by executive instructions.

25. The learned counsel for the respondents reiterated averments made in WS. He also stated that the private respondents were appointed as Senior Clerks directly and the applicants became Senior Clerks on promotion. Thus, they were from different streams. Again, vide order no. 59 dated 26.09.1990, a copy of which was produced during hearing and shown to counsel for the respondents, services of various employees working as HC, Sr. Clerk and Junior Clerk were confirmed w.e.f. 01.04.1990. From that order in which names were reportedly shown according to seniority, it was clear that Ramjee Rai and private respondent no. 4,5

and 6 were Sr. Clerk at that time and applicants were Junior Clerks. Even in the seniority list of 01.04.1991, the names of private respondents were not there whereas applicants were shown below Brij Nandan Choudhary and Vijay Kumar Rai. Thus, it is clear that the applicants were not senior to private respondents no. 4,5 and 6 as Sr. Clerks. The private respondents no. 7 joined as Head Clerk on mutual transfer in 1996. Again the OS- II post being selection post, the promotion could be given only after passing the selection test. As such, the applicants who passed selection test later could not claim promotion over private respondents.

26. We have perused the records and considered the submissions made by the parties.

27. At the outset, we note that the applicants have raised questions about their seniority and promotion in different grades , i.e. Senior Clerk, HC, OS-II and OS-I and referred to many candidates as junior to him, but except for private respondents no. 4 to 7, no one else has been made party to this case. Thus, we are mainly confining our discussion with regard to seniority viz-a-viz private respondents.

28. The main basis of the claim of the applicants for seniority above private respondents includes (i) The office letter dated 4.8. 1992 (Annexure A/3) issued by the DRM(P), Sonapur fixing the inter se seniority between Vijay Kumar Rai , Kedar Nath Singh and Girija Nandan placing applicants above Vijay Kumar Rai and allowing applicants' seniority w.e.f. 3.3.1983, the date on which their junior Vijay Kumar Rai was promoted . The seniority of Ramji Prasad Rai was also refixed in that order, (ii) the seniority list of Senior Clerk as on 01.04.1995 published by DRM(P) Sonpur on 28.05.1996 (Annexure A/2) in which applicants were shown above private respondents no. 4 to 6, and (iii) promotion of their junior as HC, OS-II prior to the applicants.

29. It is noted that the applicants and the private respondents became Senior Clerks from different streams as stated by the l/c for the respondents and

not contested by the learned counsel for the applicants. In the seniority list as on 01.04.1995 on which the applicants are relying, the date of appointment of the private respondents no. 4 to 6 and date of their promotion as Senior Clerk is the same which supports the contention that they were appointed Sr. Clerks directly. As stated earlier, respondent no. 7 joined as Head Clerk on mutual transfer in 1996 in place of Rama Shankar as per statement of applicants.

30. We now proceed to first discuss the seniority issue of applicants viz-a-viz private respondents in the grade of Senior Clerk. In the seniority list of Junior Clerks as on 01.04.1991 published on 14.07. 1991, annexed by the applicant as Annexure A/2 of the OA, the names of private respondents are not there in the list, obviously because the private respondent no. 4 to 6 were already Senior Clerks and as it appears from the details of appointment of private letters in different grades annexed by the applicant at Annexure A/13 series of their supplementary rejoinder, respondent no. 7 joined on mutual transfer as Head Clerk sometimes in 1996. From the confirmation order dated 24.09.1990 submitted by the learned counsel for respondents it is clear that till then the applicants were Junior Clerk and private respondents and Ramjee Prasad Rai were Senior Clerks. From the confirmation order it also appears that Ramjee Prasad Rai was above respondents no. 4 to 6. Thus till then the position is clear that the applicants were junior to private respondents 4 to 6. Thereafter, vide order dated 04.08.1992, the applicants' seniority as Junior Clerk was fixed w.e.f. 03.03.1983 and they were placed above Vijay Kumar Rai. Shri Ramjee Prasad Rai seniority as Junior Clerk was fixed w.e.f. 22.09.1983, i.e. below the applicants. It appears that subsequently restructuring was done. As Shri Ramjee Prasad Rai was made junior to the applicants vide order dated 04.08.1992, the applicants were given benefit thereof w.e.f. the same date as Ramjee Prasad Rai, i.e. 01.04.1984 under restructuring. This fact is clear from the promotion order dated 08.09. 1994 of applicant no. 2 wherein it was mentioned he was given benefit from the date on which his junior



