

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
BOMBAY BENCH, MUMBAI.

ORIGINAL APPLICATION NO.1064/1998

Dated: 1.4.04 .

Hon'ble Shri Anand Kumar Bhatt, Member (A),
Hon'ble Shri S.G.Deshmukh, Member (J).

D.M.Tripathi,
C/o. G.S.Walia,
Advocate,
High Court,
16, Maharashtra Bhavan,
Bora Masjid Street,
Behind Handloom House, Fort,
Mumbai - 400 001.
(By Advocate Shri G.S.Walia)

...Applicant.

Vs.

1. Union of India, through
General Manager,
Central Railway,
Headquarters Office,
Mumbai CST,
Mumbai - 400 001.
2. Divisional Railway Manager,
Mumbai Division,
Central Railway,
Mumbai CST,
Mumbai - 400 001.
3. D.L.Wagh,
Working as
Lab Superintendent (CMS-1),
Diesel Shed,
Pune.
4. Chief Workshop Manager,
Central Railway,
Parel,
Mumbai - 400 012.
(By Advocate Shri S.C.Dhawan)

...Respondents

: O R D E R :

{Anand Kumar Bhatt, Member (A)}

The following relief has been sought by the applicant,
which is as follows :

"a) This Hon'ble Tribunal will be pleased to call for
the records and proceedings which led to the passing of

...2.

gn

the impugned order dt. 30.11.1998 and after going through its validity, constitutionality, propriety, quash and set aside the same.

b) This Hon'ble Tribunal be pleased to hold and declare that the Respondent No.3 who belongs to SC and has progressed to the present post on the basis of reservation, cannot be treated as a General candidate and cannot be given eligibility to appear for the Selection pursuant to the notification dated 2.4.1998.

c) This Hon'ble Tribunal will be pleased to order and direct the Respondents to include the name of the Applicant in the Panel for the post of Asst. Chemist and Metallurgist.

d) This Hon'ble Tribunal will be pleased to order and direct the Respondent to hold the proper selection by calling candidates for one post only and form the panel in accordance with the Rule for the post of Asst. Chemist and Metallurgist.

e) This Hon'ble Tribunal will be pleased to hold and declare that there is only one post which is required to be filled-up and the Notification that there are 2 posts is wrong and illegal.

f) Any other or further order as to this Hon'ble Tribunal may deem fit and necessary in the circumstances of the case may be passed.

g) Cost of this Original Application be provided for."

2. The applicant is working as Laboratory Superintendent (CMS-1) under Respondent No.2 in the pay scale of Rs.7,450-11,500. The applicant joined Railway Service on 6.3.1970 as Junior Chemist and Metallurgist. Respondent No.3 D.L.Wagh joined the service in the same capacity much later on 25.11.1974. On 2.4.1998, a notification was issued for selection of Assistant Chemist and Metallurgist (for short, ACM) in Mechanical Department. For 2 vacancies, a list of 8 candidates was notified. The applicant in the said list was at Sl.No.2, whereas, R-3 was at Sl.No.6. Written Test was held, applicant and R-3 passed the said written test. Thereafter, viva voce was conducted. The final panel was published under office order dt.

...3.



30.11.1998. Respondent No.3 was included in the panel, whereas, the applicant was not. The contention of the applicant is that there are 4 posts in the cadre of Group 'B' ACM and as one post is already occupied by an SC candidate no more SC/ST candidate could have been taken. Respondent No.3 progressed to the present post on the basis of his belonging to SC and he was not entitled to appear in the selection as general candidate. He cannot take benefit of his seniority on the basis of his accelerated promotion. Persons belonging to general community who joined at the time when R-3 joined the Railway Service have not yet acquired the eligibility to appear for the selection/written test for the said post and therefore, calling R-3 for such selection is illegal. There was only one post vacant and only four people were required to be called for the interview. Respondent NO.3 cannot be considered as a general candidate as he is at Sl.No.23 in the seniority of the present incumbents of the posts in the scale of Rs.2000-3200 (RPS) and he was not entitled to be called for selection at all. The applicant has sought relief that the impugned selection for Group 'B' post of ACM dt. 30.11.1998 be quashed and set aside.

3. In the replies dt. 14.1.1999 and 11.1.2002, the Respondents have stated that the applicant took the calculated chance of appearing in the written ^{test} and viva voce and when he was not found suitable in the selection process, only then he has challenged the selection of R-3 and in any event, the applicant has not challenged the seniority of SC employee who is shown above him in the seniority list, who had also appeared in the selection. The list of eligible candidates was notified on

...4.

[Handwritten signature]

2.4.1998. The applicant was shown at Sl.No.2. Apart from R-3 there were two more SC candidates in the eligibility list at Sl.Nos.1 and 5. However, their inclusion has not been challenged by the applicant. The principle laid down by the Apex Court in the case of Virpal Singh Chauhan is prospective in nature^{and} is applicable on and after 10.2.1995. The seniority in the feeder cadre was finalised prior to this date. Respondent No.3 was promoted to the feeder cadre w.e.f. 1.1.1984. R-3 was assigned the correct seniority and he was in the zone of consideration and therefore, he was considered for the said selection. The applicant has not challenged the assigning of seniority of other SC candidates who participated in the selection. The Respondents have denied that there was only one vacancy as alleged by the applicant. Giving further details, they have said that the sanctioned strength of ACM Group 'B' is 4 and for the post of C&M is 2. ACM is the feeder grade to the post of C&M and therefore, the vacancies in both the grades were considered for assessment of vacancies. Against the above 6 posts only 4 employees were working. The applicant never submitted any representation to the Administration against the assessment of vacancies and seniority/eligibility list notified on 2.4.1998. The eligibility of candidates has been considered on the basis of 3 : 1 formula on the basis of the extant rules in terms of Railway Board letter dt. 28.2.1997. These instructions have been issued as a result of Virpal Singh Chauhan's case. However, the said instructions state that the general candidate regaining his seniority over earlier promoted candidate belonging to SC/ST in the immediate higher post/grade is subject to the condition that in respect of

...5.



selection posts, the over-riding principle that a Railway servant borne in an earlier panel will rank senior to a railway servant borne in a later panel will be observed. The respondents have further stated that the posts in Lab. cadre are classified as "Safety Post" and there is no differentiation or relaxation of marks between general and reserved community for passing a selection for promotion.

