

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Civil Writs No. 8214/2011

Shri Sanjay Garg, TCM Grade-I, Ajmer Rail Net, North Western Railway, Ajmer.

-----Petitioner

Versus

Union of India, through:

1. The Chairman, Railway Board, Rail Bhawan, New Delhi.
2. The Zonal Manager, North Western Railway, Jaipur.
3. The Divisional Railway Manager, (Establishment) North Western Railway, DRM Office, at Ajmer.
4. Sh. Sushant Sharma S/o late Sh. Dinesh Chand Sharma, working as Telecom Tech. (Gr.I) Construction Organization under Dy. CSTE/C, Ajmer. R/o 4/119, Rajasthan Housing Board, Panchsheel Nagar, Makarwali Road, Ajmer.
5. The Central Administrative Tribunal, Jaipur Bench, Jaipur through its Registrar.

-----Respondent

Connected With

D.B. Civil Writs No. 8760/2011

1. Union of India, through the Chairman, Railway Board, Rail Bhawan, New Delhi.
2. The General Manager, North Western Railway, Jaipur.
3. The Divisional Railway Manager (Establishment), North Western Railway, Ajmer.

-----Petitioner

Versus

1. Sushant Sharma S/o late Sh. Dinesh Chand Sharma, aged about 36 years, telecom technician (Grade-I), construction organization under Dy. CSTE/C, Ajmer, R/o House No.4/119, Rajasthan Housing Board, Panchsheel Nagar, Makarwali, Road, Ajmer.

-----Respondent

For Petitioner(s) : Mr. P.C. Sharma for petitioner in petition no.8760/2011 and Mr. Manjeet Singh Reen in petition no.8214/2011

For Respondent(s) : Mr. Manjeet Singh Reen for respondent in petition no.8760/2011 and Mr. P.C. Sharma in petition no.8214/2011.

HON'BLE MR. JUSTICE K.S.JHAVERI
HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

Judgment

13/03/2018

1. In both these petitions common question of law and facts are involved hence they are decided by this common judgment.

2. By way of these petitions, the petitioner as well as Union of India have challenged the judgment and order of the tribunal whereby tribunal has allowed the OA preferred by Mr. Sushant Sharma (respondent no.1 in CWP No.8760/2011) and respondent no.4 in CWP No.8214/2011).

3. While considering the case, the tribunal has observed as under:-

"9. Pursuant to this interim order, the respondents Department had issued letter dated 05.09.2007 wherein it was made clear that finality of the panel notified vide Annexure A/1 (Panel dated 03.08.2007) shall be subject to the outcome of this OA. By perusal of the said letter, it reveals that the panel which has been prepared had attained finality and is subject matter of this OA. Thus we are not impressed with the arguments advanced on behalf of the respondents that this OA is not maintainable against the order Annexure A/1 and sub clause 2 of regulation dated 26.11.1986 after undergoing the process of selection. Further we are not impressed with the submission advance on behalf of the private respondent No.4. that as per provisional panel, respondent no.4 is working on the post of Junior Engineer Grade II (Tele) and as Para 3.2 of Railway Board's letter dated 19.06.2009 any

previous selection panel drawn before the issuance of this letter need not be reopened. As already discussed hereinabove, the provisional panel which has been prepared is with the understanding that it shall be subject to the decision and final outcome of this OA and cannot be said to be final. Therefore, in view of the ratio decided by the Hon'ble High Court and Supreme Court and fresh Railway Board's circular dated 19.06.2009, the present OA is allowed and impugned order dated 03.08.2007 (Annexure A/1) is quashed and set aside and the respondents are directed to recast the panel of the successful candidates on the basis of total marks obtained in the LDCE and to promote the applicant to the post of Junior Engineer Grade II in case he finds place in the panel ignoring the seniority with all consequential benefits."

4. Counsel for the petitioner has taken us through the various records and also the relief sought in the OA which reads as under:-

(i) An appropriate order or direction to the respondents quashing the Clause-2 of the impugned Regulation No.E (NG) 1-84-PM7-33 (AIRF), dt. 26.11.1986 being in violation of Article 14 of the Constitution of India.

