CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

ORIGINAL APPLICATION Nos. 818 and 848 of 2011
Cuttack, this the 19th day of June, 2017

CORAM
HON'BLE MR. A.K. PATNAIK, MEMBER(J)
HON'BLE MR. R.C.MISRA, MEMBER (A)
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1- Surajit Karan aged about 40 years S/o Shri Shymapada Karan, Qr. No. D/30/B, Traffic Colony, Khurda Road, Jatni, Khurda.

Applicant of OA No. 818/11

2- Bagadi Rama Rao aged about 40 years S/o B. Suryanarayan, Vill/PO – Korlakota, PS Amadalabilasa, Dist. Srikakulam at present residing at C/o B.A.Naidu, At-Hatabazar, PO-Jatni, District-Khurda.

Applicant of OA No.848/11

By the Advocate : Shri D.K.Mohanty

-VERSUS-

1-Union of India represented through its General Manager, E.Co.Railways, Rail Vihar, Chandrasekharpur, Bhubaneswar.

2-The Chief Personnel Officer, E.Co.Railways, Rail Vihar, Chandrasekharpur, Bhubaneswar, District Khurda-23.

3-The Divisional Railway Manager, E.Co.Railways, Khurda Road, PO Jatni, Dist. Khurda-50.

4-The Senior Divisional Personnel Officer, E.Co.Railways, Khurda Road, PO Jatni, Dist. Khurda-50.

5-The Deputy Chief Personnel Officer (Rect.), E.Co.Railways, Chandrasekharpur, Rail Vihar, Bhubaneswar, District Khurda-23.

Respondents in both the OAs

By the Advocate : Shri T.Rath and Shri A.K.Rout

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O R D E R

R.C.MISRA, MEMBER (Admn.):

The point of challenge in both the applications, is on similar facts and the reliefs prayed for is also similar, therefore, both these applications are being disposed of by this common order.

2. The issue involved in the OAs, in hand are that although the applicants could not qualify in the prescribed medical category for their appointment as Gangman, still it is claimed that they should be offered appointment on alternative post(s) as has been done by the respondents in case of other similarly situated incumbents under the same selection by quashing the order dated 30.12.2010.

3. The brief facts of the case are that pursuant to Advertisement 1/98 dated 5.11.1998, applicants applied for the posts of Gangman and came out successfully in the physical test held during 2001-2002 and the written test during November 2003. The respondents published a list of successful candidates containing 1012 names as against 787 Gagmen + 225 Group in operating department totaling 1012 vacancies advertised by the East Coast Railway. Out of 1012 selected candidates, 910 candidates were appointed and since 42 candidates were found absent and 47 candidates were declared not in the zone of consideration, to fill up these 89 vacancies, another list of successful candidates including the applicant was published by the respondents and were asked to attend the Office of Divisional Railway Manager (P) Khurda on 24.12.2005 for verification of documents. While verification of documents was in progress, it was suddenly

discontinued. The applicants challenged the postponement of document verification before this Tribunal in OAs 147/2007 and 440/2006, which were disposed of on 24.8.2007 directing the respondents to resume the process of verification of documents. After verification of documents, applicants were sent for medical test wherein they were declared fit for appointment in Bee-two category. On further medical re-examination, they were declared fit in B-one category. It is the contention of the applicants that after being selected and found fit in Bee Two category, their candidature was required to be considered for B-2 category posts i.e. Storekeeper in place of Gangman as has been done in respect of other similarly placed candidates vide order dated 14.9.2006. Despite moving a representation on 16.3.2010 no steps were taken and thereupon, applicants filed OA No. 333 and OA No. 341 of 2010 before this Tribunal which were disposed of on similar lines on 1st July 2010. Applicants were given the liberty to make fresh representation before authorities who were directed to dispose of such representation in the light of consideration given to others. Thereafter, in compliance of orders of Tribunal, vide letter dated 30.12.2010 respondents informed the applicants that it may be seen that Section 47 of the Act is applicable to government servants who are already in service and not for those who are being considered for appointment to government service. Similarly, the provisions contained in IREC and Railway Establishment Manual referred to by the applicant, are applicable to Railway Servants who are already in service and not in respect of

candidates who are being considered for appointment. The applicants have pointed out that by order dated 14.9.2006, four candidates empanelled under Employment Notice No. 1/98, who were medically unfit (all are fit in Bee Two) have been provided alternative appointment in Stores Department. Hence, rejection on the ground that Section 47 of the Act is only for the Government servants who are in service is not applicable to the instant case. The applicant contended that alternative appointment to some of the candidates who were found fit in lower medical classification were given during 2006 i.e. much before the instructions dated 25.5.2009 issued by the Railway Board. Those candidates who were offered alternative employment under Annex.A/5 were the candidates under the same employment notice.

The applicant has further submitted that after the proclamation of Section 47 of the persons with Disabilities, a right has accrued in favour of the medically decategorized citizens, and the provision of the PWD Act, 1995 has been promulgated keeping in mind the right enshrined under Article 21 of the Constitution of India. Keeping in mind the said provision, para 304 of the IREC and Paras 1301 to 1311 of the IREM stipulates that in case of disabled medically decategorized persons, such person is not only required to be shifted to some other post with same pay scale and service benefits but also in rank. There are instructions that if posts are not available, until it is made available, the disabled persons should be allowed to continue by creating supernumerary posts. Keeping this in view, similarly situated

persons have been accommodated in the posts of Store Keeper although the advertisement and selection was for the post of Gangman. Thus, the action of the respondents is in violation of the doctrine of legitimate expectation and promissory estoppels. It is also discriminatory and a violation of Articles 14 and 16 of the Constitution.

4. Respondents have filed their reply admitting the fact of selection of the applicants as per the Employment Notification dated 5.11.1998 and the fact that they were issued provisional offer of appointments and were sent for pre-recruitment medical examination to adjudge their suitability and during the course of medical examination, applicants were found unfit in the medical category required for the post of Gangman but were found fit in lower medical category; as such their cases were referred for seeking clarification. After disposal of the representations negatively as per the orders passed by this Tribunal in OA Nos. 147/2007 and 341/2010, applicants, again moved this Tribunal in the present O.As. The respondents have admitted that alternative appointment to some of the candidates found fit in lower medical classification was given during the year 2006 by taking into consideration the then prevailing instructions of the Railway Board to meet with the acute shortage of staff in the alternative posts but, by efflux of time, the Railway Board found that the said provision was misused to fill up large number of popular posts in the non technical category without the same being advertised thereby preventing the

meritorious and deserving candidates from getting selected and appointed against that post. Hence, with the issuance of Instructions by the Railway Board on 25.5.2009 such practice of providing alternative appointment in the same grade to the candidates who were selected for Group C and Group D posts by the RRBs and RRCs who failed in the prescribed medical examination, has been dispensed with. Hence, no discrimination was made with the applicants. Hence, after supersession of the old policy and with the introduction of the new policy, the question of granting any alternative appointment to such individuals, who were found medically unfit did not arise. It has been submitted that in a plethora of judgments it has been settled by the Hon'ble Apex Court that under the principles of law, no post under the union government should be filled being unadvertised. Thus, applicants are not entitled to any relief in equity and enforcement of the Board's earlier instructions would tantamount to violation of Articles 14 and 16 of the Constitution.

5. We have also gone through the written note of submissions filed by the learned counsel for applicants reiterating the facts mentioned in the OA that on 24.12.2005 during the course of verification of documents, without assigning any reason, a notice was passed for postponement of the verification of documents. Law is well settled that it is true that a candidate does not get any right to the post by merely making an application but a right is created in his favour for being considered in accordance with the terms and conditions of the