4. In the oral submissions Shri G.S.Walia for the applicant initially submitted that 85th Constitutional Amendment dt. 4.1.2002 by which Article 16 (4A) of the Constitution has been amended by which the SC/ST candidates have been given reservation in promotion with consequential seniority has been challenged in the Apex Court. Shri Walia stated that his not being selected is not a bar to come before this Tribunal because as R-3 has been promoted, the applicant is barred for future selection also. He reiterated that against 4 posts one is already an SC candidate. Against 4 posts of ACM Group 'B' one is already SC and no other SC candidate can be called for selection. R-3 is ineligible and he has been considered, whereas, the applicant is not considered. He has drawn attention to the observation of the Constitution Bench of the Supreme Court in R.K.Sabharwal's case that the reservation percentage has to be decided on the basis of posts in the cadre and not on the basis of vacancies which occur from time to time.

5. For the respondents Shri Dhawan stated that the Apex Court in a number of cases has held that once a person has participated in a selection process, he cannot challenge it later on on being unsuccessful as ^{JT 1995 (2) SC 295} Chandrashekhar ; {1995 (25) ATC 603}, Madan Lal Vs. Government of J & K, and {1997 (2) SC SLJ 157} Kunjamma where the ratio is estoppel for unsuccessful

...6.

gr

candidate. He has stated that the eligibility list has not been challenged by the applicant and in the list the applicant was senior to R-3 and therefore no grievance accrues. He has cited {1999 (3) AISLJ SC 35} Sushma Suri Vs. Govt. of NCT Delhi, wherein it is held that once the selection is over no relief can be granted. Both applicant and R-3 were promoted on 1.1.1984. Shri Dhawan pointed out that after the impugned selection of 1998, the applicant appeared in the year 2000 for the higher post, but he again failed. He mentioned that Supreme Court has not given any stay on the 85th Constitutional Amendment which came into force retrospectively from the date of coming into force of Article 16 (4A) i.e. 17.6.1995. The applicant has not given any particulars of other unsuccessful candidates.

6. In rebuttal, Shri Walia stated that there cannot be estoppel in case of any violation of law. In case of glaring irregularity, acquiescence estoppel is not applicable.

7. We have considered the case. In the case of Madan Lal, it has been held by the Apex Court that once the candidate has participated in the selection, locus standi is not possessed by the unsuccessful candidate who had taken chance to get himself selected at the impugned interview. This has been reiterated by the Apex Court ~~and~~ in several other cases which have been cited by the Respondents. The applicant's case also suffers from the infirmity of non-challenging the eligibility list or the inclusion of all other SC candidates in the eligibility list. The Railway Board issued instructions on 28.2.1997 (Exhibit - R-1) after the Judgment of the Supreme Court in Virpal Singh

...7.


Chauhan's case on 10.10.1995. It is worthwhile quoting the relevant portion of the said instructions :

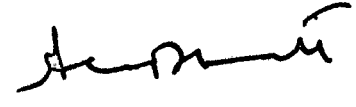
"The issue of revised instructions regulating seniority pursuant to the judgment of the Hon'ble Supreme Court has been considered by the Ministry of Railways. It has been decided that if a Railway servant belonging to the Scheduled Caste or Scheduled Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior General/OBC Railway servant who is promoted later to the said immediate higher post/grade, the General/OBC Railway servant will regain his seniority over such earlier promoted Railway servant belonging to the Scheduled Caste and the Scheduled Tribe in the immediate higher post/grade. This will, however, be subject to the condition that in respect of Selection posts, the overriding principle that a Railway servant borne in an earlier panel will rank senior to a Railway servant borne in a later panel, will be observed."

The respondents have averred that they have gone by these instructions and the post of ACM being a selection post and a safety post R-3 has been selected on the basis of merit. The 85th Constitutional Amendment came into force only on 4.1.2002, although it was deemed to have come into force w.e.f. 17.6.1995. The amendment has been challenged in the Apex Court. However, no stay has been granted. However, the impugned order is dt. 30.11.1998 and we are satisfied that action has been taken by the respondents as per the instructions issued by the Railway Board on 28.2.1997 in regard to selection posts as above (Exhibit R-1). It may be noted that even if we had arrived arrive at a different conclusion in the case in hand, in view of the 85th Amendment, as the notification was issued on 2.4.1998 for the selection of ACM (Lab.) along with the eligibility list, the consequent action by the respondents cannot be any different as the 85th Amendment which is still on the books and it has been deemed to have come into force retrospectively w.e.f. 17.6.1995.

...8.

8. In the result, we do not find any reason to give relief to the applicant. O.A. is dismissed. No costs.


(S.G. DESHMUKH)
MEMBER (J)


(ANAND KUMAR BHATT)
MEMBER (A)

B.