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Central Administrative Tribunal
Principal Bench, New Delhi.

OA-1233/2003

New Delhi this the *19th* day of August, 2004

Hon'ble Shri V.K. Majotra, Vice-Chairman(A)
Hon'ble Shri Shanker Raju, Member(J)

Shri Rachpal Singh Applicant
(By Advocate Sh. K.K. Patel)

U.O.I. & Ors. Respondents

Coram:-

Hon'ble Shri V.K. Majotra, Vice-Chairman(A)
Hon'ble Shri Shanker Raju, Member(J)

1. To be referred to the reporter or not? *Yes*
2. Whether it needs to be circulated to other Benches
of the Tribunal? *Yes*

S. Raju
(Shanker Raju)
Member(J)

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No.1233/2003

New Delhi this the 19th day of August, 2004.

**HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (A)
HON'BLE MR. SHANKER RAJU, MEMBER (J)**

Shri Rachpal Singh,
S/o Sh. Suram Chand,
Under the control of
Chief Administrative Officer (Construction),
Head Quarter Office, Kashmiri Gate,
Delhi.

-Applicant

(By Advocate Shri K.K. Patel)

-Versus-

Union of India through:

1. The General Manager,
Northern Railway,
Baroda House,
New Delhi-110 011.
2. Chief Administrative Officer (Construction),
Northern Railway,
Head Quarter Office: Kashmiri Gate
Delhi-110066.
3. Divisional Railway Manager,
Northern Railway,
New Delhi.
4. Deputy Chief Engineer (Construction),
Northern Railway,
Jhalandhar.

-Respondents

(By Advocate Shri Rajender Khatter)

O R D E R

Mr. Shanker Raju, Member (J):

Applicant impugns respondents' order dated 6.5.2003, whereby applicant has not been called for *viva voce* as yet on the ground that he has not secured qualifying marks in the written test. He has sought for

quashing of the aforesaid order with a direction to the respondents to allow him to appear in the viva voce for suitability test and to implement order dated 2.9.1999.

2. The brief factual matrix is that applicant joined as Khalasi on 15.12.1981 and was accorded temporary status on 1.1.1984. He was promoted on ad hoc basis as Material Checking Clerk (MCC) on 1.4.1993 and was paid benefit of MCC from 15.8.85 to 3.1.93. Applicant had appeared for a screening for group 'D' post and was regularized in the year 1997 as Khalasi. In view of the circular of the Railways dated 11.2.91 and 13.2.97 selection process for regularization of ad hoc MCCs was initiated. Applicant made a representation for calling him in the written test. The aforesaid inaction on the part of respondents was subject matter of OA-539/2001, whereby by an order dated 6.2.2004 directions have been issued to respondents to consider claim of applicant for regularization as MCC with all consequential benefits.

3. As a consequence thereof applicant was called to appear in the written test on 23.4.2003, which he accordingly complied with by appearing in the written test and on his information he secured 50% marks out of 100 in the written test. However, having failed to qualify applicant has not aggregated 60% marks in the written test he was not allowed to take viva voce, giving rise to the present OA.

4. A brief history reflects that earlier those who were retaining lien in the open lines and were promoted on ad hoc basis those Group 'D' employees who had shouldered responsibilities and performed duties on the post of Clerk-cum-Typist approached this Tribunal in OA-539/2001 in **Raj Pal Singh v. General Manager**, by an order dated 6.2.2002 in the wake of circulars issued by the General Manager on 11.2.99 and 13.2.97

to hold an eligibility test directions have been issued to consider claim of regularization.

5. In OA-2321/96 respondents have filed a reply stating that the post of Clerk is to be filled up 66-2/3% by direct recruitment and 33-1/3% by promotee quota amongst Group 'D' category. Seniority of those regularized MCCs was operated under paragraph 319 of the Indian Railway Establishment Manual (IREM), which provides seniority on promotion to non selection post. Accordingly OA was allowed by order dated 23.3.2000.

6. By an order dated 21.12.92 the aforesaid decision was complied with.

7. In another OA-267/95 decided by the Jodhpur Bench on 13.11.98 placing reliance on circular of Railways dated 15.2.91 regularisation of MCC was ordered. In contempt petition No.29/99 the Tribunal has observed that MCCs who were working on ad hoc basis for more than three years in construction organization would be regularized by the parent department and no more test be conducted shows that the selection process was not to be adopted.

