

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment Reserved on: July 01, 2013

Judgment Pronounced on: July 09, 2013

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W.P.(C) 8512/2011

PREM SINGH & ORS. Petitioners

Represented by: Ms.Meenu Mainee, Advocate

versus

UOI & ORS.

..... Respondents

Represented by: Mr.R.V.Sinha, Advocate with
Mr.Amit Dubey, Advocate for
Respondent No.1 to 3

W.P.(C) 901/2012

KAILASH CHAND GURJAR Petitioner

Represented by: Ms.Meenu Mainee, Advocate

versus

UOI & ORS.

..... Respondents

Represented by: Mr.V.S.R.Krishna, Advocate for
Respondent No.1 to 3
Mr.A.K.Trivedi, Advocate for R-4,
R-6 and R-7

W.P.(C) 2628/2013

RAM RAJIV & ORS. Petitioners

Represented by: Ms.Jyoti Singh, Sr.Advocate with
Ms.Tinu Bajwa and Mr.Amandeep
Joshi, Advocates

versus

UOI & ORS.

..... Respondents

Represented by: Mr.R.V.Sinha, Advocate with
Mr.A.S.Singh and Mr.Amit Dubey,
Advocates for Respondent No.1 to
3
None for the other respondents

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE V.KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. Though learned counsel for the parties projected facts pertaining to W.P.(C) No.8512/2011 and W.P.(C) No.2628/2013 as if the two pertain to two different empanelments for promotion and notwithstanding learned counsel for the respondents not being able to throw any clarificatory light, from the final list of selected candidates, being 92 in number, issued on December 22, 2008, which has been challenged in the two writ petitions it is apparent that notwithstanding two notifications issued to fill up 125 vacant posts of Goods Guards by promotion from amongst Train Clerks, Ticket Collectors, Commercial Clerks, Shunting Masters, Cabin Men and Assistant Guards; being the notification dated October 24, 2007 and March 28, 2008, averments made in both writ petitions would reveal that under both notifications 125 posts proposed to be filled up were further categorized as 65 unreserved, 35 and 25 respectively reserved for SC and ST candidates and the written examinations were held on April 06, April 10, April 26 and April 27, 2008. On July 02, 2008 names of 164 candidates were declared having obtained more than 60% marks. A committee constituted considered the ACRs of the said 164 candidates and final result containing name of 92 candidates was notified on December 22, 2008. It is this list of 92

candidates which has been challenged in both the writ petitions. Before filing the Original Application before the Tribunal a representation was made on August 20, 2009 to the Competent Authority stating therein that since the Supreme Court had quashed Rule 219(g) of the Indian Railways Employment Manual as per the decision reported as AIR 1996 SC 3126 M.Ramjayaram Vs. GM South Central Railways & Ors. and the Punjab & Haryana High Court had quashed Rule 219(j) of the Indian Railways Employment Manual as per decision dated April 09, 2008 reported as 2008 (2) SCT 787 Subhash Chand Joshi & Ors. Vs. UOI & Ors., the select list notified be set aside and re-drawn strictly as per merit position in the examination conducted in the month of April, 2008. They questioned the final select panel drawn up as per which the panel was drawn by following the principle that all those who had secured above 80% marks had their names entered as per their seniority in the feeder cadre till when half notified posts were exhausted and thereafter by adopting the same principle i.e. of seniority in the feeder cadre for those who had secured marks above 60%. The representation was rejected because on June 19, 2009 the Railway Board had issued a circular number RBE 113/2009 as per which, for future, select panels were to be drawn up in the order of seniority from amongst those who had secured a minimum of 60% marks with the exception that those who secured more than 80% marks would be placed at the top of the panel in order of seniority. We highlight that the only difference vis-à-vis Rule 219(j) of the Indian Railway Employment Manual brought about by the new office order was that hitherto before only half vacancies were filled up as per seniority from amongst those who obtained more than 80% marks and as per the circular the restriction of only 50% posts being so filled up was

done away with. The department took the stand that since the instant select list was prepared prior to June 19, 2009 the list would stand.

2. Ram Rajiv and others filed OA No.3092/2009 immediately after the representation was rejected but did not implead the persons whose names were included in the final select list issued on December 22, 2008. The Original Application filed by them was dismissed by the Tribunal vide order dated December 09, 2010 on the ground that they had not impleaded the selected candidates as respondents. Review sought by them of the order dated December 09, 2010 was dismissed by the Tribunal on February 07, 2011 against which writ petition filed registered as W.P.(C) No.6496/2011 was disposed of by a Division Bench of this Court on September 05, 2011 setting aside the orders dated December 09, 2010 and February 07, 2011 simultaneously permitting Ram Rajiv and others to implead the affected parties i.e. the empanelled candidates. At the remanded stage the Tribunal impleaded as respondents persons who would be adversely affected and allowed the Original Application filed by Ram Rajiv and others on May 31, 2012.

3. In the meanwhile Prem Singh and others who were also aggrieved with the same select list filed OA No.1727/2011 which was dismissed by the Tribunal vide decision dated May 19, 2011 on the ground; firstly that the Original Application filed in the year 2011 was belated, in that it laid a challenge to a select list notified on December 22, 2008; secondly that the persons whose selection was challenged were not impleaded as respondents and; lastly that the petitioners Prem Singh and others had participated in the selection process knowing fully well that the select list would be prepared as per Rule 219(j) of the Indian Railways Employment Manual.

4. Immediately thereafter the affected candidates in the Original Application filed by Ram Rajiv and others sought review under RA No.297/2012 drawing attention of the Tribunal to a hiatus between the decision dated May 31, 2012 allowing OA No.3092/2009 and the decision of the Tribunal in OA No.1727/2011 dated May 19, 2011 filed by Prem Singh and others. The former order quashed the select list and the latter order maintained the select list. The result was the Tribunal passing the order dated April 05, 2013 allowing the review application following the law declared by the Tribunal in its decision dismissing the Original Application filed by Prem Singh and others.

5. Relevant facts concerning WP(C) 901/2012 Kailash Chand Gurjar vs. Union of India are that on May 04, 2007 a notification was issued by the Northern Railways to fill up 07 vacant posts of JE-II (Sig.) in the pre-existing pay scale of Rs.5000-8000. For the post in question Electric Signal Maintainer, Mechanical Signal Maintainer and Signal Maintainer in different grades such as ESM-I, MSM Gr.-I, MSM, SM-I, ESM-II and ESM-III were eligible. Written Examination was conducted to determine the merit and the result was declared when a notification was issued on November 30, 2007. Name of 10 candidates were notified in the list. A Committee was constituted to consider the service record of the said 10 empanelled candidates. A select list of 6 candidates was notified on December 14, 2007 in which the name of the petitioner did not find a mention. The petitioner challenged his exclusion from the select panel by filing OA No.421/2008 and succeeded when the Tribunal allowed the Original Application as per order dated July 16, 2009 taking the view that since Rule 219(j) of the Indian Railway Employment Manual had been struck down by the Punjab & Haryana High Court on April 09, 2008 as per the decision reported as (2008) 2 SCT 787 Subhash

Chand Joshi & Ors. vs UOI & Ors. the select list prepared on the basis of seniority as a criteria was illegal.

6. The order dated July 16, 2009 passed by the Tribunal was set aside by a Division Bench of this Court when writ petition filed by the selected candidates who were impleaded as respondents in the Original Application was allowed because of the fact said respondents were served through the DRM office of the Northern Railway and there was no proof that the concerned officer who received the notices from the Central Administrative Tribunal handed over the same to said respondents. Original Application filed by the respondent was restored for adjudication afresh after granting an opportunity to the private respondents to file a response to the Original Application.

7. At the remanded state the Tribunal dismissed the Original Application vide order dated August 11, 2011 on the ground; firstly that the Original Application was filed after a lapse of almost one year from when the panel was prepared; secondly that the petitioner had participated in the selection process knowing fully well that the select list would be prepared as per Rule 219(j) of the Indian Railways Employment Manual; thirdly that the panel was prepared before the decision of the Punjab & Haryana High Court quashing Rule 219(j) of the Indian Railways Employment Manual was pronounced and; fourthly that the circular issued by the Railway Board vide letter dated June 19, 2009 stipulated that the selection already made shall not be reopened and the criteria for the purpose of preparing the panel on the basis of merits shall be in vogue from the date of issue of the instructions.

8. A review application registered as R.A.No.310/2011 was filed by the petitioner before the Tribunal to review its decision dated

August 11, 2011 which review application was dismissed by the Tribunal vide order dated September 09, 2011.

9. At the outset we must record that the decision pronounced on April 09, 2008 by the Division Bench of the Punjab & Haryana High Court reported as 2008 (2) SCT 787 Subhash Chand Joshi & Ors. Vs. UOI & Ors. quashing Rule 219(j) of the Indian Railways Employment Manual has totally misapplied the law declared by the Supreme Court in the decision reported as AIR 1996 SC 3126 M.Ramjayaram Vs. G.M.South Central Railways & Ors. which decision pertain to Rule 219(g) of the Indian Railways Employment Manual.

10. The decision of the Supreme Court in M.Ramjayaram's case (supra) would reveal that the Supreme Court did not quash Rule 219(g) of the Indian Railways Employment Manual. The Supreme Court was dealing with a case where a select panel was drawn up after a written examination was conducted and the Railway Authorities had applied Rule 219(g) of the Indian Railways Employment Manual as per which the select panel was prepared by giving 50% weightage to professional ability i.e. marks obtained at the written examination and viva-voce. 20 marks assigned to personality, address leadership and academic qualifications, 15 marks to record of service based upon ACR appraisals and 15 marks to seniority. The Supreme Court noted that Rule 320 of the Railway Establishment Code mandated how relative seniority of employees in an intermediate grade belonging to different seniority units appearing for selection/non-selection posts in higher grade had to be determined. The Supreme Court noted that a reading of the Rule would indicate that in assigning inter-se seniority irrespective of the date of confirmation of an employee the continuous length of service in the higher scale of pay was given preference to the seniority over the persons

who are drawing lesser scale of pay in a selection as well as non-selection posts to be filled up by considering the staff of different seniority units. The Supreme Court specifically noted that Rule 320 had no application to the facts of the case before the Supreme Court. The Supreme Court noted that the candidates were not from the same unit but of different units. Thus, Rule 320 of the Railway Establishment Code was held to be excluded and as a consequences the Supreme Court opined that 15 marks towards seniority given to the selected candidates was obviously illegal. We note that Rule 320 of the Railway Establishment Code reads as under:-

“Relative Seniority of Employees in an Intermediate Grade Belonging to Different Seniority Units Appearing For a Selection/Non-Selection Post In High Grade.

When a Post (selection as well as non-selection) is filled by considering staff of different seniority units, the total length of continuous service in the same or equivalent grade held by the employees shall be the determining factor for assigning inter-seniority irrespective of the date of confirmation of an employee with lesser length of continuous service as compared to another unconfirmed employee with longer length of continuous service. This is subject to the proviso that only non-fortuitous service should be taken into account for this purpose.”

11. Rule 219(g) of the Indian Railways Employment Manual which was considered by the Supreme Court reads as under:-

“Selection should be made primarily on the basis of overall merit but for guidance of Selection Board the factors to be taken into account and their relative weightage are laid down as below:

	<i>Maximum marks</i>	<i>Qualifying Marks</i>
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(i) Professional ability	50	30
(ii) Personality, address leadership and academic qualification	20	-
(iii) Record of Service	15	-
(iv) Seniority	15	-

12. Rule 219(j) of the Indian Railways Employment Manual reads as under:-

“The names of selected candidates should be arranged in order of seniority but those securing a total of more than 80% marks will be classed as outstanding and placed in the panel appropriately in order of their superiority allowing them to supersede not more than 50% of total field of eligibility.”

13. In Subhash Chand Joshi’s case (supra) the Division Bench of the Punjab & Haryana High Court treated as if in all cases giving 15% weightage to seniority was opined to be illegal by the Supreme Court. We reiterate, in M.Ramjayaram’s case (supra) the Supreme Court did not hold so. The Supreme Court held that where Rule 320 of the Railway Establishment Code could not be applied and a seniority list could not be drawn as contemplated by the said Rule, Rule 219(g) could not be made applicable, in that, 15% weightage to seniority could not be given. Indeed, in the absence of a common seniority list being drawn up it would be impossible to give 15% weightage to seniority. Likewise, applying Rule 219(j) of the Indian Railways Establishment Manual unless a seniority list could be drawn up as per Rule 320 of the Railway Establishment Code the names of the selected candidates could not be arranged in order of seniority as contemplated by Rule 219(j) of the Indian Railways Establishment Manual. Thus, the question of declaring

Rule 219(j) of the Indian Railways Establishment Manual as unconstitutional does not arise. It has to be seen on case to case basis whether a seniority list as contemplated by Rule 320 of the Railway Establishment Code can or cannot be drawn up. If it can be, select lists would have to be as per Rule 219(g) and Rule 219(j) of the Indian Railways Establishment Manual. If seniority lists contemplated by Rule 320 of the Railway Establishment Code cannot be drawn up the select panels have to be drawn up as declared by the Supreme Court in M.Ramjayaram's case (supra). But, we must concede that on facts the decision of the Punjab & Haryana High Court is correct because it has specifically been noted in the decision that no common seniority list was drawn up and shown to the Court.

14. With aforesaid clarification of the legal position, from the facts noted by us in paragraphs 2 and 3 above it is apparent that the select list pertaining to appointment by promotion to fill up 125 vacant posts of Goods Guards containing names of only 92 persons selected was notified on December 22, 2008. Filing a representation against the said list on August 20, 2009 which was rejected on a date not disclosed by either party Ram Rajiv and others filed OA No.3092/2009 and we find that the said Original Application was filed within the prescribed period of limitation which is one year from when the cause of action accrues as per Section 21(1)(a) of the Central Administrative Tribunals Act, 1985. Further, while computing limitation of one year time had to be excluded as contemplated by Section 21(1)(b) of the Act since as per Section 20 of the Act a person aggrieved has to exhaust the remedy available before the Department and which would be making a representation against an alleged wrongful act. Even excluding said period OA No.3092/2009 was filed within one year of the select list being issued on December 22,

2008. The Original Application was dismissed by the Tribunal on December 09, 2010 on the ground that the impleaded selected candidates had not been impleaded as respondents. Review filed was declined on February 07, 2011. W.P.(C) No.6496/2011 filed by Ram Rajiv and others was disposed of by a Division Bench of this Court on September 05, 2011 permitting Ram Rajiv and others to implead the selected candidates before the Tribunal. At the remanded stage the Original Application filed by Ram Rajiv and others was allowed on May 31, 2012. But in the meanwhile OA No.1727/2011 filed by Prem Singh and others challenging the same select list notified on December 22, 2008 was dismissed by the Tribunal being barred by limitation and secondly for not impleading the selected candidates and lastly Prem Singh and others having participated in the selection process knowing fully well that the select list would be drawn as per Rule 219(j) of the Indian Railways Establishment Manual. Immediately thereafter the affected candidates sought review of the decision dated May 31, 2012 allowing OA No.3092/2009 filed by Ram Rajiv and others drawing attention of the Tribunal to the fact that there was a hiatus between the decision dated May 31, 2012 allowing OA No.3092/2009 and quashing the select list and the decision dated May 19, 2012 dismissing OA No.1727/2011. Both Original Applications concerning the same select list. The Tribunal followed the decision in the Original Application filed by Prem Singh and others and allowed the review application on April 05, 2013.

15. At first blush one would reach the conclusion that the decision dated April 05, 2013 is incorrect because it blindly follows the decision of the Tribunal dated May 19, 2011 dismissing OA No.1727/2011 filed by Prem Singh and others. The Tribunal overlooked the fact that whereas Prem Singh and others had filed an Original

Application which was beyond limitation and they had not sought delay to be condoned, Ram Rajiv and others had approached the Tribunal within the period prescribed. It may happen that against a wrongful act an aggrieved person approaches the Court within limitation and obtains relief but another person who approaches the Court beyond limitation is denied the relief. Whereas the Original Application filed by Prem Singh and others continued to suffer the defect of not impleading necessary parties, the Original Application filed by Ram Rajiv and others had the said defect cured because deciding W.P.(C) No.6496/2011 on September 05, 2011 a Division Bench of this Court restored the Original Application filed by Ram Rajiv and others subject to impleading the selected candidates as respondents in the Original Application.

16. But, on the principle of not upsetting wrong decisions if there is delay in approaching a Court and in the meanwhile positions having got settled, the Original Application filed by Ram Rajiv and others requires to be dismissed because of the fact it is settled law that unless amendment applications are allowed with specific direction that the amendment is retrospective and as regards necessary parties to a proceedings qua necessary parties subsequently impleaded in judicial proceedings, a claim would be required to be treated as instituted on the day said necessary party is impleaded (and we clarify that this would not be the legal position where due to a bona fide mistake a wrong party is impleaded as a respondent and later on a correction is made when the mistake surfaces and a correct party is impleaded as a respondent or a mis-description in the name of a respondent is corrected). And we may only refer to Section 21 of the Limitation Act, 1963.

17. A selection made and completed on December 22, 2008 was questioned by Prem Singh and others somewhere around mid 2011 when

OA No.1727/2011 was filed by them; a claim which was clearly barred by limitation. Ram Rajiv and others may have filed OA No.3092/2009 within limitation but they did not implead necessary parties within the period of limitation. The necessary parties were impleaded pursuant to the order dated September 05, 2011 when W.P.(C) No.6496/2011 was allowed and thus qua the selected candidates OA No.3092/2009 would be required to be treated as having been filed when they were impleaded as respondents and thus the claim to quash the select list would be required to be treated as barred by limitation.

18. The reasoning of the Tribunal in Prem Singh and others case that the selections could not be challenged because the candidates knew that the select list would be prepared applying Rule 219(j) of the Indian Railways Establishment Manual is an incorrect reasoning because whether or not said Rule would apply would be contingent upon whether or not seniority list could be prepared as envisaged by Rule 320 of the Railway Establishment Code and thus the principle of law that a person cannot approbate and reprobate i.e. cannot take a chance on the terms notified and having failed question the very process which gave the person a chance to compete is not applicable in the instant case.

19. Further, we find that it is not the case pleaded by Prem Singh and others as also Ram Rajiv and others that a seniority list as envisaged by Rule 320 of the Railway Establishment Code was not drawn up.

20. Thus, not for the reasons given by the Tribunal; but for the reasons given hereinabove W.P.(C) No.8512/2011 and W.P.(C).2628/2013 filed by Prem Singh and others and Ram Rajiv and others respectively are dismissed.

21. As regards W.P.(C) No.901/2012 filed by Kailash Chand Gurjar we find that even he has not pleaded that a combined seniority list

as contemplated by Rule 320 of the Railway Establishment Code was not prepared.

22. Thus, W.P.(C) No.901/2012 is dismissed by us, but not for the reasons given by the Tribunal but for the reason of the law as we understand and as declared by the Supreme Court in M.Ramjayaram's case (supra).

23. Before concluding we must note that the Railway Authorities need not have issued any clarificatory circular on June 19, 2009 for the reason the same was based upon the decision of the Division Bench of the Punjab & Haryana High Court, which we have opined to be the result of a misreading of the decision of the Supreme Court in M.Ramjayaram's case (supra). Rule 219(j) of the Indian Railways Establishment Manual cannot be struck down as unconstitutional. Whether or not it can be applied would be contingent upon whether or not a seniority list can be prepared as envisaged by Rule 320 of the Railway Establishment Code.

24. The three writ petitions are dismissed but without any orders as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

JULY 09, 2013
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