was given the said benefit under restructuring. Consequently in the provisional seniority list as on 01.04.1995, the applicants were shown senior to private respondents, above Ramjee Rai who was senior to them as mentioned earlier. In the said list annexed at Annexure A/2 series in OA 402 of 2006 also it is mentioned in the note below the names that the seniority of the applicants and Ramjee Prasad Rai (sl. no. 8,9 & 10) shall be decided in future based on decisions in pending Court cases. After decision in the CWJC filed by Ramjee Prasad Rai in Hon'ble High Court in which applicants were also party and SLP in High Supreme Court in which also they were party, the seniority of Shri Ramjee Prasad Rai has been refixed above the applicants. As a corollary to that the applicant who were placed above private respondents only because of their being given seniority above Ramjee Prasad Rai should logically revert back to their original position , i.e below private respondents no. 4 to 6.. The case in High Court related to seniority of Ramjee Prasad Rai viz- a -viz applicants. Thus no order could have been passed by the Hon'ble Court in respect of applicants' seniority viz-z-viz private respondents who were not party to that case. We find no illegality in refixing the seniority of applicants in the grade of Senior Clerks after passing of order of Hon'ble High Court, especially when there was a mention thereof in their promotion orders as well as in the provisional seniority list of 1995. The plea that the chapter was closed once the order as contained in Annexure R/2 of WS in OA 402/2006 was passed in which no mention of seniority of applicants was there, is not considered tenable. As the case in Hon'ble High Court was in the matter of Ramjee Prasad Rai, the order in compliance thereof was obviously with regard to Ramjee Prasad Rai. Consequential orders passed can not be termed as illegal or arbitrary or malafide.

31. As regards seniority in the grade of Head Clerk, the promotion to that grade is based on seniority cum merit as admitted by the learned counsel for applicant. Thus promotion of private respondents no. 4 to 6 earlier than the



applicant cannot be said to be illegal as they were senior to applicants in the grade of Sr. Clerk. As regards respondent no. 7, he joined on mutual transfer as Head Clerk in 1996 in place of Rama Shankar as per statement annexed by the applicant in their 3rd rejoinder. This fact, however, needs verification. The name of Rama Shankar in seniority list of 01.04.1995 was just below respondent no. 4, and he was a SC candidate. In other lists prior to 1996 which have been placed on record in the OA, the name of Rama Shankar does not seem to appear and hence we cannot comment on fixation of seniority of respondent no. 7 as Head Clerk viz-a-viz the applicants. It is further noted that in the promotion order of 27.04.2001, promoting the applicants to the grade of Head Clerk it was noted in footnote that the said promotion would depend on the outcome of case pending in the Court (Annexure A/6 series in OA 402 of 2006).

32. As regards promotion to OS II grade, the same is based on selection through test and seniority is fixed accordingly. Since applicants were junior to private respondents no. 4 to 6 who were given the OS-II grade vide order dated 6.12.2001 based on selection, the applicant cannot claim the grade above them. The applicants' have alleged that they were debarred from appearing in the selection test due to pendency of court cases and they protested against it. However, from Annexure A/22 and A/23 series annexed with 4th supplementary rejoinder, it appears that the letter written by M.P. and reply to him as well as to the applicant given in 1997 were regarding promotion of applicant no. 1 from Senior Clerk to Head Clerk. In his letter of August, 2001, the applicant no. 1 protested regarding irregularities in selection of OS-II and prayed for postponement thereof. The ground was again the seniority viz-a-viz the private respondents. In view of preceding discussion about seniority of private respondents no. 4 to 6 in the grade of Head Clerk, the plea that they were illegally not allowed to appear in selection of OS-II does not appear to be convincing. Since promotion to OS-I is also seniority cum selection based, the applicants can not



claim seniority over private respondents no. 4 to 6. As regards private respondent no. 7, it will have to be examined with regard to his seniority in Head Clerk grade and whether the applicants were denied opportunity to appear viz-z-viz private respondent no. 7.

