

CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION NO. 40/93

Date of Decision: 13-7-99

V.Nilappana & Ors.

Petitioner/s

Shri G.S.Walia

Advocate for the
Petitioner/s.

v/s.

Union of India & Ors.

Respondent/s

Shri V.G.Rege

Advocate for the
Respondent/s

CORAM:

Hon'ble Shri Justice R.G.Vaidyanatha, Vice Chairman

Hon'ble Shri D.S.Baweja, Member (A)

- (1) To be referred to the Reporter or not? ✓
- (2) Whether it needs to be circulated to other Benches of the Tribunal? ✓

D.S. Baweja
(D.S. BAWEJA)
MEMBER (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

DA.NO. 40/93

Dated this the 13th day of July, 1999.

CORAM: Hon'ble Shri Justice R.G.Vaidyanatha, Vice Chairman
Hon'ble Shri D.S.Baweja, Member (A)

1. Varghese Nilappana
2. A.B.Pal
3. Krishin N.Godhwani
4. Jagdale Dnyandeo M
5. Deepak G.Battulwar

All are working as Sr.Clerks
under COS Headquarters,
Bombay V.T., Central Railway,
Bombay.

... Applicants

By Advocate Shri G.S.Walia

V/S.

1. Union of India through
General Manager, Central
Railway, Bombay V.T., Bombay.
2. Chief Personnel Officer
(S&M), Central Railway,
Bombay V.T., Bombay.
3. Controller of Stores,
Headquarters, Central
Railway, Bombay V.T., Bombay.
4. Mrs.C.S.Ghumre,
working as Head Clerk
in COS (HQ), Bombay V.T.,
Central Railway, Bombay.
5. Mrs.Mary Jose
working as Sr.Clerk
under COS Headquarters,
Bombay V.T., Bombay.
6. Mrs.S.V.Tanavade,
working as Sr.Clerk under
COS(Headquarters), C.Rly,
Bombay V.T., Bombay.
7. Mrs.M.M.Wagh,
working as Sr.Clerk in
COS (HQ) Office, C.Rly.
Bombay V.T., Bombay.
8. Mrs.M.M.Shaikh Amiruddin,
working as Sr.Clerk under
COS (HQ), C.Rly.Bombay V.T., Bombay.

... Respondents

By Advocate Shri V.G.Rege

O R D E R

(Per: Shri D.S.Baweja, Member (A))

This application has been filed jointly by 5 applicants who are working as Senior Clerk in the Stores Department of Central Railway. The applicants were directly recruited and appointed as Senior Clerk on 29.6.1989. The applicants submit that Respondents No. 4 to 8 were promoted as Senior Clerk in the scale of Rs.1200-2040 from the post of Junior Clerk on adhoc basis and provisional basis under Office Order dated 31.5.1989. Subsequently, they were subjected to suitability test and the result of the suitability test was declared as per order dated 31.5.1990. In the seniority list issued on 30.11.1992, the respondents No. 4 to 8 have been shown senior to the applicants by giving the benefit of adhoc and provisional promotion service to them from 31.5.1989. The applicants contend that since they have been appointed on 29.6.1989, i.e. earlier to regularisation of promotion of Respondents No. 4 to 8, they are senior to Respondents No. 4 to 8. Applicants are aggrieved by this action of the official respondents and have filed this OA. on 19.1.1993 seeking the following reliefs :- (a) to set aside the seniority list dated 30.11.1992. (b) to hold and declare that the period of adhoc and provisional promotion prior

to passing the suitability test cannot be counted for seniority as Senior Clerk in respect of Respondents No. 4 to 8.

2. The Respondents No. 4 to 8 have been made as party respondents on a representative basis and the applicants have made a prayer that they are aggrieved by the seniority allowed to all the employees mentioned in the Office Order No. 45/89 dated 31.5.1989.

3. The main contention of the applicants is that seniority of the applicants vis-a-vis Respondents No. 4 to 8 has to be fixed in accordance with the provisions of Para 302 of Indian Railway Establishment Manual. The respondents have violated the provisions of ^{the} Para 302 by counting the period of adhoc service prior to regular promotion after passing the suitability test and therefore the action of the respondents is improper, arbitrary and unconstitutional.

