

THE HON'BLE SRI JUSTICE K.C. BHANU
AND
THE HON'BLE MRS JUSTICE ANIS

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WRIT PETITION Nos.6930 AND 7186 OF 2004

COMMON ORDER: (per Hon'ble Sri Justice K.C.Bhanu)

Writ Petition Nos.6930 and 7186 of 2004 are filed under Article 226 of the Constitution of India to call for the records relating to the Order, dated 17.12.2003, in Original Application Nos.367 of 2003 and 516 of 2002 respectively passed by the Central Administrative Tribunal, Hyderabad Bench, Hyderabad (for short, 'the Tribunal') and quash the same.

2. Original Application No.516 of 2002 was filed to declare the action of the respondents therein in not considering the applicant therein for promotion to the post of Assistant Electrical Engineer with effect from May, 1992 onwards as arbitrary and illegal and consequently direct the respondents therein to issue promotion orders by considering him to the post of Assistant Electrical Engineer with effect from May, 1992 with all consequential benefits of arrears of pay, allowances, scales and seniority.

3. Whereas Original Application No.367 of 2003 was filed to declare the proceedings, dated 04.03.1994 and 15.10.2001 of the 1st respondent therein, which were communicated along with additional reply in M.A.No.474 of 2002 in O.A.No.1017 of 1992, as illegal and arbitrary and consequently direct the respondents therein to promote the applicant therein to the post of Assistant Electrical Engineer with retrospective effect duly declaring that the

applicant has obtained qualified marks in Record of Service and that his name be included in the empanelment list as per the secured marks.

4. Upon considering the material on record, the Tribunal gave a finding that the impugned proceedings, dated 04.03.1994 and 15.10.2001, issued by the 1st respondent therein, in O.A.No.367 of 2003 were illegal and arbitrary and accordingly set aside the same, and further directed the respondents therein to promote the applicant notionally to the post of Assistant Electrical Engineer with effect from May, 1992 with all consequential benefits, such as scale of pay, seniority etc. Challenging the said order, the present writ petitions are filed.

5. Factual matrix is not in dispute. The issue involved in both the writ petitions is relating to promotion of the respondent herein/applicant to the post of Assistant Electrical Engineer in the quota of Limited Direct Recruitment. The selection to the said post is by way of written test and viva voce.

6. According to the learned counsel for the petitioners, there were three vacancies in the category of Limited Direct Recruitment; that in pursuance of the written test and the marks awarded and basing upon the overall performance of the candidates, who came up for selection, a select list has been issued by the appointing authority; that selection list has not been challenged at any point of time by the respondent herein, therefore, at this point of time, giving promotion to the respondent notionally from May, 1992 is nothing but directing the petitioners to act contrary to the Railway Services (Conduct) Rules, 1966(for

short, 'the Rules'); that the question of giving promotion notionally from May, 1992 onwards may not arise for the reason as on that date, no vacancy arises in the category of Assistant Electrical Engineer, as all the three posts have been filled up by selecting the suitable candidates in pursuance of selection process.

He further contended that procedure prescribed under the Rules has been followed in awarding the marks basing on the entries made in the annual confidential reports; that the respondent secured only '13' marks, but for the promotion to the post of Assistant Electrical Engineer, bench mark is '15'; that as the respondent has not come up to the level of bench mark, he was not given promotion; that three persons, who were selected in the year, 1992, were given appointment; that the annual confidential report of the respondent for the year, 1992 has been re-reviewed by the General Manager, Railway Electrification Project, Allahabad, Uttar Pradesh as per the directions given by the Tribunal in the earlier round of litigation and that order has become final; that an application in M.A.No.388 of 1994 to include the name of the respondent in the empanelment list as per the secured marks, was dismissed on 28.07.1994; that the finding with regard to the awarding of Grade in the annual confidential report of the respondent for the year, 1992 has become final; that now that issue cannot be re-agitated by filing another Original Application as it violates the principle of *res judicata* and therefore, he prays to set aside the impugned order.

7. Learned counsel appearing for the respondent vehemently contended that except in the year, 1992, annual confidential reports of the respondent are 'good' and 'very good', but for the year, 1992, it was written as 'average', though during that period, a

cash award and a Meritorious Certificate were given to him for his performance; that writing the annual confidential report for the year, 1992 as 'average' is nothing but depriving the promotion of the respondent; that when the case of the respondent is similarly situated with that of another person, the said person was given 'outstanding' mark in the annual confidential report and if that is taken into consideration, the respondent would have got not less than '17' marks in the category of all annual confidential reports basing on the overall performance and therefore, he prays to dismiss the writ petitions.

