(31)

OA 15/2008 with MAs 12/2008 & 339/2008

18/7/2011 Mr. S.K. Jain, counsel for applicant.
Mr. Anupam Agrawal, counsel for respdts. No. 1 & 2.
Mr. Nand Kishore, counsel for respdts. No. 2 to 5 & 12 to 15.

Heard learned counsel for the parties.

The OA as well as MAs stand disposed of, by a separate order.

Anil Kumar
(Anil Kumar)
M (A)

K. Sheorey
(Justice K.S. Rathore)
M (J)

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

Jaipur, this the 18th day of July, 2011

CORAM:

HON'BLE MR. JUSTICE K.S.RATHORE, MEMBER (JUDL.)
HON'BLE MR. ANIL KUMAR, MEMBER (ADMV.)

OA No.323/2007

Abdul Salam Khan
s/o Abdul Gaffar Khar
r/o Kota now a days Section Engineer,
Mill Writ Wagon Repairs Shop,
Central Western Railway,
Kota Division, Kota.

.. Applicant

(By Advocate: S.K.Jain)

Versus

1. Union of India
through General Manager,
West Central Railway,
Jabalpur (MP)

2. Chief Works Manager,
Wagon Repairs Shop,
Kota.

3. Rajesh Kumar Shekhar
JE-I through CWM Wagon Repairs Shop,
Kota Division, Kota.

.. Respondents

(By Advocate: Shri Anupam Agarwal)

OA No. 15/2008

Naurat Mal Kumawat
s/o Shri Jodh Raj
r/o G 508, Makar Wali Road,
New Guru Nanak School,
Vaishali Nagar, Ajmer
Now a days Sr. TC Ajmer,
North Western Railway,
Ajmer.

.. Applicant

(By Advocate: S.K.Jain)

Versus

1. Union of India
through General Manager,
North Western Railway,
Hasan pura,
Jaipur

2. Divisional Railway Manager,
North Western Railway,
Ajmer.

3. Ram Prakash (SC),
Head TTE , Abu Road.

4. Modi Lal Meena,
Head TTE , Abu Road

5. Lal Chand Meena,
Head TTE Abu Road.

6. Sohan Lal Meena, TNCR
Marwad Jn.

7. Mangi Lal (SC),
Head TTE Abu Road.

8. Nagar Mal Meena,
Head TTE Abu Road.

9. Kamal Kumar Mehra,
Head TTE Abu Road.

10. Bhagirath Singh (SC),
Head TTE Mawli Jn.

11. Lalit Prakash Bharti (SC)
Head TC Marwad Jn.

12. Madan Lal Kotaria (SC),
Head TC Ajmer.

13. Vimal Vhand Gahlot (ST),
Head TC Ajmer.

14. Mayank Kumar (SC),
Head TC Ajmer.

15. Indra Prakash Bayala (SC),
Head TC Abu Road.

16. Shiv Ram Parmar (ST),
Head TC Udaipur.

17. Dinesh Yadav (SC),
Head TC Abu Road.

.. Respondents

(By Advocate: Shri Anupam Agarwal for resp. 1 & 2 and Shri Nand Kishore for resp. Nos. 3 to 5 and 12 to 15)

ORDER (ORAL)

Since similar question of law and facts is involved in both the OAs, as such, these are being disposed of by this common judgment.

2. The relief claimed by the applicant in OA No.323/2007 is as under:-

"In view of the facts and grounds mentioned in para 4 and 5 the applicant prays for the following reliefs:-

(1) By an appropriate order or direction the impugned amendment in Rule 319 IREM Vol I vide dated 15.5.98 and 8.3.2002 be declared ultra vires to the constitution of India and be quashed and set aside accordingly along with the orders of reservation issued so far by the Railway Administration and direction be issued to them to pass consequential orders in this regard.

(2) That by appropriate order or direction the impugned order dated 2.8.2007 Ann.A/1 be quashed and set aside and the respondents be directed not to issue any orders of promotion on the basis of reservation to the respondent No.3 or any Railway servant.

(3) That by an appropriate order or direction the impugned order dated 25.1.2006 Ann.A/7 be quashed and set aside along with the order dated 5.10.2000 promoting the respondent No.3 to the post of JE.I.

(4) Any other relief this Hon'ble Tribunal may deem fit may also be passed."

3. Similar relief is claimed in OA No.15/2008 which reads as under:-

"In view of the facts and grounds mentioned in the Para 4 and 5 of the application the applicant prays for the following reliefs:-

(i) By an appropriate order of direction the impugned promotion of the respondents No. 3 to 17 vide Ann.A/1 be declared to be illegal and be quashed and set aside and they be reverted to the lower post from which they had been promoted.