8. As per General Manager's circular dated 2.9.99 regarding ad hoc MCCs would be subject to proper selection procedure and on successfully qualifying they would be regularized.

9. Writ Petition filed by the Union of India bearing No.7261/2001 before the High Court of Delhi which has sought quashing of order passed in OA-2703/99 dated 23.5.2001 in Union of India v. Hari Singh who was promoted on ad hoc basis as Typists in Construction organization it has been reiterated that those ad hoc Typists completing three years up to

14.3.94 would be subjected to only suitability test. This is exactly the stand taken by the respondents before the High Court.

10. In the above backdrop Sh. K.K. Patel, learned counsel appearing for respondents contended that the post of MCC which is re-designated as Office Clerk-cum-Typist is a non-selection post and is to be filled up on the basis of seniority-cum-suitability. Paragraph 319 of the IREM operates seniority. Insistence on minimum qualifying marks in the written test which is essential for selection post cannot be applied to a non-selection post, which is violative of Articles 14 and 16 of the Constitution of India.

11. On the other hand, respondents' counsel Sh. Rajinder Khatter vehemently opposed the contentions. According to him as per paragraph 189 of the IREM promotion from Group 'D' to Group 'C' is on a selection post where a positive selection is to be undertaken. As per correction slip No.66 under paragraph 219 (g) dated 16.11.98 it is stated that in selection for viva voce one has to secure a minimum of 60% marks in aggregate. As applicant has failed to secure 60% in the written examination he having appeared in the selection having failed to qualify is estopped from challenging the selection in the light of the decision of the Apex Court in **Madan Lal v. State of J&K**, 1995 SCC (L&S) 712.

12. The learned counsel further states that the post of MCC/Typist is a Group 'C' post as per paragraph 174 of IREM and in so far as filling up this post on promotion under 33-1/3% quota amongst Group 'D' staff one has to undergo a positive act of selection.

13. As regards plea of applicant that applicant belongs to reserved category and is a scheduled caste, his evaluation should be done at the relaxed standards, which has been denied by respondents and it is further contended that applicant's record does not show him as belonging to SC

community as there is no proof or declaration to that effect in the service record.

14. We have carefully considered the rival contentions of the parties and perused the material on record.

15. It is trite law that having failed to qualify in a selection one cannot take a calculated chance and turn back to assail the selection process. However, a decision of the larger Bench of the Apex Court in **Raj Kumar v. Shakti Raj, (1997) 9 SCC 527** has observed as under:

“16. Yet another circumstance is that the Government had not taken out the posts from the purview of the Board, but after the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para 6 of 1970 Notification and the posts were taken out from the purview thereof. Thereafter the selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in *Madan Lal v. State of J&J ((1995)3 SCC 486)* and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law.”

16. If one has regard to the above, acquiescence and estoppel would not be applicable if the method of selection and exercise of power is not in accordance with rules. It is also established that on construction side Group 'D' employees who had retained their lien in the open lines had been entrusted with shouldering of higher responsibilities of Group 'C' post and for number of years they continued on the above posts. They had

been subjected to a qualifying test before being put to work on Group 'C' post as Clerks/Typists. This is also not in dispute that a policy decision from time to time had been taken by the respondents through circulars issued by the General Manager to regularize MCCs subjecting them to a selection to adjudge their suitability. Applicant is similarly circumstanced, having worked as MCC on ad hoc basis claims the same. As per para 2 (11) of IREM-I a selection post has been defined as post which has been declared as such by the Railway Board to which promotions are made on the basis of a positive act of selection as per the procedure in force for filling up the selection post. This depends on the requirement of service, whereas non-selection post in para 2 (1)(4)a) IREM are to be filled up by promotion of the seniormost suitable railway servant and their suitability is to be adjudged after subjecting them to a suitability test.

17. Paragraph 174 (b) of the IREM deals with the grade of Office Clerk other than Accounts Department is reproduced as under:

“174. (b) Other than Accounts Departments

(i) Office Clerks

(1) The vacancies in the category of Office Clerks Scale Rs.950-1500 will be filled as under:-

(i) 66-2/3% by direct recruitment through the agency of the Railway Recruitment Boards; and

(ii) 33-1/3% by promotion by selection of specified Group 'D' staff.

(2) Qualifications etc. For direct recruitment are as under:--

(i) Educational :- Matriculation or its equivalent examination with not less than 50% marks in the aggregate.

