

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3292 OF 2004

Ashok Shahaji Hiwarale	...Petitioner
Versus	
Union of India & Ors.	...Respondents

Mr. Sandeep V. Marne, Advocate for the Petitioner.
Mr. T. J. Pandian, Advocate for the Respondents.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

Date of Reserving Judgment	: 01.08.2018
Date of Pronouncing Judgment	: 06.08.2018

JUDGMENT :-

- 1] Heard the learned counsel for the parties.

- 2] The challenge in this petition is to the judgment and order dated 13.02.2004 made by the Central Administrative Tribunal (CAT) dismissing Original Application No. 521 of 2003 instituted by the petitioner.

- 3] The petitioner was initially appointed as a Pointsman in Railways and thereafter promoted to post of Switchman. On 09.01.2003, the Divisional Railway Manager,

Bhusawal Division issued a notification announcing the process for promotions to the post of Passenger Guard in the pay scale of Rs.5000/- to 8000/-. The petitioner applied through the proper channel for promotion through the general category, even though the petitioner belongs to the SC category.

4] In terms of the selection procedures, written test was held on 31.05.2003 and a supplementary test was held on 07.06.2003. The results were declared on 11.07.2003 and the candidates indicated on the result sheet dated 10.07.2003 were called to attend the viva voce test scheduled on 21.07.2003, 22.07.2003 and 23.07.2003.

5] In the declaration dated 10.07.2003, the name of the petitioner appears at Sr. No. 67. It is the case of the petitioner that 10 candidates, which includes respondent Nos. 4 to 8, who had actually failed in the written test, also found place in the result declared on 10.07.2003 at positions above the petitioner. It is the case of the petitioner that, this was in terms of the Railway Boards circular dated 05.12.1984 which had permitted addition of

Notional Seniority Marks even in respect of candidates who had failed in the written examination. It is the case of the petitioner that, this circular dated 05.12.1984 had already been quashed by the Jabalpur Bench of the CAT and therefore, the Railway Authorities were not at all justified in relying upon the circular dated 05.12.1984 and on such basis including respondent Nos. 4 to 8 in the result declaration dated 10.07.2003.

6] The result declaration dated 10.07.2003 had made it clear that respondent Nos. 4 to 8 were called upon to attend the viva voce test in terms of Railway Boards circular dated 05.12.1984 and therefore, it should be made clear to them that they are being called for the interview based on the marks awarded to them on Notional basis.

7] The petitioner attended the viva voce test held on 22.07.2003 without protesting the inclusion of respondent Nos. 4 to 8 on the basis of Railway Boards circular dated 05.12.1984. After the conclusion of the viva voce test on 22.07.2003, the petitioner on 23.07.2003 addressed a representation to the ADRM Central Railway

stating that the interview committee members asked the petitioner only 4 questions and appeared to be biased against the petitioner. Significantly, in the representation dated 23.07.2003, the petitioner, made no grievance whatsoever about the inclusion of respondent Nos. 4 to 8 in the result announcement dated 10.07.2003 or the fact that respondent Nos. 4 to 8 were called to attend the interview / viva voce test along with the petitioner.

8] On 28.07.2003 the Railways published the panel including the candidates who could be promoted to the post of Passenger Guards. The petitioner, realizing that his name did not find place in the panel because respondent Nos. 4 to 8 had secured higher marks than him, on 31.07.2003 instituted Original Application No. 521 of 2003 challenging empanelment dated 28.07.2004. By the impugned judgment and order dated 13.02.2004, the CAT has dismissed OA No. 521 of 2003 instituted by the petitioner. Hence, the present petition.

9] Mr. Marne, the learned Counsel for the petitioner submits that, there was a gap of hardly 9 days between the

conduct of the written test and a viva voce test. In these circumstances, the CAT was not justified in non suiting the petitioner for having participated in the viva voce test without protest. Mr. Marne, therefore submits that, the CAT erred in invoking the principle laid down by the Hon'ble Supreme Court in the case of ***Madan Lal & Ors. Vs. State of J & K & Ors. (1005) 29 ATC 603.***

10] Mr. Marne, further submits that the Railway Board circular dated 05.12.1984 had already been struck down by the Jabalpur Bench of the CAT. As against the same, the Union of India had instituted *Special Leave Petition No. 19927 of 1996* before the Hon'ble Supreme Court, which petition had since been dismissed. In these circumstances, the CAT was not at all justified in proceeding on the basis that the Railway Board circular dated 05.12.1985 was valid and in terms of the same, the inclusion of Respondent Nos. 4 to 8 in the result announcement dated 10.07.2003 was justified.

11] Mr. Marne submits that, if the candidatures of respondent Nos. 4 to 8 were excluded from the result

announcement dated 10.07.2003, then, the petitioner, would have certainly been empaneled and promoted as Passenger Guard. In this regard, Mr. Marne pointed out to the reasoning in ground 9 (h) of the memo of the Writ Petition.

12] For all the aforesaid reasons, Mr. Marne submits that the impugned judgment and order warrant interference.

13] Mr. Pandian, the learned Counsel for the respondent-Railways submits that, the Hon'ble Supreme Court whilst dismissing the Special Leave Petition against the order of the Jabalpur Bench of the CAT had left the issue of illegality of the circular of the Railway Board expressly open. He further pointed out that, the Mumbai Bench of the CAT had stayed the impugned judgment and order dated 20.04.2001 made by the CAT in Original Application No. 1185 of 1996, which had followed the judgment of the Jabalpur Bench. He points out that, *WP No. 2607 of 2001* in which the stay had been granted, was ultimately allowed by judgment and order dated 17.07.2009 and the order of the

CAT, Mumbai Bench was set aside. Mr. Pandian submits that, if these circumstances are taken into consideration then there is no case made out to interfere with the impugned judgment and order made by the CAT.

14] Mr. Pandian further submits that, this is a case where the petitioner took his chances and only after he was not selected turned around to challenge the selection process. Mr. Pandian finally submits that, there are several candidates who were much senior to the petitioner and therefore, even if the candidatures of respondent Nos. 4 to 8 were to be excluded, the petitioner, would never be entitled to any empanelment. For these additional reasons as well, Mr. Pandian submits that this petition may be dismissed.

15] Rival contentions now fall for our determination.

16] The reasoning of the CAT in the impugned judgment and order is mainly contained in paragraph 12, which reads as follows.

“12. The learned Counsel for respondents replying to these points stated that in the order of Apex Court dated 08.05.2001 the legality of the Circular has not been examined. In the first sentence itself,

it is mentioned “we find it unnecessary to go into the question of illegality of the Circular”. He further said that in another case the High Court of Judicature at Bombay by its order dated 07.05.2001 passed in W.P. No. 2607/01 have stayed the order of the Tribunal based on the aforementioned order of CAT, Jabalpur treating the Circular as bad in law. He said that the question relating to the legality is thus an open question since the Writ Petition in the High Court is still pending.”

17] At the stage when the CAT made the impugned judgment and order, the judgment and order dated 20.04.2001 made by the CAT, Mumbai bench at OA No. 1185 of 1996 following the decision of the Jabalpur Bench had merely been stayed by this Court vide order dated 07.05.2001 made in *W.P. No. 2607 of 2001*. On this basis and coupled with the Hon'ble Apex Court's order dated 08.05.2001, the CAT had held that there was no illegality in including respondent Nos. 4 to 8 in the result announcement dated 10.07.2003.

18] As of today, there is no dispute that *W.P. No. 2607 of 2001* stands disposed of by judgment and order dated 17.07.2009. This Court, has in fact set aside the CAT's judgment and order dated 20.04.2001 in OA No. 1185 of 1996.

19] There is no doubt that, Mr. Marne did attempt to argue that *W.P. No. 2607 of 2001* was allowed by this Court mainly because it found on facts that the respondents therein could not have benefited, even if the candidates who had secured the benefit of the Railway Board circular dated 05.12.1984 had been excluded from consideration. Such a distinction, is not strictly speaking relevant, because, the fact remains that the CAT's judgment and order dated 20.04.2001 in OA No. 1185 of 1996, which had followed the Jabalpur Bench decision, was formally set aside by this Court in its judgment and order dated 17.07.2009.

20] That apart, there is no perversity as such in the view taken by the CAT that the petitioner in the present case took his chances in the matter and it is only after he found that he was not empaneled that the petitioner has attacked the selection process. Even assuming that a time gap between a written test and viva voce test was of only 9 days and therefore, it was not possible for the petitioner to rush to the CAT, nothing prevented the petitioner, from at least lodging his protest and participating in the selection process under such protest. The petitioner, participated in

the selection process without any demur. As if this was not sufficient, the petitioner, in his representation dated 23.07.2003 made soon after the conclusion of the viva voce test addressed a representation making grievance about the type of questions posed to him by the members of the interview committee and alleging some sort of bias against the members. Significantly, in such representation, there was not even a whisper about the inclusion of the respondent Nos. 4 to 8 in the selection process. At least in this representation, nothing prevented the petitioner from protesting against the invitation extended to respondent Nos. 4 to 8 for the viva voce test. It is only after the petitioner realized that the respondent Nos. 4 to 8, by virtue of the composite marks obtained by them were higher than the petitioner, the petitioner choose to institute the Original Application No. 521 of 2003. In such circumstances, we cannot say that, the view taken by the CAT on the basis of the ***Madan Lal & Ors. Vs. State of J & K & Ors. (Supra)*** is vitiated by any perversity as such.

20] One of the considerations taken into account by this Court in its judgment and order dated 17.07.2009

disposing of *WP No. 2607 of 2001* was the possibility that the petitioners therein might not have benefited even if candidatures of the respondents were to be excluded. In the present case as well, there is no clarity as to whether the petitioner will indeed be benefited even if the candidatures of respondent Nos. 4 to 8 are to be excluded. This is because in the result announcement, the petitioner was placed at position No. 67 whereas, the respondent Nos. 4 to 8 were placed at position Nos. 35 to 29. The reasoning or rather the calculations projected by the petitioner in paragraph 9 (h) of the petition are seriously disputed by the respondents. At this stage, it is not possible to resolve such disputed questions of fact. Even otherwise, we must note that the reasoning or calculations in paragraph 9 (h) of the petition are rather convoluted and dependent upon some sort of a hypothesis projected by the petitioner. This is an additional consideration for not interfering with the impugned judgment and order.

21] Therefore, upon cumulative consideration of all the aforesaid facts and circumstances, we see no good ground to interfere with the impugned judgment and order.

This petition is dismissed. Rule is discharged. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)