33. Having observed as above, the claim of the applicants for fixing their seniority above private respondents no. 4 to 6 is not considered tenable. However, viz-z-viz respondent no. 7, it needs further verification with reference to seniority of the person against whose post he came on mutual transfer and thus was allotted seniority position of that person.

34. The applicants have also raised questions about their seniority viz-a-viz some others, namely, Bhagwan Prasad Srivastava, Umesh Kumar Singh, Madan Mohan Rai, Daya Shankar Prasad, Deo Kumar Rai, Ramesh Prasad Rai and Rameshwar Prasad who have been shown as senior to the applicants in the grade of OS-II as per seniority list published on 05.02.2010, whereas according to seniority list of Head Clerks as on 01.04.2005 they were promoted on 24.07.2003 or 6.8.2003. The applicants have claimed that they were promoted as Head Clerk on 01.1.1996 and 07.02.1997 and OS- II on 27.08.2003 and 21.09.2004. In the seniority list of OS- II of 2010, their date of promotion to OS-II grade has been shown as 13.08.2006. This obviously is based on the impugned letters dated 22.1.2007 and 14.12.2007 refixing the pay of the applicants.

35. The judgments cited by the applicant and rule position mentioned have been taken note of, but in view of factual finding as above, the same do not need any elaborate discussion further.

36. As to the question of recovery, we note that this whole situation has arisen because of refixation in the light of judgment in court cases. There was no misrepresentation or suppression of facts on the part of the applicants. Again the change of date of their appointment as Junior Clerk while working out the over payments has already been admitted to be a mistake by the respondents.



Furthermore, the change of date of their promotion as Head Clerk and OS-II viz-a-viz their seniority compared to persons named above and the respondent no. 7 is not yet clear from the facts in the pleadings. Moreover, the applicants are almost at the verge of retirement. Though we are not in agreement with the applicants that recoveries of excess payments due to wrong fixation can not be made but in view of the facts of this case and its peculiar circumstances, we think that recovery was not appropriate especially when there was no misrepresentation/suppression of facts on the part of the applicants and when some facts are still not clear.

37. In view of the foregoing discussions, this OA is disposed of with following observations and directions:-

[a] The claim of the applicants for fixing their seniority as Senior Clerk and in subsequent grade above respondent no. 4 to 6 is disallowed.

[b] The seniority of the applicants viz-a-viz respondent no. 7 in the grade of Head Clerk & OS-II shall be re-examined by the respondents in the light of rules and instructions on fixation of seniority on mutual transfer as reportedly respondent no. 7 joined as Head Clerk on mutual transfer (as per applicants).

[c] As regards re-fixation of seniority of the applicants in the grade of Head Clerk, OS-II & OS- I viz-s-viz persons named in paragraph 3^A above, the matter shall be re-examined by the respondents in the light of observations made in this order.


[d] The respondents are directed to stop recovery if still continuing and refund the amount recovered from the salary of the applicants on account of re-fixation done as per order dated 22.1.2007 and 14.12.2007.

[e] The exercise as per direction at sl. [b] and [c] above shall be carried out by respondent no. 2, i.e. DRM, ECR, Sonapur Division and then he shall pass a speaking order keeping in view the observations made in this order. If required, the orders dated 22.01.2007 and 14.12.2007 as contained in Annexure A/1 series of OA 293/2008 shall be modified. This exercise shall be completed within a period of four months from the date of receipt/production of a copy of this order. Refund as per direction at [d] above shall

also be made within one month of passing the order of DRM, ECR, Sonapur in pursuance of this order.

[f] Applicant is directed to submit a copy of this order to respondent no. 2 within a period of 15 days from the date of receipt of certified copy.

38. No costs.


[Bidisha Banerjee]
Member [J]
srk.


[Akhil Kumar Jain]
Member[A]