(ii) Age:- Between 18 and 25 years.”

18. Promotion to higher grade in Group 'C' is dealt with in paragraphs 188 and 189 of the IREM, which are reproduced as below:

"188. Promotion to lower grades in Group 'C'— Lower grades in Group 'C' like Junior Clerks, Material Checkers, etc. in scales such as Rs.825-1200 should be wholly filled by promotion from Group 'D' railway servants who have put in 5 years service. In the case of posts which are in the normal avenue of promotion to Group 'D' railway servants, promotion should be made from amongst the railway servants of the Deptt. Concerned in each promotion unit on the basis of seniority-cum-suitability after holding such written and/or practical tests as may be considered necessary. In the case of posts which are not in the normal avenue of promotion, promotion should be made on the basis of selection after holding such written and/or practical test as may be considered necessary and from panel drawn and according to prevailing rules in respect of selection posts.

189. Promotion to higher grades in Group 'C':--
CS NO.75, 76

(a) Railway servants in Group 'D' categories for whom no regular avenue of promotion exists 33-1/3% of the vacancies in the lowest grade of Commercial clerks, Ticket Collectors, Trains Clerks, Number Takers, Time Keepers, Fuel Checkers, Office Clerks, Typists and Stores Clerks etc. should be earmarked for promotion. The quota for promotion of Group 'D' staff in the Accounts Deptts. To Group 'C' post post of Accounts Clerks will be 25%. Promotion to Group 'C' will be subject to the following conditions:-

(i) All promotions should be made on the basis of selection. There should be written tests to assess the educational attainments of candidates followed by interviews where considered necessary. Group 'C' categories referred to above should be suitably linked with specified categories in the lower grades on broad affinity of work to form groups for promotion but it should be ensured that the prospects are made regularly equal in the different groups. The test should be correlated to the standards of proficiency that can reasonably be expected from railway servants who are generally non-matriculates. The aim of the examiners should be to assess the general suitability of the class IV railway servants offering themselves for promotion to class III posts from the point of view of their knowledge of English and their general standard of intelligence.

(1) Written test should consist of one paper of 3 hours duration divided into two parts—Part 'A' to test the

working knowledge of the railway servant of the English language and part 'B' his general standard of intelligence and proficiency through questions in Arithmetic, General Knowledge mainly pertaining to Railway matters and matters immediately pertaining to the work he has been acquainted with during his Railway service. In drawing up the questions it must be ensured that they are not set as such a standard as to make it impracticable for a Group 'D' railway servant of average intelligence and normal standards of efficiency to qualify in the test.

(2) Oral test should adjudge other factors of suitability if so considered necessary by the General Manager.

(3) Selections may not be restricted to three times the number of vacancies but kept open to all eligible candidates who would like to be considered for such selection.

(4) All those who qualify in written and oral test, the qualifying percentage of marks being prescribed by the General Manager, should be arranged in the order of their seniority for promotion against the yearly vacancies available for them in Group 'C' categories.

(ii) Group 'D' railway servants to be eligible for promotion to Group 'D' posts should have put in a minimum 3 years of continuous service. This does not apply to Scheduled Castes and Scheduled Tribes candidates.

(iii) (a) The standard of training imparted to the Group 'D' railway servants selected for Group 'C' posts should be the same as for direct recruits for the same Group 'C' categories and in the case of failures in the first attempt such employees may be given a second-chance to qualify.

(b) Group 'D' railway servants to be promoted as typists should have a minimum speed of 40 words per minute in typewriting as for direct recruits.

(c) Group 'D' railway servants when promoted to Group 'C' posts in the Accounts Deptt. Shall go through the same training and test and shall be subject to the same conditions of service as are in force for the new recruits. During the period of their training they would get as stipend the pay that they would have normally drawn on promotion to Group 'C'. All allowances like Dearness, Compensatory and House rent Allowances will be allowed to them at the scales applicable, had the stipend been treated as pay."

In the light of the decision of this Tribunal in **M. Ramjayaram v.**

General Manager, 1996 (1) SCSLJ 536 the procedure for filling up

general selection posts had been reviewed on 16.11.98 which provides final panel to be drawn among those securing 60% marks in professional ability and 60% in aggregate.