(ii) By an appropriate order or direction the impugned Notification dated 1.10.2007 and the notification dated 3.1.2008 be quashed and set aside.

(iii) That the applicant be declared to have been promoted to the post of HTTE/HTC/TNCR grade 5000-8000 w.e.f. 19.5.2004 in the up gradation scheme. He be paid the arrears of salary and the fixation of pay and seniority be accordingly done.

(iv) Any other relief this Hon'ble Bench may deem fit may also be granted to the applicant.

4. In both the OAs the applicants challenge the impugned promotion of private respondents i.e. respondent Nos. 3 to 17 in OA No.15/08 and respondent No.3 in OA No.323/2007. Further challenged the validity of notification dated 1.10.2007 and 3.1.2008

wherein in OA No.323/2008 the impugned amendment in Rule 319 of IREM Vol.I vide order dated 15.5.98 and 8.3.2002 are under challenge.

5. The main challenge of the applicant in OA No.15/2008 to the amendment, notification and impugned promotion order is on the ground that out of 29 vacancies shown vide notification dated 1.10.2007, 24 posts are unreserved. Previously, the above selection was going to be held on 30.10.2007 but the same was cancelled and now new date has been announced on which date the selection by holding the written examination shall be held on 18.1.2008 vide notification dated 3.1.2008. It is also stated by the applicant that he met with an accident on 3.10.2005 and due to this accident his leg has been imputed above knee. The applicant could not file the petition at relevant point of time to challenge his supersession in 2004. Further, since the matter was pending in the Central Administrative Tribunal regarding the question of reservation in upgradation which has now been decided by the Tribunal on 28.11.2007 the cause of action has accrued to the applicant only after the decision by various benches as well as this bench. If the selection of 2004 is cancelled then the vacancies shall increase and in that eventuality the vacancies notified in the notification of 1.10.2007 and the number of candidates called shall also increase thereby increasing the zone of consideration. As such, the notification dated 1.10.2007 is illegal being not having correct assessment of vacancies.

6. The learned counsel for the applicant also referred to the case of Indira Sahni decided by the Hon'ble Supreme Court wherein reservation in promotion has been held to be ultra vires to Article 16 of the Constitution and the said decision came to be in existence only in 1997. Thereafter no order of reservation has been issued by the Railway Administration. The Parliament amended Article 16 and inserted Article 16(4A) in Article 16 of the Constitution of India. The above provision introduced the permissibility of framing rules regarding the reservation only when it came to the finding that the SC/ST is not sufficiently represented in the service. If such a finding is arrived at by the Parliament then it can make provision for reservation in certain class or classes of the post in the service. In other words, the reservation can not be ordered on all posts if the said conditions are satisfied and is to be confined only to some class or classes of the post in service.

7. In OA No.323/2007 the notification of promotion has been challenged on the same ground that the Parliament amended the provisions of Article 16(4) and introduced the enabling provisions of Article 16(4A) In the Constitution of India and as per the above provisions it is clear that the question of reservation is wholly dependent and is subject to the fact that whether there is sufficient representation of a community belonging to the Schedules Caste and Schedules Tribe. If on the scrutiny the State comes to the conclusion that there is no sufficient representation of a community in the class of post it can frame the policy of reservation. If it comes to the conclusion that there is sufficient representation of the

community, there is no power with the State to frame the policy of reservation. As such, since such scrutiny of sufficiency of representation has not been made by the Railway, there is no question of allowing reservation to any community and if any rule, regulation policy or circular has been issued by the Railway it is wholly ultra vires and illegal and nonest.

8. On the contrary, the learned counsel appearing for the respondents first raised objection regarding maintainability of the OA, as OA No.323/2007 is directed against Ann.A/7 and the applicant has failed to file any application seeking condonation of delay. Further, submitted that as per Para 215 (a) of IREM, in case adhoc promotion is followed by regular promotion then the said period has to be counted for the purpose of experience. Further, the requirement of two years experience does not come in the way of consideration for promotion, however, the same is an impediment for promotion only. Therefore consideration of respondent No.3 vide Ann.A/1 for the vacancies reserved for SC category is as per rules. Also submitted that maintenance of percentage in every cadre for SC/ST candidates is the mandate of the Constitution as well as the law as circulated by the Railway Board.

9. So far enacting any rule pursuant to Article 16 (4A) is concerned, respondents have stated that the same being the prerogative of the competent authority which cannot be challenged in the manner done by the applicant and the action since based upon post based reservation as propounded by the

Apex Court in the case of R.K.Sabarwal is to be upheld. Thus, the applicant cannot challenge selection of respondent No.3 on the post of JE-I at such a belated stage and the OA is not maintainable only on the ground of delay.

10. Same plea has been taken by the respondents in OA No.15/2008. It is stated by the learned counsel for the respondents that the cause of action arose as early as on 19.4.2004 and even prior to that date and the accident took place on 3.10.2005. The Tribunal had decided that in case of old vacancies reservation shall be applicable. There were 22 vacancies for the post of HTC/HTTE/TNCR earlier to 31.20.2003. It is denied that cause of action has accrued to the applicant on 28.11.2007. Further stated that there were 29 vacancies as per Ann.A/3 and the applicant's name appeared at Sl.No.4. It is therefore not understood why he is assailing the said notification dated 1.10.2007. It can safely be assumed that the applicant does not want to face the selection.

11. Having heard the rival submissions of the respective parties and upon perusal of the material available on record and the relevant rules and the judgment referred before us, it is not disputed that the applicants in both the OAs have challenged the selection. It is also not disputed that applicants appeared in the examination and declared fail and after declaration of result, they have opted to challenge the selection of private respondents.

12. The learned counsel for the applicants placed reliance on the judgment rendered by the Full Bench of this Tribunal at Principal Bench, New Delhi in OA No.2211/2008. All India Equality Forum and

ors. vs. Union of India and ors. decided on 2nd December, 2010. The Full Bench considered the ratio decided by the Hon'ble Supreme Court in the case of M.Nagraj v. Unon of India [(2006) 8 SCC 212 and the instructions contained in para 319-A of Indian Railway Establishment Manual Vol.I placing reliance on the judgment of the Hon'ble Supreme Court in the case of Union of India v. Virpal Singh Chauhan [JT 1995 (7) SC 231]. As per the ratio decided by the Hon'ble Supreme Court in Virpal Singh Chauhan a general category employee as and when promoted would cat up in the matter of seniority with the junior, who was promoted earlier only because of reservation. Pursuant to the directions, the Ministry of Railways decided as follows:-

> "a) SC/ST Railway Servans 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".
>
> c)

After considering each and every aspect and the judgment rendered by the Hon'ble Supreme Court, the Full Bench observed as under:-

> "37. We have applied our mind to the pleadings and the contentions raised by the learned counsel representing the applicants on the issues as mentioned above, but are of the view that once, in brevity, it is the case of the applicants that when no compliance of pre-conditions as spelled out in M.Nagaraj's case has been done, reservation in promotion with accelerated seniority shall have to be worked in the way and manner as per the law settled earlier on the issue. If that be so, we need not have to labour on the issues raised by the applicants, as surely, if the position is already settled, the only relevant discussion and adjudication in this case can be and should be confined to non-observance of the pre-conditions for making accelerated promotions as valid. We have already held above that the railways have not worked out or

> even applied their mind to the pre-conditions as mentioned above before giving effect to the provisions of Article 16(4A), and for that reason, circular dated 29.2.2008 vide which the seniority of SC/ST railway servants promoted by virtue of rule of reservation/roster has to be regulated in terms of instructions contained in Board's letter dated 8.3.2002 and 13.1.2005, has to be quashed. There is a specific prayer to quash instructions dated 8.3.2002 and 13.1.2005 as well, but there would be no need to do so as the same have been discussed in the case of railways itself in the matter of Virpal Singh Chauhan (supra), and commented upon. While setting aside instructions dated 29.2.2008, our directions would be to not to give accelerated seniority to Scheduled Caste and Scheduled Tribe category employees till such time pre-conditions on which alone Article 16(4A) of the Constitution is to operate, are complied with. No directions in this case can be given as regards seniority of the applicants vis-à-vis those who were appointed with them and have stolen a march over them because of reservation and have obtained accelerated seniority. No such specific prayer has been made either. However, it would be open for the parties to this lis or any one else to seek determination of their proper seniority for which legal proceedings shall have to be resorted to. It would be difficult to order across the board that all those who have obtained the benefit of reservation and have also been accorded accelerated seniority be put below general category candidates who may have been senior to the reserved category employees and became below in seniority on the promoted posts because of conferment of accelerated seniority to the reserved category employees. Surely, for seeking seniority over and above Schedules Caste and Scheduled Tribe employees, number of things shall have to be gone into, as for instance, as to when was the promotion made and seniority fixed and whether the cause of general category employees would be within limitation. There can be number of issues that may arise. We have mentioned only one by way of illustration."

As per the observations made by the Full Bench for seeking seniority over and above SC and ST employees, number of things shall have to be gone into i.e. as to when was the promotion made and seniority fixed, and whether the cause of general category employees would be within limitation. There can be number of issues that may arise and the Full Bench has not given any direction observing that no direction can be given as regards seniority of the

applicants vis-à-vis those who were appointed with them and have stolen a march over them because of reservation and have obtained accelerated seniority.