8. It is not in dispute before this Court that O.A.No.1017 of 1992 was disposed of on 26.10.1993, wherein it is held thus –

“Under the circumstances brought out by the learned counsel for the applicant, we feel that the contention in regard to bias cannot be considered altogether baseless. So, it is just and proper to have a re-review of the Confidential Reports already initiated by R-5 for the years 1988-92 by the General Manager, Railway Electrification Project, Allahabad who is the Controlling Officer for the Chief Project Manager also. The entries in the Service Record of the applicant will also be taken into account while doing re-review by the General Manager, Railway Electrification Project, Allahabad. On the basis of the re-review the marks to be award to the applicant for the recaord of service for the years 1988-92 will be computed and if the applicant gets minimum of 15 marks for the period of service, then his case has to be re-considered for empanelment to the post of Assistant Electrical Engineer in accordance with law. The above re-review has to be done only if the Confidential Reports for all the years from 1988-92 was initiated by R-5. The above said re-review has to be completed within a period of two months from the date of receipt of the copy of this modified order”.

That order was modified under the caption 'for being mentioned'. Because the Chief Electrical Engineer cannot review the Confidential Reports, it is directed that the General Manager, Railway Electrification Project, Allahabad, who is Controlling Officer for the Chief Project Manager, is the competent Officer to re-review the same. In pursuance of the said order, the General Manager, Railway Electrification Project, Allahabad, has re-reviewed the Confidential Reports for the relevant period and satisfied with the ratings already given as objective and accordingly confirmed the same. That order was communicated by the Chief Personnel Officer, Secunderabad by letter, dated 15.04.1994. Therefore, Miscellaneous Application No.388 of 1994 was dismissed on 28.07.1994, wherein it is held that –

“Nothing is alleged against the General Manager, Railway Electrification, Allahabad, who re-reviewed in regard to the case of the applicant. Hence, it is not just and proper to refer to any other authority for re-reviewing the case of the applicant.

As the report on the basis of the re-reviewing is adverse to the applicant, the question of directing inclusion of the name of the applicant in the select list of Assistant Electrical Engineers does not arise. Thus, the MA does not merit consideration.

In the result, the MA is dismissed. No costs.”

9. Thereafter, the review application was filed to review the order in M.A.No.388 of 1994, dated 28.07.1994. That application was also dismissed as there was no error apparent on the face of the record so as to review the order. Then, the respondent filed C.P.No.94 of 1999 in M.A.No.714 of 1998 and M.A.No.533 of 1999 in O.A.No.1077 of 1996, dated 23.12.1999, wherein it is held thus:

“This is indeed a controversial question which is required to be straightened out by initiating fresh proceedings, either by a way of a representation to the respondents if the applicant is so advised or to take proceedings before this Tribunal by filing fresh OA.”

Basing on the above observation, learned counsel for the respondent contended that as the Tribunal has given liberty, two Original Applications have been filed before the Tribunal. The Original Application No.1077 of 1996 was disposed of with a direction to respondent No.5 therein to cause departmental inquiry to be conducted from the stage of serving charge sheet on the applicant within two weeks from the date of receipt of the copy of that order and to take all necessary steps expeditiously, so that the inquiry could be completed within a reasonable time. The order passed in the Original Application is nothing to do with the principal issue involved in the contempt proceedings. As rightly pointed out by the learned counsel for the petitioners, the issue with regard to the review of the entries made in the annual confidential report of the respondent for the year, 1992 has attained finality. There cannot be any dispute that when the issue has been substantially decided by the competent Court, the petitioner cannot be permitted to re-agitate the same in the subsequent proceedings as the principle of *res judicata* would apply. It is well settled that principle of *res judicata* applies to the Tribunal as well as the writ proceedings before this Court. Therefore, on the principle of *res judicata*, the Original Application filed by the respondent to review the annual confidential reports for the year 1992 and to give promotion with effect from 1992 with all consequential benefits cannot be given to him.

10. In pursuance of the direction given by the Tribunal, the competent authority re-reviewed the annual confidential reports of the respondent for the year, 1992 and confirmed the grading given to him as 'average', which was taken into consideration for awarding marks. It is not in dispute with regard to awarding of marks basing on the grading in the annual confidential reports of the respondent. This is in accordance with the Rules governing the service conditions for effecting promotion to the post of Assistant Electrical Engineer.

11. The contention of the learned counsel for the respondent is that the respondent is entitled to be given grading of 'outstanding', which carries five marks, but the grading given to him is 'average', which carries two marks.

12. So, if that 'outstanding' grading is given, the respondent would have got '17' marks over and above the bench mark fixed to be qualified for the promotion to the post of Assistant Electrical Engineer. The issue with regard to the grading has already been settled in the earlier round of litigation. Therefore, the Tribunal cannot review its earlier order by impliedly over-ruling the order passed in M.A.No.388 of 1994, which is not permissible under law. Further-more, when all the vacancies in the cadre of Assistant Electrical Engineers have been filled up, the question of giving promotion to the respondent notionally 1992 onwards does not arise. This aspect of the case has not been considered by the Tribunal and came to a wrong conclusion. Therefore, the findings of the Tribunal are not based upon the material available on record and hence the impugned order is liable to be set aside.

13. Accordingly, both the Writ Petitions are allowed setting aside the impugned order. In the circumstances, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this writ petition shall stand closed.

JUSTICE K.C. BHANU

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JUSTICE ANIS

Date:04.08.2014
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