19. Para 219 of the IREM provides procedure to be adopted by the Selection Board.

20. If one has has cumulative and joint reading of this provision what has been discernible before hand as a sine qua non for nomenclature of selection grade to a post in Railways a declaration to the effect that the post is a selection post is mandated. We do not find any such declaration by the Railway Board, declaring the post of Office Clerk as a selection post. Accordingly the only inference which could be drawn applying the negative *Covenant* is that the post of Office Clerk other than the Accounts Department is a non selection post. Though a positive selection is required when 66-2/3% quota under IREM the other quota of 33-1/3% is to be filled up by promotion amongst specified Group 'D' staff through selection. There is no declaration or mention about the post being a selection post. Even in case of a non-selection post a process of ascertaining the fitness is to be tested through a suitability test which is nothing but a selection. However, to explain better para 188 of the IREM clearly provides that lower grades in Group 'C' to be filled by promotion amongst railway servant in Group 'D' employees on the basis of seniority cum suitability after holding written and a practical test as considered necessary. But exception to this is wen the post which are not in the normal avenue of promotion, promotion should be made on the basis of selection after holding test as per the prevalent rules in respect of a selection post. Paragraph 189 makes it clear that the post of Commercial

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Clerk, Ticket Collector etc. Typist should be earmarked for promotion to Group 'D' shall be eligible on the basis of selection.

21. The aforesaid provision clearly shows that the post of MCC now re-designated promotion is in normal avenue from Group 'D' on the basis of seniority-cum-suitability the process of selection as envisaged under paragraph 219 (g) amended shall have no application.

22. The aforesaid gains support from the stand taken by the respondents before the High Court in CWP No.7267/2001. The Writ Petition clearly shows that for the post of Typist which is a Group 'C' post the selection was on the basis of a suitability test and those who are found suitable have been regularized. There is no mention of any positive act of selection and acquiring 60% marks in aggregate as in paragraph 219 of the IREM.

23. Another admission which has come-forth is in the decision in CA-2321/96 in Chamoli's case where a specific averment has been made that the assignment of seniority to those MCC regularized shall be under paragraphs 319 of the IREM which determines seniority and promotion to non-selection post.

24. In view of the admitted stand by the respondents that the Group 'C' posts of Typist and MCC are non-selection posts and adopting a selection procedure of non-selection post would be hit by the equitable principle of estoppel.

25. Once it has been established that while considering applicant for regularisation a wrong selection process had been adopted, even if applicant had participated in the selection and failed would not stop him from challenging the selection in the light of the decision of the Apex Court in the case of Shakti Raj (supra).

26. Moreover, we find that in the past relying upon the circulars of General Manager respondents have regularized similarly circumstanced ad hoc MCCs subjecting them to a suitability test. Now, subjecting applicant deeming the post as selection through a positive act of selection has no intelligible differentia and reasonable nexus with the objects sought to be achieved. Forming a class applicant cannot be imparted with any unequal treatment which shall be anti thesis to the decision of the Apex court in **D.S. Nakara v. Union of India**, 1983 SCC (L&S) 145.

27. We are conscious of the decision of the High Court of Delhi in CWP No.5057/2001 dated 13.8.2002 where the Tribunal's directions to regularize Group 'D' Gangman having lien in the open lines as MCC/Office Clerk has been overturned but the following observations have been made:

"17. For the reasons aforementioned, the impugned judgment cannot be upheld, which is set aside accordingly.

However, keeping in view the peculiar facts and circumstances of this case, the cases of the respondents may be considered for regular appointment along with other eligible candidates in terms of the recruitment rules after giving them the benefit of relaxation of age keeping in view the fact that they had worked for such a long time.

This writ petition is allowed without any order as to costs."

28. The above directions to consider for regular appointment those MCCs on ad hoc with other eligible candidates in terms of recruitment rules has left open the issue as to what rules shall apply for regularisation of applicant and as to what process of selection would have application. Accordingly keeping in view the statements given before the Tribunal and before the High Court (supra) the suitability test without insisting on the 60% aggregate marks as a non selection process is the criteria to be followed.

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29. In the result, for the foregoing reasons, OA is allowed. Impugned order is quashed and set aside. Respondents are directed to subject applicant to a suitability test, deeming the post of MCC now re-designated as a non-selection post and thereafter consider him for promotion on regular basis to the post of Office Clerk-cum-Typist. This shall be complied with within a period of three months from the date of receipt of a copy of this order. No costs.

S. Raju
(Shanker Raju)
Member (J)

V.K. Majotra
(V.K. Majotra)
Vice-Chairman(A)

19.8.04.

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