(ii) An appropriate order or direction to the respondents for quashing the order dt. 3.8.2007 (Annexure-1) to the extent of adding the applicant name in the provisional panel of the selected candidates for the post of Junior Engineer-II (Tele) under General Category with consequential benefits.

(iii) An appropriate order or direction to quash any order passed during the pendency of this application adversely affecting the purpose of this application.

4.1 He has taken us to the letter dt.15.11.2006 regarding selection for the post of J.E. (Tele) Pay scale of Rs.5000-8000 (RP)

against 20% LDC Quota (Telecom Department) Ajmer Division and the same reads as under:-

It has been decided to fill up 01 vacancy of J.E.-Gr-II(Tele) scale Rs.5000-8000(RP) against 20% LDCE Quota (Telecom Department)

Sanctioned Cadre	05
Working	05
Vacancy	Nil
Linked vacancy in Higher Grade	07
Linked vacancy of W/c Post in Higher Grade	01
Total Vacancy	08

From above 08 vacancies, 03 vacancies (Gen-01, SC-01, ST-01) are reserved for direct recruitment for which 01 SC selected candidate is under training before appointment and demand note for 01 ST post has been sent to HQ-Jaipur.

Selection process was started by downgrading above 04 higher grade linked vacancy in J.E. G-II scale – 5000-8000 by letter no. E/Sig./1025/3/3 part – I, dated 27.04.2006 through Ranker Quota (30%), in which no employee found suitable for selection in written test result No.E/Sig./1025/3/3 part – I, dated 12.10.06. Now applications are invited from eligible & willing employee for filling the 01 unreserved post through 20% LDCE Quota in connection with vacant work-charged post linked in Higher Grade on the following basis:-

No selection has been made through LDCE Quota till date so it is first number of first cycle which is unreserved post for General.

For the above post, all the willing staff working in Group "C", Grade-3050-4590 (RP) or higher grade in telecom department having three years regular service (including training period) and are not above 45 year of age and are matriculates or secondary passed are eligible.

All such applications by eligible and willing staff in the attached proforma should reach this office through proper channel upto dated 18.12.2006 positively. Applications received after the above stipulated date will be not be entertained. Selection will be based on written test.

As per directions given by HQ office, NWR Jaipur's is letter no.97/E/0/SL/1, dated 08.09.06 (PS No. 124/06), in the written test, objective type question should be set for about 50% (in the range of 45%+55%) of the total marks for the written test. It is clarify that multi choice question, fill in the blanks, true or false, right or wrong, one word/one line answers, yes or no type questions, and answering the questions related to name of states, Railways, Designation, post etc. are included in objective type questions.

Performa of application form & syllabus of written test is attached herewith. This should be given wide publicity amongst the staff and a copy of this notice should be placed on the notice board. All the eligible and willing staff should be necessarily informed about this notice and it is the responsibility of concerned unit incharge.

All the eligible & willing staff who wants to apply, can send their applications form in attached proforma to this office through proper channel last dated 18.12.2006. This has the approved of competent authority (Sr. DSTE).

4.2 He has also taken us to the details of the applications received whose details has been given in letter dt. 15.1.2007 which reads as under:-

Sub:- 20% LDCE Quota for the pst of T.C.I. Gr. III/J.E.-II(Tele) pay scale 5000-8000 (RP) Telecom deptt. - Ajmer Division.

Ref. This office letter No. Even. Dtd. 15-11-2006

With reference to above referred letter, applications were invited as per eligibility criteria mentioned from eligible & willing staff of Telecom Department for filling 01 No. Unreserved vacancy of J.E. II (Tele) pay scale Rs.5000-8000 (RP) through 20% LDCE Quota. Applications are being received of the following staff:-

S.No.	Name & Father's Name	Cast	Desig.	Present work place
1.	Umesh Mishra S/o Late Laxmi Narayan	Other	TCM/MCF	Ajmer
2.	Vijay Kumar	Other	TCM/MCF	Abu Road

	Satpute			
3.	Sunil Kumar Sharma	Other	TCM Gr. I	Aii
4.	Vinod Kumar Agrawal	Other	WTM Gr. I	Railnet-Aii
5.	Shabbir Ahmed Kallukhan	Other	WTM Gr. I	Aii-(M)
6.	Umrao Singh Dindayal	SC	TCM Gr. I	GLO Exch. Aii
7.	Sudhir Kumar Sharma (P)	Other	TCM Gr. I	GLO Exch. Aii
8.	Mohammed Shafi Khan	Other	TCM Gr. I	MJ
9.	Kanhaiya Lal Meena	ST	WTM Gr. I	Comm. Deptt. HQ-Jaipur working on Deputation
10.	Sanjay Garg	Other	TCM Gr. I	Aii
11.	Kamlesh Kumar Khorwal	SC	TCM Gr. I	Railnet-Aii
12.	Susshant Sharma	Other	TCM Gr. I	Dy. CSTE(C) Aii
13.	Niranjan Lal Verma	SC	TCM Gr. I	Aii
14.	Sunil Dutt Ranga S/o Shri Vishnu Dutt Ranga	Other	TCM Gr. I	AEN (on work charge post)
15.	Rajesh Meena S/o Sh. Ghanshyam Lal Meena	ST	TCM Gr. I	Aii
16.	Himanshu Sharma S/o Sh. Brijesh Sharma	Other	TCM Gr. I	Aii
17.	Deepak Jain	Other	TCM Gr. I	Aii
18.	Dayaram Saini	Other	TCM Gr. I	ABR
19.	Manish Joshi	Other	TCM Gr. I	UDZ
20.	Vishnu Kumar Soni	Other	TCM Gr. II	Aii
21.	Aashish Verma	Other	TCM Gr. II	Aii
22.	Raj Narayan Tailor	Other	TCM Gr. II	UDZ
23.	Mahesh Kumar Charan	Other	TCM Gr. II	ABR
24.	Smt. Versha Rani	Other	TCM Gr. II	ABR

25.	Satya Narayan Meena	ST	TCM Gr. II	ABR
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Shri Arvind Kumar Sharma, Sr. Telephone Operator pay scale Rs.4000-6000 (RP) is not eligible for the above category as per rules.

Rest all willing staff are eligible for the written test of above category. Eligibility list of TCM/WTM staff of Telecom deptt. Is not in order os seniority.

If any employee have any objection regrding the above eligibility list, on opportunity to represent with documentary evidence within 15 days though proper channel is hereby extending as per rules. All the eligible/willing employee should be informed for be prepared himself for written test of above selection.

All over directors are already circulated vide letter no. Even dtd 15.11.2006. Date of Written test will be notified later.

4.3 He also taken us to the Railway Board's Orders particularly R.B.E. No.113/2009 dt. 19.6.2009 where clause (2) reads as under:-

"2. The instructions regarding formation of penal in the order of seniority, have been under challenge before various Courts/tribunals for granting relief in terms of placement of names on panel in the order of merit based on the marks obtained in such General Selections. The provision of placement of names on final panel in the order of seniority, as indicated above, has been struck down by High Court/Punjab & Haryana, in Writ Petition No.4746/2002 vide judgment dt. 9.4.2008. High Court, have inter-alia, held that, since in such General Selections, candidates are not from the same seniority units and there is no common seniority list on the basis of which their names can be placed in the order of seniority, therefore, promotion to such posts should be made only on the basis of merit, uninfluenced by seniority of the candidates. The Hon'ble High Court have accordingly declared the provision of arranging the names on final panel in the order of seniority in General Selections as wholly illegal and arbitrary and set

aside the same. The Special Leave Petition No.16774/2008 filed before the Hon'ble Supreme Court against the High Court's above-mentioned judgment, has also been dismissed on 5.1.2009."

4.4 He also contended in view of clause 3.2 & 4 of the aforesaid order which reads as under:-

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.

4. Accordingly, the Indian Railway Establishment Manual, Volume I, 1989 is also amended, as per ACS No.209 enclosed.

4.5 He contended that the view taken by the tribunal is required to be reversed.

4.6 He further contended that same tribunal consisting of the same members in OA No.71/2009 decided on 9.8.2011 has taken a contrary view holding as under:-

"6. Following the clarification and the RBE No.232/86, the panel has been prepared on the basis of seniority from amongst the staff who qualify in the written test. In view of the aforesaid circular and in view of the facts and circumstances of this case, we find no illegality in the panel prepared by the respondents on 3.1.2006 as well as in the order dt. 16.1.2008 by which representation of the applicants have been decided pursuant to the direction issued by this Tribunal vide order dt. 4.9.2006 and, therefore, no interference is called for."

4.7 He further contended that tribunal has taken a contradictory view in OA No.570/2209 decided on 8.9.2011 which reads as under:-

8. Learned counsel for the respondents further argued that the applicants have since participated in the process of selection, they cannot now challenge the same as the principle of estoppel applies in this case and he referred to the judgment of the Hon'ble Supreme Court in the case of K.G.Siraj vs. High Court of Kerala & Others, 2006(6) SCC 395. In which Hon'ble Supreme Court has held that candidates who participated in interview with the knowledge that for selection they have to secure minimum pass marks, held, on being unsuccessful in interview could not turn round and challenge that the said provision of minimum marks was improper, held that such challenge liable to be dismissed on the ground of estoppel. Learned counsel for the respondents argued that the ratio is squarely applicable in this case as the applicants had participated in the written test and they have also been assessed for their service record. They knew that as per the circular, the panel will be prepared on the basis of seniority. Now they cannot challenge that criterion. They have participated in the selection process and after being declared unsuccessful, they cannot challenge the criteria of selection.

9. Learned counsel for the applicant referred to a decision of this Bench of the Tribunal in OA No. 57/2006 and 58/2006 decided on 24.08.2007 wherein the Hon'ble Tribunal held that since the Circular No. E/E/1025/9 Part-I dated 08.04.2005 has clearly mentioned that the selection will be only on the basis of written examination and, therefore, the final panel should have been prepared on the basis of written examination only. This judgment/order of the Hon'ble Tribunal has been upheld by the Hon'ble High Court in DB Civil Writ Petition No.980/2009. Therefore, on the basis of ratio laid down by the Hon'ble Tribunal as affirmed by the Hon'ble High Court, the name of the applicants be included in the final panel dated 13.01.2009 (Annexure A/1),

10. We have carefully gone through the order of this Tribunal as well as order of the Hon'ble High Court affirming the judgment of the Tribunal. After careful perusal, we are of the

opinion that the facts of OA nos. 57/2006 and 58/2006 are quite different than the present OA and, therefore, the ratio laid down in these cases will not be applicable in this particular case. In OA No. 58/2006, there was a specific circular which mentioned that the selection will be only on the basis of written test whereas in the present selection, the applicants have failed to put on record any document which suggest that selection would be based only on written examination. On the contrary, the respondents have stated that the selection will be on the basis of written examination as well as on the basis of service record and finally the panel will be made on the basis of seniority as per Circular No. E(NG)I-98/PMI/II dated 16.11.1998 (Annexure R/2).

The action of the respondents is according to the prevalent at the time of preparing of the panel. Accordingly, the present OA has not merit and, therefore, the same is dismissed with no order as to costs.

4.8 Counsel for the petitioner has relied upon the decision of Delhi High Court in Prem Singh & ors. vs. UOI & ors. in W.P.(C) No.8512/2011 and other connected matters, decided on 9.7.2013 wherein it has been held as under:-

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.

4.9 Thereafter, in review the court observed as under:-

"We dispose of the writ petition quashing the select list in question and direct a fresh list to be prepared keeping in view the principle of law declared in our decision dt. July 9, 2013."

5. We have gone through the judgment.

6. Prima facie, it seems that tribunal has taken different view without considering the matter in true spirit. In that view of the matter, without making any observation on merit, we quash and set aside the order of the tribunal and remit back the matter to the tribunal to consider the same afresh.

7. Both the parties will appear before the tribunal on 16.4.2018. The tribunal will proceed with the matter taking into consideration the subsequent law declared by the different High Court and Supreme Court.

8. The petitions stand allowed.

(VIJAY KUMAR VYAS),J

(K.S.JHAVERI),J