

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 347 of 2012

Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)

Om Prakash Goswami aged about 40 years, S/o Late A. Goswami working as Stores Khalasi under Sr. Section Engineer (Works), Cuttack residing at Quarter No. E78/A, Gorkha Colony, Cuttack, Pin -753003.

.....Applicant

VERSUS

1. Union of India service through General Manager, E.Co.Rly, Chandrasekharpur, Bhubaneswar, Pin – 751017.
2. Chief Personnel Officer, E.Co.Rly, Rail Vihar, Chandrasekharpur, Bhubaneswar, Pin – 751023.
3. Sr. Divisional Personnel Officer, E.Co. Railway, Khurda Road, PO – Jatni, Dist. – Khurda, Pin – 752050.
4. Sr. Section Engineer (Works), E.Co.Railway, Cuttack, PO – College Square, Pin – 753003.
5. Secretary, Railway Board, Rail Bhavan, New Delhi-1.
6. Sri Prasant Kumar Subudhi, C/o Sr. Divisional Personnel Officer, E.Co. Railway, Khurda Road, PO – Jatni, Dist. – Khurda, Pin – 752050.
7. Sri Bibhudatta Panda, C/o Sr. Divisional Personnel Officer, E.Co. Railway, Khurda Road, PO – Jatni, Dist. – Khurda, Pin – 752050.
8. Sri Arjun Gauda, C/o Sr. Divisional Engineer (Co-ord), E.Co. Railway, Khurda Road, PO – Jatni, Dist. – Khurda, Pin – 752050.
9. Smt. Sabita Behera, C/o Sr. Divisional Personnel Officer, E.Co. Railway, Khurda Road, PO – Jatni, Dist. – Khurda, Pin – 752050.

.....Respondents.

For the applicant : Mr.G.Rath, counsel

For the respondents: Mr.A.C.Deo, counsel

Heard & reserved on : 19.7.2019 Order on : 30.7.2019

ORDER

Per Mr. Gokul Chandra Pati, Member (A)

The applicant had appeared in an examination for preparation of a panel of 47 staffs for promotion to Junior Clerk-cum-Typist post against 33 1/3% promotion quota as per the circular dated 24.8.2011 (Annexure-A/1). The applicant appeared in the test. When the result was declared on 6.3.2012 (Annexure-A/2) with a panel, the applicant's name was not there. He submitted a representation dated 12.3.2012 (Annexure-A/4) stating that the seniority

should not have been one of the criteria for preparation of the panel as per the circular of Railway Board since the selection in question was for general post. He is aggrieved by the fact that his name was not included in the panel at Annexure A/2, although he had qualified in the written examination, since the panel was prepared based on seniority from among the candidates who had qualified the test. Following reliefs are sought for by the applicant vide para 8 of the OA:-

- "(1) To direct the respondents to publish the panel afresh on the basis of the marks secured by the candidates and accordingly act upon the same as per the Rules;
- (2) And/or to quash the panel at Annexure A/2 and to declare the panel of Jr. Clerk-cum-Typist as per the Railway Board's instructions issued vide No.E(NG)I-2008/PM7/4 SLP Dt. 19.6.2009 (RBE No. 113/2009) showing the name of the applicant in the appropriate place as per his merit position in the selection;
- (3) To direct the respondents to promote the applicant to the post of Jr. Clerk-cum-Typist as per merit position with retrospective with all service and financial benefits;
- (4) To declare 2nd sub para of Para 'C' under the heading "Mode of Test" under Annexure A/1 as non est in the eye of law;
- (5) And pass any other order as this Hon'ble Tribunal deems fit and proper in the interest of justice."

2. The respondents filed the Counter opposing the OA stating that as per the notification for the vacancy for promotion from Group D to Group C against 33 1/3% quota, the selection was made on the basis of written test and record of service and those qualifying the test were to be included in the panel in order of seniority. The modalities of the test are as per the circular RBE No. 162/2005 (Annexure-R/1 to the Counter). For the examination in question, 40 candidates including the applicant qualified the written test. From these candidates, a panel of 32 candidates was prepared from those securing 50% or more in written test and 40% or more in record of service and such panel was prepared as per their seniority positions in accordance with the Annexure-R/1 and notification notifying the selection at Annexure A/1. The said panel was published vide Annexure-A/2 of the OA. It is stated that the applicant could not be placed in the panel as he was not senior enough to be placed in the panel.

3. Regarding the nature and modalities of selection in question, it is stated in para 7 of the Counter as under:-

"7. That the instant selection is not a general selection. The vacancies of Jr. Clerk-cum-Typist against 33 1/3% DPO, which is on the basis of suitability-cum-seniority as per para 189 of the Indian Railway Establishment Manual, 1989 Edition, Volume-1 (IREM, 1989 Edn, Vol.1) have been assessed from all departments and filled up according to the vacancies in their own department. Accordingly para 4.4 is answered.