4. The ^{official} respondents have filed a written statement opposing the application. The respondents have submitted that during the year 1980-81 a notification was issued for recruitment to the post of Junior Clerks. The selection against this notification could not be finalised as some irregularities and mal-practices were noted and therefore investigation had to be carried out by

the vigilance organisation. Though some of the candidates from the panel joined in 1983, but the Respondents No. 4 to 8 who also belong to same selection could be appointed only in May, 1987. A dispute arose with regard to seniority between those appointed in 1987 and those who were promoted departmentally before 1987 or were appointed against the subsequent notifications. The matter was agitated before this Bench of the Tribunal and the same was decided on 27.10.1988. Thereafter, the norms for seniority were laid down and Respondents No. 4 to 8 and others were allowed seniority with reference to the panel prepared as per notification of the year 1980-81. In view of the dispute with regard to seniority, the Respondents No. 4 to 8 could not take suitability test passing of which is a condition precedent to promotion to the post of Senior Clerk on regular basis. The respondents No. 4 to 8 and others were therefore promoted on adhoc basis from 31.5.1989 pending conducting of the suitability test. Suitability test was conducted in May, 1990 and the Respondents No. 4 to 8 and others qualified in the suitability test. Since the respondents No. 4 to 8 could not take suitability test on account of seniority dispute and there was no fault on their part, Administration considering the special facts and circumstances of their case have allowed them seniority as Senior Clerk from 31.5.1989, i.e. from the date from which

they were continuously holding the post of Senior Clerk without any break till their regularisation. The respondents have submitted that though the contention advanced by the applicants in Para 4.2^{of OA.} based on the provisions in Para 302 of Indian Railway Establishment Manual, may be tenable in the normal circumstances but in view of the special facts of the case of Respondents No. 4 to 8 and others, the stand of the applicants does not hold good. It is the view of the respondents that provisions of Para 302 cannot be^{made} applicable in fixing the seniority of Respondents No. 4 to 8 and others. The respondents therefore plead that the seniority allowed to the Respondents No. 4 to 8 and others based on the result of the auitability test declared on 31.5.90 from 31.5.1989 when they were promoted on adhoc basis is legal, valid and just and fair. In view of these averments, the respondents contend that the applicants have no case and the OA. deserves to be dismissed.

5. The applicants have not filed any rejoinder reply for the written statement of the respondents.

6. Heard the arguments of Shri G.S.Walia, learned counsel for the applicants and Shri V.G.Rege, learned counsel for the respondents. Private respondents have neither filed any written statement nor were represented through a counsel.

7. During the hearing, the learned counsel for the applicants relied upon the following judgements in support of the grounds taken by the applicants in the OA. :-

- (1) Masood Akhtar Khan & Ors. vs. State of Madhya Pradesh & Ors., 1990 SCC (L&S) 580.
- (2) Keshav Chandra Joshi vs. Union of India, 1991 Supreme Court 284.
- (3) T.N.Saxena & Ors. vs. State of U.P. & Ors., 1992 SCC (L&S) 82
- (4) S.K.Jha vs. Prem Prakash Aggarwal & Ors., 1994 SCC (L&S) 574.
- (5) Anuradha Mukerjee & Ors. vs. Union of India, 1996 SCC (L&S) 1187.
- (6) Kuttiyappan vs. Union of India & Ors., 1997 SCC (L&S) 83.
- (7) Davinder Bathia & Ors. vs. Union of India & Ors., 1998 (2) SC SLJ 132.

8. The basic facts involved in the issue under challenge are not indispute. The applicants have been appointed as Senior Clerk through direct recruitment on 29.6.1989. The respondents No. 4 to 8 who have been impleaded on a representative basis along with others were initially promoted on adhoc basis as Senior Clerk as per order dated 31.5.1989 (Ex. 'A'). They were subsequently subjected to suitability test in 1990 and the result of the suitability

test was notified as per order dated 31.5.1990. The respondents No. 4 to 8 along with others have been placed senior over the applicants by treating their date of promotion from 31.5.1989 ^{i.e.} counting their period of adhoc service. The applicants' claim is that seniority of promotees and direct recruits is to be governed by provisions of Para 302 of Indian Railway Establishment Manual (IREM) and since the applicants have been regularised only from 31.5.1990, they cannot be given seniority from the earlier date counting period of adhoc service. The respondents, on the other hand, while contesting this contention of the applicants have stated that the Respondents No. 4 to 8 along with others could not undertake the suitability test earlier on account of some seniority dispute and since this was not on account of fault of the private ^{respondents} the promotion of the Respondents No. 4 to 8 along with others has been treated as regular from the date of adhoc promotion i.e. 31.5.1989 after they had qualified in the suitability test. Keeping this rival stand of the parties, the short question which requires to be gone into is whether the action of the respondents in giving seniority from the date of adhoc promotion to Respondents No. 4 to 8 and others is according to the statutory rules and is legally sustainable.