advertisement and the existing recruitment rules. In the case of P.Mahendran and Ors. Vs. State of Karnataka and ors. reported in AIR 1990 SC 405 and in the case of State of Bihar and Ors. Vs. Mithilesh Kumar reported in (2010) 13 SC 467, it was held that while a person may not acquire an indefeasible right to appointment merely on the basis of selection and it has been negated by a change of policy after the selection process has begun, hence it is not justified. In the order of rejection, the sole ground is that the Ministry of Railways has reviewed the provision of alternative appointment in the same grade to candidates selected for Group C and Group D posts by RRBs and RRCs who fail in the prescribed medical examination and considering such aspect, the RRB decided to discontinue the policy of providing alternative appointment to the medically failed empanelled candidates selected through the RRBs/RRCs for any group D post. However, the learned counsel for applicant argued that the sole rejection on the basis of Circular dated 25.5.2009 stating that medically failed empanelled candidates are discontinued from the date i.e. 25.5.2009 would not come in the way of the present applicants as per the show cause filed by the Railways in the CP No. 10/2008 (OA No. 848/11) that they were already empanelled before the circular dated 25.5.2009 came into force.

6. Having heard Ld. Counsels for both sides, we have perused the records as well as the notes for argument filed by both counsels. The issue for resolution in this O.A. is whether the applicants

should be considered for alternative appointment on medical ground on the same lines as adopted for 4 candidates in respect of the same employment notification. It is also the question whether the prohibition imposed by the Railway Board Circular dt. 25.05.2009 on alternative appointment will debar the applicants from such consideration, when alternative appointment was given to 4 candidates by the order dated 14.09.2006, when the Railway Board Circular dt. 25.05.2009 was not in force. The concurrent issue thrown up for resolution is whether the prayer of the applicants should be considered under the earlier policy of the Railway Board for giving alternative appointment.

7. The argument advanced by Ld. Counsel for the applicant is that like similarly placed persons in E.N.No. 1/98 under Annexure-A/4 to the O.A., the applicants, here, were fit for B-two instead of B-one. They were empanelled for before the introduction of the new policy banning alternative appointment considering the gross misuse of the old policy. Therefore, the applicants' case could not be governed by the new policy introduced in 2009. During the period of consideration of the appointment of applicants, the old policy of alternative appointment was very much in force. The submission of Ld. Counsel is that law is settled by the Hon'ble Apex Court in the case of P.Mahendran & Ors. Vs. State of Karnataka & Ors. reported in AIR 1990 SC 405 and in the case of State of Bihar & Ors. Vs. Mithilesh Kumar reported in (2010) 13 SC 487, it the effect that while a person may not acquire an indefeasible right to appointment merely on the

basis of selection, it cannot be, however, negated by a change of policy after the selection process has begun.

8. In their written notes of submission, respondents have argued that in the impugned order dated 30.12.2010, two grounds are taken to reject the prayer of the applicants. First, Section 47 of the Persons with Disabilities Act, 1995 is applicable only to persons who are already employees of the Govt. and not to those who are applicants and aspirants for employment, Secondly, Railway Board has decided to discontinue the policy of providing alternative appointment to the medically failed empanelled candidates by issuing RBE No. 90/2009 dated 25.05.2009. Elaborating this submission further, respondents have clarified that the Circular dated 25.05.2009 is not in the nature of amendment. The Circular itself specifies that it supersedes all other circulars issued on the subject in the past. It is already effective from the date of its issue. It prohibits the G.Ms. to exercise the earlier prerogative enjoyed by them to give alternative appointment to medically decategorized empanelled candidates. Alternative appointment is not a right for the candidates. The Railway Board had the practice of alternative appointment since there was acute shortage of staff. But having observed that this provision was being widely misused, this practice has been discontinued. Moreover, the candidates have no right to claim such a right.

9. Respondents have brought it to our notice that Railway Board by Circular dated 04.09.2010 further clarified that requests for

alternative appointment should not be considered irrespective of the fact whether the case occurred before 25.05.2009 or after 25.05.2009. The relevant para of the circular is quoted below:

> "Prior to issue of Board's instructions dt. 25.05.2009 General Managers of Zonal Railways were authorized to consider requests from such candidates for appointment in alternative category in the same grade provided there is an acute shortage of staff in the alternative post. When the delegated powers ceased to exist with the issue of Board's instructions ibid, it is immaterial whether case occurred before 25.05.2009 or after 25.05.2009. Therefore, in the above scenario request for alternative appointment of medically unfit candidates should not be considered in any case."

The Respondents have further submitted that applicants cannot compel respondents to do something that is against Article 14 and 16 of the Constitution which enshrine equal opportunity in the matters of public employment. Alternative appointment is against the spirit of Article 14 and 16 because it amounts to filling up a post, which has not been advertised, by a medically decategorized person, who was empanelled under another employment notice, but was found to be medically unfit. The RBE No. 90/2009 dt. 25.05.2009 is a curative measure by which the respondents have stopped an earlier practice, which strictly speaking, was not in consonance with the Constitutional provisions. The respondents have also indirectly though taken the position that alternative appointment given to similarly placed persons by order dt. 14.09.2006 cannot be taken as a ground for considering the prayer of present applicants, since it is trite law that there is no equality in illegality. The Ld. Counsel for the respondents

has also submitted that in O.A.No. 849/2011 the Tribunal has disposed of a similar matter on the above lines.

10. We have perused the orders dated 06.07.2015 in O.A. No. 849/2011 disposed of by this Bench of the Tribunal. The facts and circumstances of that O.A. are exactly the same as in the present O.As. The matter in O.A. No. 849/2011 was heard and dismissed by an order dated 29.06.2015. The order of dismissal was based upon grounds that were discussed in detail in the order dated 29.06.2015 in the earlier O.A. Since these grounds are directly relevant to the present O.A. we consider it apt to quote the paragraphs 17, 19 and 21 of that order. The same reasoning will apply to the facts of the present O.A.

> "17. We have considered this submissions and perused the contents of the above decisions as produced by the applicant. In the case at hand, in our considered opinion, interpretation of any amended or unamended rule is not involved. It is not the case of the applicant that after the Respondents resorted to take action pursuant to Employment Notice No.1/98 dated 5.11.1998 for filling up 1012 vacancies, have attempted to recourse to certain amended recruitment rules in that behalf during the course of selection. It is also not the case of the applicant that the Respondent-Railways have violated or infringed any of the terms and conditions of Employment Notice No.1/98 in the matter of selection and appointment to 1012 Group-D posts. Therefore, by no stretch of imagination, there has been any infraction of the existing provisions of the recruitment rules as notified in the Employment Notice No.1/98 and in effect, no right of the applicant has been taken away by the respondents in any manner, whatsoever.
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> 18. xxx xxx xxx

19. The above contention of the Railways cannot be overlooked. Any parallel to alternative appointment given to four persons in 2006 cannot be drawn in the case of the applicant. This is because the case of the applicant came to be considered after the cut off date of 25.5.2009. The applicant was admittedly not fit in the prescribed Bee-One medical category for Gangman. He was being considered for alternative appointment on the basis of his medical fitness in Bee-Two category. By the time of that consideration, the policy of alternative appointment was jettisoned by the Railway Board. This policy decision, as per our view, cannot be interfered with by the Tribunal. Employment is a matter of Government policy. The present applicant has neither an inherent nor an indefeasible right to be considered for alternative appointment. Had he produced any case of alternative appointment made after the cut off date of 25.5.2009, he could have contended that his right to equality under Article 14 of the Constitution has been infringed. Therefore, the contention of the applicant claiming a precedent of alternative appointment by the Railways as at A/4 loses its force. The direction of the Tribunal in the previous O.A. was certainly for consideration of the applicant's case in the light of consideration given to others as in order at Annexure-A/4 but cannot be construed as a positive direction to confer alternative appointment on the applicant. His case was considered by the authorities as per the Tribunal's direction and has been found to be rejected on grounds that appear valid and convincing.

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21. Having considered all aspects of the matter, we answer the point in issue against the applicant and in favour of the Respondents. Accordingly, we hold that applicant has no right to be provided with an alternative appointment because of his lower medical standard on the ground that similarly situated persons have been so provided.

11. For the reasons as stated above, the O.A. Nos. 818 and 848 of 2011 being devoid of merit are dismissed with no costs to the parties.

[R.C.Misra]
Member (A)

[A.K.Patnaik]
Member (J)

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