8. That in reply to the averment made by the applicant in para 4.5 at the cost of repetition it is humbly submitted that the selection has been conducted strictly adhering to the guidelines contained in the advance correction slip No. 155, circulated under Estt. Srl. No. 145/2003 which stipulates that all those

who qualify on the basis of written test and record of service, the qualifying percentage of marks being prescribed by the General Manager, should be included in the panel in order of their seniority for their promotion. The copy of Estt. Srl. No. 145/2003 is annexed herewith as Annexure-R/3 please.

Xxx xxx xxx xxx xx

9.In the selection for promotion from Group 'D' posts to Group 'C' posts in the category of Jr. Clerk cum-typist there are two quotas in DPQ, i.e. 33 1/3% of the vacancies on the basis of seniority and 16 2/3% of the vacancies on the basis of merit only. In the instant case the selection is based against 33 1/3% vacancies of DPQ which is based on seniority only."

4. Heard learned counsels for the applicant and respondents, who reiterated the stand in their respective pleadings. The applicant's counsel filed a written note enclosing the following judgments on which he relied for his case:-

1. M.Ramjayaram -vs- General Manager, South Central Railway & Others [AIR 1996 SC 3126]
2. Subhash Chand Joshi & Others -vs- Union of India & Others [Civil Writ Petition No. 4746-CAT of 2002 of High Court of Punjab and Haryana at Chandigarh]
3. Binapani Panda -vs- Union of India & Others [OA 26/2008 of CAT, Cuttack Bench]
4. Paresh Chandra Tarai & Others -vs- Union of India & Ors. [OA 300/2007, CAT, Cuttack Bench]
5. Union of India & Others -vs- Paresh Chandra Tarai & Others [WP(C) No. 18138/2011 of Hon'ble High Court of Orissa]
6. Bimal Kumar Hota & Others -vs- Union of India & Others [OA 781/2010 of CAT, Cuttack Bench]
7. Kali Prasad Singh Samanta -vs- Union of India & Others [OA 592/2011 of CAT, Cuttack Bench]

5. Learned counsel for the applicant had also referred to the circular RBE No. 113/2009 dated 19.6.2009 (Annexure-A/3) to argue that the post in question being a general post for which candidates from different categories participate, the panel is to be prepared strictly as per merit. The RBE No. 113/2009 states as under:-

"Sub : Selection Procedure for promotion to General Selection Posts - Placement of names on panel - Instructions regarding.

3. The matter has, accordingly been carefully considered by the Board and it has been decided that in cases of promotion to General Posts in which candidates are called from different categories, whether in the same department or from different departments and where zone of consideration, is not confined to three times the number of staff to be empanelled, panels should be strictly prepared as per merit, with reference to marks obtained by the candidates in 'Professional ability' and 'Record of Service'. Subject to usual relaxation for SC/ST staff, wherever permissible, those securing less than 60% in 'Professional ability' and 60% in aggregate, will not be considered eligible for inclusion in the panel. Further, the service records of only those candidates who secure a minimum of 60% marks in 'Professional ability', shall be assessed. Since the final panel has to be drawn on the basis of merit, there will be no scope for erstwhile provision of placement of candidates who secure 80% or more marks, classified as 'Outstanding', on the top of the panel.

3.1 These instructions will supersede all previous instructions, as far as the same relate to the provision of arranging names on the final panel in the order of seniority, for promotion to General Posts,. However, all other conditions, as contained in the specific instructions for a particular category, shall continue to hold good.

3.2 These instructions shall be applicable with immediate effect, i.e. from the date of issue of these orders, to all panels for promotion to General Posts. Any previous selection panel drawn up otherwise, before issue of this letter, need not be reopened."

6. In reply to the averments of the applicant about applicability of the RBE No. 113/2009, it is stated in the Counter (para 7 and 10) that the said circular is not applicable to the selection in question as per the notification at Annexure-A/1, which was not a general selection and that for the present selection, the RBE No. 165/2003 (Annexure-R/3) will apply.

7. The main question to be answered in this OA is whether the RBE No. 113/2009 (Annexure A/3) is applicable for the selection as notified in the circular dated 24.8.2011 (Annexure A/1). As discussed earlier, the RBE No. 113/2009 is applicable for all general selection posts. We have gone through the notification at Annexure A/1 which states that the vacancies in different posts were to be filled up against 33 1/3% Departmental Promotion Quota. In the Mode of Test at para C of the Annexure A/1, it is specified that candidates should secure a minimum marks to qualify in written test (50% for UR and 40% for SC/St candidates) and all those who qualify the written test and record of service will be included in the panel in order of their seniority. The applicant, in this OA, has challenged this Mode of Test in the notification at Annexure A/1 on the ground that it was a general selection post and by virtue of RBE No. 113/2009, the criteria for selection should be only merit with no consideration for seniority. There is no stipulation in the notification at Annexure A/1 to the effect that it was a general selection post. These posts were Departmental Promotion Quota as stated in Annexure A/1.