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9. The respondents have explained that the respondents No. 4 to 8 and others were recruited as Junior Clerks against the notification of 1980-81 but the operation of panel was delayed on account of the investigation being carried out by the vigilance branch on account of ^{some} mal-practices and irregularities. The respondents state that the Respondents No. 4 to 8 could be offered appointment only in 1987 after the investigations were completed. This has resulted in serious seniority dispute among the Junior Clerks and the matter was agitated before the Tribunal. The respondents submit that the issue with regard to seniority was decided as per the order dated 27.10.1988 of this Bench. The respondents have further contended that subsequent to this order, the seniority of Respondents No. 4 to 8 and others could be fixed as Junior Clerk . As per the respondents, since the seniority issue was pending, the respondents No. 4 to 8 were not able to undertake suitability test for promotion to senior Clerk and therefore they were promoted on adhoc basis on 31.5.1989. Thereafter, they were subjected to suitability test in which they qualified and the result was declared on 31.5.1990. The main stand of the respondents with this background is that the respondents No. 4 to 8 and others were prevented from taking suitability test on account of seniority dispute and they were

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not at fault and therefore they were entitled for seniority as Senior Clerk from the date of their adhoc promotion which is followed by their qualifying in the suitability test for regular promotion. On considering the facts and circumstances of the case and the provisions of the rules stated by the applicants, it is our considered view that the action of the respondents cannot be legally sustainable. The respondents have not cited any rules under which the power has been exercised for giving the seniority to and others the Respondents No. 4 to 8 counting the adhoc period of service. The seniority of the promotees and the direct recruits is to be governed by extant rules. The respondents have not denied that the relative seniority of promotees and direct recruits is covered by provision of Para 302 of IREM. Once, the statutory rules have been laid down for seniority, the respondents cannot take a decision contrary to the same by relaxing the same in the absence of any power to the competent authority to relax the statutory rules. We are also not impressed by the argument of the respondents that the facts and circumstances prevailing in the case of Respondents No. 4 to 8 and others were such that they were prevented from taking suitability test and therefore they were entitled for the benefit of seniority from the date of adhoc promotion.

(A)

The delay in selection is inherent in the system and many times the selections get upheld either due to seniority disputes or other causes. This does not mean that in such a situation the statutory seniority rules are to be relaxed and seniority is to be decided based on the merits of the individual case. In this connection, we refer to the judgement in the case of Kuttiyappan vs. Union of India & Ors. (supra) cited by the applicants to counter the contention of the respondents with regard to delay in the selection process in respect of Respondents No. 4 to 8 and others. In this judgement, the process of selection for promotion for both to direct recruits as well as departmental promotion was started. However, the selection of the direct recruits got finalised earlier and the candidates ^{were} posted on the working post after completion of training earlier to those ^{departmental} who were selected for promotion. The promotees had agitated the matter before the Tribunal claiming seniority over the direct recruits on the plea that their selection process had started earlier and therefore the provisions of Para 306 of IREM will apply in their case. This plea was rejected by the Tribunal and the matter thereafter was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court held that the Tribunal had rightly rejected the claim of seniority made by the promotees over the direct recruits. The Hon'ble Supreme Court has also

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held that the provisions of Para 306 are inapplicable in determining the inter-se seniority between the promotees and direct recruits. In the present case, the same situation is prevailing. The promotees have been given seniority by the respondents over the direct recruits who were appointed in 1989 on the plea that their selection process was delayed. Keeping in view what is held by the Hon'ble Supreme Court in above and the fact that there are no statutory rules cited by the respondents, according to which, the respondents have exercised power ^{of} granting seniority to the promotees from the date of adhoc promotion, we are constrained to conclude that the action of the respondents is not legally sustainable.

10. We have held above that the respondents have not cited any rules under which the Respondents No. 4 to 8 and others have been allowed seniority from the date of adhoc promotion. As brought out by the applicants by citing several judgements of the Hon'ble Supreme Court, it is ^{now} a settled law that seniority is to be reckoned from the date of regular appointment after following the due process of selection and the adhoc service prior to regular promotion made as a stop gap arrangement cannot be counted for the purpose of granting seniority. This view has been

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held in the judgements cited by the applicants, namely, Masood Akhtar Khan & Ors. vs. State of Madhya Pradesh & Ors., T.N.Saxena & Ors. vs. State of U.P. & Ors., S.K.Jha vs. Prem Prakash Aggarwal & Ors. and Davinder Bathia & Ors. vs. Union of India & Ors. Further, in the judgement of Anuradha Mukerjee & Ors. vs. Union of India, the Hon'ble Supreme Court while considering the promotion to the post of Senior Clerk in the case of Railways from different sources has held that adhoc appointees dehors rules and subsequently selected and appointed according to rules cannot be allowed seniority from the back date and the seniority has to take effect from the due date of selection and they would have to be junior to the direct recruits who have been appointed earlier to the completion of selection process. Keeping in view the law laid down by the Hon'ble Supreme Court, we are unable to uphold the action of the respondents.

11. The learned counsel for the official respondents, however, sought to justify their action in giving seniority to Respondents No. 4 to 8 and others from the date of adhoc promotion relying upon the judgement of the Hon'ble Supreme Court in the case of Direct Recruits Class II Engineering Officers Association vs. State of Maharashtra, 1990 SCC (L&S) 339. The counsel for the official respondents advocated that the case of the applicants is covered by the conclusion



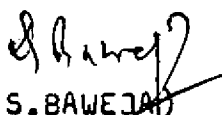
(B) in Para 47 of this judgement since the private respondents have been continuing on adhoc promotion without any break and the same was confirmed on regular basis after passing the suitability test as per the selection procedure laid down. He further stated that adhoc promotion was like a regular promotion and therefore private respondents were entitled for seniority as granted. On careful consideration of the judgement, we are not persuaded to endorse the contention of the respondents. Firstly, it is noted that the adhoc promotion was done in May, 1989 and regular selection has been done in May, 1990, i.e. ^{only} after a period of about one year and therefore promotion was not continuing for a long period. Further, conclusion (B) will apply only if the case of the respondents No. 4 to 8 and others is not covered by conclusion (A) in the same para 47. The conclusion (B) covers a different kind of situation wherein the appointments are otherwise regular except for certain defects/procedural deficiencies as per the extant rules. That is not the situation in the present case. Promotion from 31.5.1989 was done on adhoc basis as a stop gap arrangement as ^{is} clear from the order as the promotion to the post of Senior Clerk could be only done after the employee had passed the suitability test. Therefore the adhoc promotion was dehors rules. From the result of the suitability test,

it is noted that a number of seniors have failed in the suitability test. In the case covered under conclusion (B), normally the promotions would not get up set and may be there was some procedural deficiency which could be rectified subsequently. In this connection, we refer to the latest judgement of the Hon'ble Supreme Court in the case of Dr. Anuradha Bodi & Ors. vs. Municipal Corporation of Delhi & Ors., AIR 1998 SC 2093 wherein the scope of conclusion (A) and (B) in Para 47 of the judgement in the case of Direct Recruits has been gone into. Keeping in view the analysis made by the Hon'ble Supreme Court with regard to conclusions (A) and (B) in this judgement, we are of the view that case of the respondents No. 4 to 8 and others falls under conclusion (A) and therefore they are not entitled for seniority from the date of adhoc promotion.

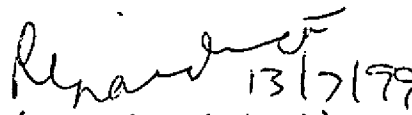
12. The counsel for the respondents during the hearing also brought to our notice the judgement dated 31.7.1997 of this Bench in OA.NO.549/91 and other connected OAs. and stated that this issue has already been gone into. After going through this order, we find that the issue involved in this OA. is entirely different and it relates to seniority in the cadre of Junior Clerks and not in respect of the senior clerks. Therefore, we do not find that what is decided in this order has ^{any} ~~no~~ relevance to

the issue challenged through the present OA.

13. In the result of the above, we find merit in the OA, and the same is allowed. The impugned seniority list dated 30.11.1992 is accordingly set aside. The Applicants No. 1 to 5 shall be allowed seniority based on their date of appointment as a direct recruit over the Respondents No. 4 to 8 and others who have been given seniority above the applicants as per seniority list dated 30.11.1992. Consequential benefits if any that may arise with revision of seniority of the applicants shall be also allowed. No order as to costs.


(D.S. BAWEJA)

MEMBER (A)


(R.G. VAIDYANATHA)

VICE CHAIRMAN

mrj.