

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

Jaipur, this the 5th day of March, 2009

ORIGINAL APPLICATION No.10/2004

CORAM:

HON'BLE MR.M.L.CHAUHAN, JUDICIAL MEMBER
HON'BLE MR.B.L.KHATRI, ADMINISTRATIVE MEMBER

1. M.C.Johari s/o Shri S.K.Johari, r/o Q.No.584-B,
Loco Colony, Kota- Goods Guard.
2. O.P.Tiwari s/o Shri P.L.Tiwari r/o Shubh Laxmi
Nagar, Gangapurcity- Goods Guard
3. L.N.Pachauri s/o Shri Tej Singh Pachauri,
Emmanual School, Kota- Goods Guard
4. D.C.Gupta s/o Shri R.P.Gupta r/o B-34, J.N.,
Kota - Goods Guard.
5. Jagdish Prasad Sharma s/o Shri L.R.Sharma r/o
Mahu Kalan, Goods Guard.
6. Rajendra Gaur s/o Shri K.B.L.Gaur, r/o 612-B,
New Railway Colony, Kota Jn. Goods Guard.
7. D.S.Rajawat s/o D.S.Rajawat r/o Near Junior
Railway Institute, Goods Guard
8. Hemant sharma s/o R.C.Sharma r/o 404, Nanak
Palace, Bal Mandir School Road, Kota, Goods
Guard.
9. V.S.Sharma s/o Shri H.P.Sharma r/o 940-B, Old
Railway Colony, Kota Jn. Goods Guard.
10. Mohd. Rafiq s/o Shri Akbar Khan r/o Islampura,
GGC Goods Guard.
11. Gurcharan Singh s/o Shri D.P.Singh r/o Model
Town, Kota Jn. Goods Guard.
12. Anil Kumar Sharma s/o Joravar Singh r/o 840-B,
New Railway Colony, Kota, Goods Guard
13. Uttam Singh s/o Shri Vishram Singh r/o 527-A,
New Railway Colony, Kota Jn. Goods Guard.

14. Rajkumar Sharma s/o Shri R.B.Sharma r/o 417/B, New Railway Colony, Kota, Goods Guard
15. Haripal Singh s/o Shri S.Singh r/o Mahu Kalan, Goods Guard.
16. Rakesh Kumar s/o Shri Neenuram, r/o Behind B Cabin, Rangpur Colony, Kota, Goods Guard
17. Rajesh Gautam s/o Shri Ram Swaroop r/o 38, Adarsh Colony, Kherli, Kota- Goods Guard
18. Rajendra P.Sharma s/o Shri C.L.Sharma r/o Kota, Goods Guard
19. M.H.Bohra s/o late Shri M.H.Bohra, BCI Computer Education, Kota Jn. Goods Guard.
20. Vikas Chhatri s/o Shri B.B.Chhatri, r/o 381/B, New Railway Colony, Kota Jn. Goods Guard
21. Shashi Bhushan s/o SShri D.N.Sharma r/o 23, Model Town, Kherli Phatak, Kota- Goods Guard
22. Ravindra Sharma s/o Shri Manmohan Lal r/o 172-A, Railway Colony, Kota -Goods Guard.
23. S.K.Bhola s/o Shri Bhagmal Bhola, r/o 227, Rangpur Road, Dadwara, Kota - Goods Guard.

.. Applicants

(By Advocate: Shri P.V.Calla)

Versus

1. Union of India through the General Manager, West Central Railway, Jabalpur.
2. Senior DOM, West Central Railway, Kota Division, Kota.
3. The Divisional Railway Manager, West Central Railway, Kota Division, Kota.
4. Bhagirath Mal, Senior Goods Guard.