8. There is nothing on record to show that the applicant disputed the 'Mode of Test' stipulated in the notification at Annexure A/1 prior to his participation in the said test. The applicant had participated in the said test as per the notification without any protest and when he failed to be included in the panel, he challenged criteria for selection as specified in the Mode of Test in Annexure A/1 in this OA on the ground that it violated the RBE No. 113/2009 (Annexure A/3). As per settled law, it is not open for a candidate to challenge the notification for a selection after participating in it and failing to qualify the same.

9. Learned counsel for the applicant has cited judgments of Hon'ble Apex Court in the case of M.Ramjayaram -vs- General Manger, South Central Railay and Others [AIR 1996 SC 3126] in which it was held that for selection of general posts, merit is to be the only criteria. Based on this judgment, RBE No. 113/2009 was issued by the Railway Board. As discussed earlier, from the notification as Annexure A/1 for the post, it is not clear that it is for general posts and it mentioned 'Seniority' to be one of the criteria which was not objected by the applicant prior to his participation in the said test. The

applicant participated in the selection process and protested only when he could not qualify as per the criteria specified in the said notification. In the case of Subhas Chand Joshi (supra) cited by applicant's counsel, it was held that criteria of 'seniority' for promotions in pursuance to a notification was held to be illegal in terms of the applicable rules and it was also held that promotions to a selection post is to be made on merit in the qualifying examination.

10. Learned counsel for the applicant also cited the order dated 22.12.2010 of this Tribunal in OA 26/2008. In that case the issue was of promotion to Dresser Grade III for general selection by conducting written test only. It was observed in that order as under :

"Except bald assertion that the post was to be filled up on the basis of the seniority cum merit basis, no material has been placed by the respondents in support of the said submission. Respondents have also failed to substantiate that consideration of the candidates was out of one homogeneous group having a common seniority list."

It was held by the Tribunal vide order dated 22.12.2010 that principles of RBE 113/2009 will be applicable. However, this cited case is distinguishable from the present case because in the advertisement for the post at Annexure A/1, seniority was mentioned as a criteria in the advertisement itself. The learned counsel also cited an order dated 25.3.2019 of this Tribunal in OA 592/2011. In that OA for promotion to the post of Junior Ticket Collector by selection, it was mentioned in the advertisement in that OA that the selection will be finalised purely on merit, which was not followed while preparing the panel. But in this OA, the notification neither mentioned that it was for general selection post nor it was mentioned that selection will be made only on the basis of merit. On the other hand the criteria of seniority was mentioned in the notification at Annexure A/1 which was not challenged by the applicant prior to applying for the said post. Therefore, the cited cases are of no help to the applicant.

11. We take note of the fact that on this issue Hon'ble Apex Court in the case of Chandra Prakash Tiwari & Others –vs- Shakuntala Shukla & Others [(2002) 6 SCC 127] has held as under :

"In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining the doctrine of Estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in Om Parkash Shukla ([Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.](#), [1986] Supp. SCC 285) a Three Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination

without protest and subsequently found to be not successful in the examination, question of entertaining a Petition challenging the said examination would not arise."

12. In this OA, the applicant had admittedly participated in the notification dated 24.8.2011 (Annexure A/1) for selection of the posts in question in which there was a clear stipulation at paragraph 'C' regarding Mode of Test that the candidates securing a minimum mark qualifying in the written test and all those qualified be placed in the panel in order of their seniority and there is nothing on record to show that he had challenged the aforesaid criteria. After participating in the said test and failing to qualify, he has now challenged the Mode of Test in Annexure A/1. Such challenge after participating in the selection process will not be sustainable in the light of the judgment of Hon'ble Apex Court in the case of Chandra Prakash Tiwari (supra) as discussed above.

13. In view of above discussions, we are of the view that no case has been made out in this OA to justify interference of this Tribunal in this case. It is not the case of the applicant that the respondents have violated the stipulations of the notification dated 24.8.2011 (Annexure A/1) in any manner while preparing the panel. Further, there is nothing on record to corroborate the averment of the applicant that the posts in question were general selection posts. Although the notification of Annexure A/1 mentioned that Group 'D' staffs in various departments as stated in the Annexure-II of the said notification were eligible to apply, it also stipulated seniority as one of the criteria for selection. The respondents have relied on the RBE No. 165/2003 (Annexure R/3) and RBE No. 162/2005 (Annexure R/1) for the aforesaid selection which was not challenged by the applicant before participating in the said test.

14. As a result, the OA has no merit and is accordingly dismissed. There will be no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath