

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

Original Application No. 260/00594 of 2011
Cuttack, this the 20th day of September, 2017

CORAM
HON'BLE MR. S.K.PATTNAIK, MEMBER (J)
HON'BLE DR. M. SARANGI, MEMBER (A)

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Swapna Kumar Gour,
Aged about 48 years,
S/o- Akashi Nath Gour,
At present residing at MIG-II/52,
Kanan Vihar Phase-II, Patia, Bhubaneswar,
working as a JE-I (Drawing)
under Chief Bridge Engineer,
East Coast Railway, Rail Vihar,
Chandrasekharpur, Bhubaneswar, Orissa.

...Applicant

Advocates: M/s. N.R.Routray, S.Mishra, T.K.Choudhury, S.K.Mohanty.

VERSUS

Union of India represented through

1. General Manager,
East Coast Railway, E.Co.R.Sadan,
Chandrasekharpur, Bhubaneswar,
Dist- Khurda.
2. Chief Personnel Officer,
East Coast Railway, E.Co.R.Sadan,
Chandrasekharpur, Bhubaneswar,
Dist- Khurda.
3. Principal Chief Engineer,
East Coast Railway, Rail Vihar,
Chandrasekharpur, Bhubaneswar.

..... Respondents

Advocate(s) : Mr. B.B.Pattnaik (Railway Advocate)

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ORDER

S.K.PATTNAIK, MEMBER (JUDL.):

The applicant has filed this O.A. being aggrieved by the promotion of Mr. Amalendu Mallik, an SC community employee, under Un-Reserved Category and not giving promotion to him in spite of passing in the written examination for selection for the post of S.E. (Drg.) and availability of one post under UR category. The applicant seeks promotion w.e.f. 16.11.2006 with consequential benefits.

2. The case of the applicant, in short, runs as follows:

Respondent No.2 published a notification on 05.07.2006 (Annexure-A/1) to fill up two posts of SE (Drg.) in the scale of Rs. 6500-10,500/-. Out of two vacancies, one post was unreserved and other post was reserved for SC category. The Notification further enlisted names of three persons, Mr. Amalendu Mallik under SC category and Mr. A.K.Tripathy and Mr. Swapan Kumar Gour (applicant) under Un-Reserved category. For some reason, Mr. A.K.Tripathy opted out of the competition and only two persons appeared and both the candidates were declared successful vide result dated 23.08.2006 (Annexure-A/2). Respondent No.2 promoted Mr. Amalendu Mallik on 16.11.2006 to the post of SE(Drg.) on merit against Un-Reserved roster (Annexure-A/3). The applicant made several representations against his non-promotion and also sought information under RTI and finally, as he could not get any relief, approached this Tribunal for redressal of his grievance. The main ground of the applicant is that since only two posts were lying

vacant, one under SC category and other under UR category, and since only two persons qualified that too one under SC category and one under UR category, department should have given promotion to both the candidates and only to deprive the applicant from his legitimate promotion gave promotion to Mr. Amalendu Mallik against the UR roster and rather keeping the post under SC category vacant.

3. Respondents filed a counter pleading that though two posts were lying vacant, one under UR category and other under SC category, Mr. Amalendu Mallik, though belonging to SC category, was empanelled under UR category post on his own merit in terms of RBE 103/2003 and the present applicant could not be empanelled as he was junior to Mr. Mallik and there was no other vacant post in UR category. According to the Respondents, since the post of SE (Drg.) is filled up 20% through Direct Recruitment Quota and 80% through Departmental Promotion Quota and Mr. Amalendu Mallik, an SC candidate, was promoted on his own merit against UR vacancy, the applicant could not get the promotional avenue. Ld. Counsel for the Respondents submitted that the promotion of an SC candidate against General Quota is in terms of RBE 103/2003 (Annexure-R/2).

4. There is no dispute on the guidelines of 2003 but the ground reality in this case is that when there were only two posts advertised for filling up under the promotional quota and one post was reserved for SC candidate and the other post was Unreserved and only one candidate from each category qualified and passed, both of them should have been

given promotion and denying a General Category candidate on the ground that the SC candidate is adjusted against the UR quota is not only unjust but is treated as a ploy to deprive a General Category candidate from getting the fruit of promotion. After the Constitutional Bench judgment in the case of *M.Nagraj Vs. UOI & Ors. reported in (2006) 8 SCC 212* things have changed. Now there cannot be any reservation in promotion so long as the State has not collected quantifiable data of representation of different community. The Railway being a State under Article 12 of the Constitution has not collected any data about the representation of backward classes. Recently, the Division Bench of the Hon'ble High Court of Patna in the case of *State of Bihar Vs. Sunil Kumar Singh reported in 2015(3) PLJR 594* have categorically observed that there cannot be any reservation in promotion. Even, the Railway Board vide RBE No. 117/2016 dated 30.09.2016 has put a hold on acceleratory promotion based on reservation till the conclusion of S.L.P. and kept in abeyance the RBE No. 126/2010 dated 01.09.2010.

5. Recently, in the case of All India Equality Forum & Ors. Vs. Union of India through its *Secretary & Ors. in W.P.(C) 3490/2010 & CM No. 6956/2010* decided on 23.08.2017, the Hon'ble High Court of Delhi have categorically restrained the Union of India from granting any reservation in promotion to SC or ST candidates in exercise of power conferred by Article 16(4A) of the Constitution of India, without, in the first instance, carrying out the necessary preliminary exercise of acquiring quantifiable data indicating inadequacy of representation, of

the said categories, in service, and evaluating the situation by taking into consideration the said data, along with the competing considerations of backwardness and overall efficiency in administration, and arriving at an empirical decision on the basis thereof. Even, Their Lordships have quashed all promotions made in pursuance of O.M.No. 36012/18/95-Estt. (Res.) Pt. II dated 13.08.1997 wherein the DoPT had resorted to reservation in promotion in respect of SC/ST candidates. The aforesaid decision closed all doors of continuance of roster point in promotion.

6. In view of such authoritative pronouncements, there cannot be promotion on the basis of reservation and, as such, an exercise under Article 16[4A] can be undertaken if the State takes opinion that such class of persons is not adequately represented in the service under the State, which is equally applicable to the Railways and not otherwise. If the department feels that there will be administrative difficulty in implementing the order in that event they are to give promotion to the General Category candidate, who has been overlooked by such promotion of SC Category candidate so that the right of promotion of Un-Reserved candidate is not affected as Article 335 remains as a guiding principle for maintenance of efficiency of administration in connection with affairs of the Union or of a State. Furthermore, in the matter of *S.Panneer Selvam & Ors. Vs. State of Tamil Nadu & Ors. reported in (2015) 10 SCC 292*, Their Lordships of the Hon'ble Apex Court have categorically held that catch-up rule would be applicable in such circumstances, i.e. Reserved category promottees cannot count their

seniority in the promoted category from the date of their promotion, and if the senior General Candidate later reach the promotional level, General candidates will regain their seniority. These observations of the Hon'ble Apex Court have to be kept in mind before undertaking any exercise, so that the action of the Respondents shall not have the effect of nullifying the judgment of Hon'ble Supreme Court.

7. O.A. is allowed accordingly. Applicant to be given promotion retrospectively from the date he was denied promotion, i.e. from the date the reserved category candidate had availed promotion under unreserved category. The exercise be completed preferably within a period of one month from today. No costs.

(M. SARANGI)
Member (Admn.)

(S.K.PATTNAIK)
Member (Judl.)

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