5. Chaturbhuj Mehar, Senior Goods Guard.
6. Satya Narain Verma, Senior Goods Guard
7. Ratan Lal S., Senior Goods Guard
8. Rameshwar Prasad, Senior Goods Guard
9. Om Prakash Verma, Senior Goods Guard
10. Madan Lal K., Senior Goods Guard
11. Triveni Prasad, Senior Goods Guard

.. Respondents

(By Advocate: Shri Anupam Agarwal for respondent Nos. 1 to 3)

O R D E R

Per Hon'ble Mr. M.L.Chauhan

The applicants have filed this OA thereby praying for the following reliefs:-

- i) That by an appropriate order or direction, the impugned Indian Railway Establishment Code and Indian Railway Establishment Manual and the Rules, Circulars, directions framed in regard to the railway servants be declared ultra vires to the powers of the President of India.
- i) (a) By an appropriate order or direction, the impugned amendments in Rule 319 of the Indian Railway Establishment Manual vide dated 15.5.1998 and dated 8.3.2002 be declared ultra vires to the Constitution of India and be quashed and set aside accordingly along with the orders issued regarding reservation on that basis.
- ii) That by an appropriate order or direction, the impugned seniority list dated 19.2.2003 Annex.A/1 be quashed and set aside.
- iii) That by an appropriate order or direction, the impugned order dated 16.8.2002 Annexure-A/2 and the impugned order dated 25.7.2003 Annexure -A/3 be quashed and set aside and

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the candidates shown in the above orders be reverted in consequences thereof. The respondents be further directed not to include the posts temporary down-graded for regular promotion.

- iv) That the respondents be directed to reconstitute the seniority list on the basis of the base grade seniority and then consider promotion for higher posts on the basis of the base grade seniority.
- v) Any other relief which this Hon'ble Tribunal deems fit may also be granted to the humble applicants, looking to the facts and circumstances of the present case.

2. The main grievance of the applicants is regarding letter 19.2.2003 (Ann.A1) whereby tentative seniority list of Senior Goods Guards in the pay scale of Rs. 5000-8000 was circulated and it was mentioned in the said letter that in case any person has any grievance regarding their seniority they should file objections within a period of one month. Such grievance is based on the fact that the said tentative seniority list has been prepared showing the cadre of Senior Goods Guard as 90 whereas the said cadre consist of only 73 posts and also on the fact that earlier the respondents have issued a seniority list dated 16.8.2001 (Ann.A4) on the basis of the base grade seniority of the Goods Guard grade Rs. 4500-7000 in which name of the applicants were shown senior to the respondent Nos. 4 to 11 in this OA. Thus, according to the applicants, such a course was not permissible for the respondents while issuing the impugned seniority list Ann.A1. The applicants have also challenged amendment in Rule 319

of the IREM vide letter dated 15.5.98 and 8.3.2002 which prescribe principle of reservation for employees belonging to SC/ST promoted earlier vis-à-vis general category candidates promoted later on the ground that the same is ultra vires to the Article 16(4A) of the Constitution of India and Constitution (Eighty-fifth Amendment) Act, 2001 which provides consequential seniority on the ground that such a provision can be made by the State Government and Central Government in favour of SC/ST candidates only if in the opinion of the State there is no adequate representation of SC/ST candidates in service.

3. Notice of this application was given to the respondents. The respondents have filed reply. In the reply the respondents have justified their action on the basis of Constitution (Eighty-fifth Amendment) Act, 2001. On merits, it has been contended that the impugned letter Ann.A1 is tentative seniority list inviting objections from the concerned employees which cannot be challenged until the same is finalized. It is further stated that in fact the cadre strength of the Senior Goods Guard is 73. So far as cadre strength of 90 is concerned, the same was prepared for making promotion for Passenger Guards. The variation will not affect the cadre strength as the seniormost employees will be Passenger Guards and the remaining strength will be again the same. Thus, according to the

respondents, this is only the eligibility list for the purpose of promotion to the post of Passenger Guard.

4. We have heard the learned counsel for the parties and gone through the material placed on record. As can be seen from the facts as stated above, the sole question which requires our consideration is what is the effect of Constitution (Eighty-fifth Amendment) Act, which has resulted into issuance of letter dated 8.3.2002 by the Railway Board vide RBE No. 33/2002 which was formed basis by the respondents in issuing the impugned seniority list vide letter dated 19.2.2003 (Ann.A1).