13. The learned counsel appearing for the respondents in support of his submissions place reliance on the judgment rendered by the Hon'ble Supreme Court in the case of Union of India vs. Pushpa Rani and ors. [(2008) 9 SCC 242] wherein the Supreme Court held that the matter relating to creation/abolition of posts, formation/restructuring of cadres, source/mode of recruitment, prescription of which fall in employers domain. Judicai review comes into play only if State action is contrary to constitutional or statutory provisions, or is patently arbitrary or vitiated by mala-fides. The case before the Hon'ble Supreme Court was whether reservation for SCs and STs was applicable to restructuring of Group C and D cadres done by the Railway Board vide its Letter dated 9.10.2003. Answer to this issue depended upon whether it was simply an upgradation of existing posts, or in essence it involved promotion which attracted policy of reservation. It was mentioned in letter dated 9.10.2003 that cadre review was undertaken "on the basis of functional, operational and administrative requirement". The letter therefore further mentioned that restructuring involved "duties and responsibilities of greater importance". Accordingly, provision for obtaining vigilance clearance was also made applicable "for affecting promotions under these orders..." Para 14 of letter dated 9.10.2003 provided that "existing instructions with regard to reservation of SC/ST wherever applicable will continue to apply".

This para was stuck down by the Administrative Tribunal on the reasoning that this was a case of simple upgradation of posts, for which reservation was not applicable. The High Court affirmed this decision. The Supreme Court however took the opposite view that provisions of letter dated 9.10.2003 virtually involved promotion on the additional posts which became available as a result of restructuring, and therefore reservation policy was rightly applied by the Railways. On an earlier occasion also, the Railway undertook similar restructuring vide its letter dated 25.6.1985, wherein provision for reservation of SCs/STs was made by the Railways but this was struck down by the Administrative Tribunal in V.K.Sirothia vs, (2008) 9 SCC 283. The Supreme Court dismissed SLP against this decision, However, in the present case Supreme Court compared letters dated 25.6.1985 and 9.10.2003 and concluded that there were "stark dissimilarities" between earlier scheme and present scheme of restructuring and therefore case law which was applied earlier to the letter dated 25.6.1985 was not applicable to the present scheme contained in letter dated 9.10.2003. The conclusion of the Supreme Court was that it was not a case of simple upgradation of posts, but additional posts created by virtue of restructuring had all the features of promotion, and therefore reservation policy was applicable.

14. In the instant case, the applicant in OA No.15/2008 claims that the impugned promotion order of respondent Nos. 3 to 17 vide Ann.A/1 be declared illegal and be quashed and set aside and they may be reverted to the lower post from which they had been

promoted. Same relief has been claimed in OA No.323/2007 that promotion made on the basis of reservation to respondent No.3 be quashed and set aside.

15. Applying the ratio relied upon by the applicants based upon the judgment of the Full Bench of the Principal Bench at New Delhi in OA No.2211/2008, as discussed hereinabove, the Full Bench has not given any direction as regards seniority of the applicants vis-à-vis those who were appointed with them and have stolen a march over them because of reservation and have obtained accelerated seniority. The Full Bench further observed that for seeking seniority over and above SC and ST employees, number of things shall have to be gone into like as to when was the promotion made and seniority fixed and whether the cause of general category employees would be within limitation whereas in the case or Union of India vs. Pushpa Rani (supra), the Supreme Court has categorically held that it is not for court to suggest manner of restructuring of cadres for the purpose of improving efficiency of administration. The observations were made where Administrative Tribunal interfered with the scheme of restructuring introduced by the Railways by holding that reservations for SC/STS could not be applied to restructuring and the Hon'ble Supreme Court was of the view that it was not a case of simple upgration but additional posts created by virtue of restructuring had all the features of promotion, and therefore reservation policy was applicable.

16. In view of the ratio decided by the Full Bench of the Tribunal at Principal Bench (supra) and the Hon'ble Supreme case in the

case of Pushpa Rani (supra) the promotion which has been given and is under challenge in both the OAs required no interference as the promotions have been made in accordance with the policy and the law and consequently, the OAs being bereft of merit stand dismissed with no order as to costs.

17. In view of dismissal of OAs, no order is required to be passed in MA No.12/2008 and 339/2008, which shall stand disposed of accordingly.

Anil Kumar

(ANIL KUMAR)
Admv. Member

K.S. Rathore

(JUSTICE K.S.RATHORE)
Judl. Member

R/