5. Before we examine this issue it may be stated here that after the judgment dated 16.11.1992 rendered by the Hon'ble Apex Court in Indra Sahwaney vs. Union of India, 1992 SCC (L&S) Supp 1 in which it was held that reservation in appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion, the Government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone, which resulted into Constitution (Seventy seventh Amendment) Act, 1995 introducing clause (4-A) in Article 16 of the Constitution thereby providing reservation in promotion for SCs and STs. It may be

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stated here that after Constitution (Seventy seventh Amendment) Act, 1995 the Hon'ble Apex Court in order to balance the conflicting interests of general category vis-à-vis reserved category rendered judgment in the case of Union of India vs. Virpal Singh Chauhan, 1996 SCC (L&S) 1 in which it was held that a roster point promotee getting the benefit of accelerated promotion would not get consequential seniority followed by another decision of the Apex Court in the case of Ajit Singh Januja vs. State of Punjab, 1996 SCC (L&S) 540 bringing in the concept of 'catch-up' rule which adversely affected the interest of SCs and STs in the matter of seniority on promotion to next higher grade. Under these circumstances, Clause (4-A) of Article 16 was again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster point promotees by Constitution (Eighty fifth Amendment) Act, 2001 which was in the nature of extension of Clause (4-A) of Article 16. At this stage, it will be useful to quote Statement of Objects and Reasons with the text of the Constitution (Eighty-fifth Amendment) Act, 2001, which thus reads:-

"THE CONSTITUTION (EIGHTY FIFTH AMENDMENT) ACT, 2001

Statement of Objects and Reasons- the Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation.

The judgments of the Supreme Court in the case of Union of India v. Virpal Singh Chauhan and Ajit Singh Januja v. State of Punjab which led to the issue of OM dated 30.1.1997, have adversely affected the interest of the government servants belonging to the Schedules Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the government servants belonging to Scheduled Castes and Scheduled Tribes.

2. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the government servants belonging to the Schedules Castes and Scheduled Tribes, it has been decided to negate the effect of OM dated 30.1.1997 immediately. Mere withdrawal of the OM dated 30.1.1997 will not meet the desired purpose and review or revision of seniority of the government servants and grant of consequential benefits to such government servants will also be necessary. This will require amendment to Article 16(4-A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4-A) with effect from the date of coming into force of Article 16(4-A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects.

Received the assent of the President on 4.1.2002.

An Act further to amend the Constitution of India.

Be enacted by Parliament in the Fifty-second year of the Republic of India as follows-

1. *Short title and commencement*- (1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June, 1995.

2. *Amendment to Article 16*- In Article 16 of the Constitution, in clause (4-A), for the words 'in matter of promotion to any class', the words 'in matter of promotion, with

consequential seniority, to any class' shall be substituted".

Reading the Constitution (Seventy-seventh Amendment) Act, 1995 with the Constitution (Eighty-fifth Amendment Act, 2001, clause (4-A) of Article 16 reads as under:-

"16.(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Schedules Tribes which, in the opinion of the State, are not adequately represented in the service under the State".

6. As already stated above, in this case we are not concerned with the amendment inserted by way of clause (4-A) in Article 16 of the Constitution by way of Constitution (Seventy-seventh Amendment) Act, 1995 which is of enabling nature and empowers the State to make provision regarding reservation in the matter of promotion where in the opinion of the State SCs and STs are not adequately represented in the service under the State. In fact, we are concerned with the constitutional amendment extended to clause (4-A) to Article 16 of the Constitution by way of Constitution (Eighty-fifth Amendment) Act, 2001 thereby providing consequential seniority on promotion. Both these amendments came for consideration before the Constitutional Bench of the Hon'ble Apex Court in the case of M.Nagraj and others vs. Union of India and others, (2007) 1 SCC (L&S) 1013. Undoubtedly, the Apex

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Court has upheld validity of Constitution (Seventy-seventh Amendment) Act, 1995 and also Constitution (Eighty-fifth Amendment) Act, 2001 alongwith other constitutional amendments subject to certain conditions as stipulated in para 123 of the judgment, which thus reads:-

"123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provisions for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

7. The question which requires our consideration in the instant case is whether the condition as stipulated above is applicable to the amendment as carried to Article 16 (4-A) of the Constitution by way of Constitution (Eighty-fifth Amendment) Act, 2001. The learned counsel for the applicants vehemently argued that observations as made by the Apex Court in Para 123 (supra) will not only apply to constitutional validity of Constitution (Seventy-seventh Amendment)

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Act, 1995 but will also apply to Constitution (Eighty-fifth Amendment) Act, 2001. On the other hand, the learned counsel for the respondents has drawn our attention to Para 2 and 3 of the Railway Board letter dated 8.3.2002 as circulated vide RBE No. 33/2002 which is based on Constitution (Eighty-fifth Amendment) Act, 2001 and argued that action of the respondents cannot be faulted whereby the respondents have issued a provisional seniority list which has not become final as yet. At this stage, it will be useful to quote Para 2 and 3 of the said letter, which thus reads:-

"2. Now in pursuance of the Constitution (Eighty-fifth) Amendment Act, 2001, amending Article 16(4A) of the Constitution right from the date of its inclusion in the Constitution i.e. 17th June, 1995, the Government through the Department of Personnel and Training have decided to negate the effects of the DOP&T's OM dated 30.1.97 with a view to allow the SC/ST employees to retain the seniority in the case of promotion by virtue of rule of reservation.

3. Accordingly, the Ministry of Railways have also considered the matter and decided to negate the effects of para 319A of Indian Railway Establishment Manual Vol.I, 1989. It has therefore been decided as follows:

(i) (a) SC/ST Railway servants shall, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also, and

(b) The above decision shall be effective from 17th June, 1995.

(ii) The provisions contained in Para 319A of Indian Railway Establishment Manual, Vol.I 1989 as introduced vide ACS Nos. 25 and 44 issued under this Ministry's letters No. E(NG) I-97/SR6/3 dated 28.9.97 and

15.5.98 shall stand withdrawn and cease to have effect from 17.6.95.

(iii) Seniority of the Railway servants determined in the light of Para 319A ibid shall be revised as if this para never existed. However, as indicated in the opening para of this letter since the earlier instructions issued pursuant to Hon'ble Supreme Court's judgment in Virpal Singh Chauhan's case (JT 1995 (7) SC 231) as incorporated in para 319A ibid were effective from 10.2.95 and in the light of revised instructions now being issued being made effective from 17.6.95, the question as to how the cases falling between 10.2.95 and 16.6.95 should be regulated, is under consideration in consultation with the Department of Personnel & Training. Therefore, separate instructions in this regard will follow.

(iv) (a) On the basis of the revised seniority, consequential benefits like promotion, pay, pension etc. should be allowed to the concerned SC/ST Railway servants (but without arrears by applying principle of 'no work no pay').

(b) For this purpose, senior SC/ST Railway servants may be granted promotion with effect from the date of promotion of their immediate junior general/OBC Railway servants.

(c) Such promotion of SC/ST Railway servants may be ordered with the approval of Appointing Authority of the post to which the Railway servant is to be promoted at each level after following normal procedure viz. selection/non-selection.

(v) Except seniority, other consequential benefits like promotion, pay etc. (including retiral benefits in respect of those who have already retired) allowed to general/OBC Railway servants by virtue of implementation of provisions of para 319A of IREM, Vol.I 1989 and/or in pursuance of the direction of CAT/Court should be protected as personal to them."

8. We have given due consideration to the submissions made by the learned counsel for the

parties. As can be seen from para 123 of the judgment of the Apex Court in the case of M.Nagaraj as reproduced above, the observations appear to have been made by the Apex Court where the main issue concerns with 'the extent of reservation'. According to us, in case the State wish to exercise their discretion to make provisions of reservation the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. According to us, in the instant case, the matter in issue is not regarding 'the extent of reservation' which the State/Railway Authority is contemplating to extend in favour of SCs/STs in terms of Constitution (Seventy-seventh Amendment) Act, 1995 but, as can be seen from Para 4 (xxii) of the OA, the challenge is regarding consequential seniority on their promotion on the basis of rule of reservation based on Constitution (Eighty-fifth Amendment) Act, 2001 which has led to issuance of RBE No. 33/2002 vide letter dated 8.3.2002 and consequential amendment in the original para 319 of the IREM Vol.I 1989 by inserting Para 319-A. Thus, so long as specific challenge is not made. regarding the extent of reservation made in terms of Constitution (Seventy-seventh Amendment) Act, 1995 on the ground that without there being any quantifiable data showing backwardness of the class and inadequacy of

representation etc., the railway authorities have made provisions for promotion in favour of SC/ST categories (no such rules/instructions are under challenge), the applicants cannot succeed solely by challenging rule/decision taken by the Railway Board conferring benefit of consequential seniority on promotion in respect of SC/ST category based on Constitution (Eighty-fifth Amendment) Act, 2001.

9. Although the applicants have challenged validity of the provisions of Rule 123 and 124 of the Indian Railway Establishment Code being ultra vires to the provisions of Article 309 of the Constitution of India and circulars issued in exercise of such powers from time to time and amendment made in Rule 319 of the IREM vide order dated 15.5.1998 and 8.3.2002 and has also sought specific relief [prayer clause i(a)], but the learned counsel for the applicant has not seriously addressed this point at the time of hearing of this case, rightly so as the matter stands concluded by the decision of the Apex Court in the case of Union of India vs. Pushpa Rani and Ors., (2008) 2 SCC (L&S) 851 whereby the Apex Court has relied on its earlier Constitution Bench decision in the case of B.S.Vadera vs. Union of India, AIR 1969 SC 118 where the nature and scope of the Railway Board's powers to make rules was considered, and in Para 20 it was held that in view of the pronouncement of the

Constitution Bench, there cannot be any doubt that the Railway Board and General Managers are empowered to frame rules for regulating the recruitment and conditions of service of the employees. This finding in Para 20 of the judgment rendered in the case of Pushpa Rani (supra) was based on Para 21 to 25 of the judgment rendered by the Constitution Bench in the case of B.S.Vadera (supra). However, we wish to reproduce Para 24 and 25 of this judgment which will clinch the point in issue and thus reads:-

"24. It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning, unless hedged in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution' shall have effect subject to provisions any such Act.' That is, if the appropriate legislature has passed an Act, under Article 309, the rules, framed under the proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate legislature, on the matter, in our opinion, the rules made by the President or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other constitutional provision, must be enforced, if made by the appropriate authority.

25. In the case before us, the Indian Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Article 309. Under Rule 157, the President has directed the Railway Board, to make rules, of general application to non-gazetted railway servants, under their control. The rules, which are embodied in the Schemes, framed by the Board under Annexure 4 and 7, are within the

powers, conferred under Rule 157; and in the absence of any Act, having been passed by the 'appropriate' legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated retrospectively also. Such indication, about retrospective effect, as has already been pointed out by us, is clearly there, in the impugned provisions."

(emphasis supplied)

10. Thus, in view of what has been stated above, we are of the view that the applicants have not made out any case for grant of relief and we see no infirmity in the action of the respondents whereby they have proceeded on the basis of aforesaid amendment carried out/instructions issued in terms of Constitution (Eighty-fifth Amendment) Act, 2001.

11. With these observations, the OA is dismissed with no order as to costs.

(B.L.KHATRI)

Admv. Member



(M.L.CHAUHAN)

Judl.Member

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