

A

UNION OF INDIA AND ORS.

v.

RAJ KUMAR GUPTA AND ORS. ETC. ETC.

MARCH 23, 1995

B

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

*Service law*

*Indian Railways Establishment Manual—Para 167—Appendix-II—Para 4(a).*

C

*Railway Board's Circular dated 24.6.1986—Accounts Clerk Grade-I—Recruitment of—Condition of passing test during probation for confirmation—Failure to pass test within the prescribed time—Held liable to be discharged from service—Direction issued to give another chance—Circular held not in conflict with Para 167.*

D

The respondents were selected and appointed as Accounts Clerks Grade-I in the Northern Railway. In terms of Para 167 of Indian Railways Establishment Manual (IREM), during probation they were required to pass the test prescribed in Appendix-II and in para 4(a) therein. The letters of appointment clearly indicated that they were required to pass the test within the period of probation for confirmation and in the event of their failure to pass the prescribed examination within the time prescribed under the relevant para of IREM and the Railway Board's Circular dated 24.6.1986 they were liable to be discharged. On respondents' failure to pass the prescribed test their services were terminated. They challenged their termination before the Tribunal which held that the Circular dated 24.6.86 was in conflict with Para 167 of IREM and consequently quashed the termination orders.

E

F

G

In appeals to this Court on the question whether Railway Board's Circular dated 24.6.86 was in conflict with Para 167 of IREM :

Allowing the appeals, this Court.

H

HELD : 1. The Railway Board's circular dated 24.6.86 is not in conflict with para 167 of Indian Railways Establishment Manual. It is not in supersession but to supplement the yawning gaps therein. It envisages

that direct recruit Accounts Clerks Grade-I are eligible for two chances to pass the examinations prescribed in Appendix-II within a period of three years from the date of entering into service. Failure to qualify in the examination within the two attempts render them ineligible for confirmation. Thereby, they become liable to be discharged from service. It is true that Appendix-II in para 4(a) as a general rule gives three normal chances to the railway servants to take the examinations and exceptions have been provided giving power to the Financial Adviser and Chief Accounts Officer to permit a candidate to take the examination for the fourth time and in deserving cases and in very exceptional circumstances the General Manager is given discretion to permit the employees to take the examination for the fifth and the last time. The last two chances cannot be taken to be automatic or as of right. They are exceptional and are within the discretionary zone. [1004-G-H, 1005-A-B]

2. All, except a few respondents, had availed of three chances and they did not pass the examinations prescribed in Appendix II of the Manual. Therefore, they are liable to be discharged from service. There is no illegality in the action taken by the appellants. However, in view of the fact that para 4(a) of the Appendix itself gives right to the employee to take three maximum normal chances for passing prescribed tests, the appellant is directed to give another chance as an exceptional circumstance to take the examination. Such candidates who pass the examination will be considered for confirmation. If they do not pass, appropriate orders would be issued to discharge them from service. [1005-E-F]

*State of Karnataka v. B.V. Thimmappa*, [1994] Supp. 1 S.C.C. 124, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4480-4483 of 1995 etc. etc.

From the Judgment and Order dated 31.7.91 of the Central Administrative Tribunal, Lucknow in O.A. Nos. 115, 127, 118 and 86 of 1990.

Altaf Ahmed, Additional Solicitor General, T.C. Sharma, V.K. Verma, Arvind K. Sharma, Mrs. Indu Goswami and C.V.S. Rao with him for the Appellants.

P.P. Rao, Govind Mukhote, M.N. Krishnamani, Raj Kumar Gupta,

- A Rajesh, Jitendra Mohan Sharma, Arvind Verma, Dhruv Mehta, K.L. Mehta, S. Kulshreshta, R.K. Lacham, M.V. Goswami and C.P. Lal with them for the Respondents.

The following Order of the Court was delivered :

- B Leave granted.

These appeals by special leave are filed against different orders of the Central Administrative Tribunal, Lucknow Bench in O.A. No. 115/90 and batch.

- C Pursuant to an advertisement for direct recruitment to the posts of Accounts Clerks Grade I, the respondents applied for and appeared in written examination as well as interview and were selected and appointed as Accounts Clerk Grade I between April- June 1986 and were put on probation. Under para 167 of the Indian Railways Establishment Manual (IREM), during probation they are required to pass the tests prescribed in appendix 2 and in paragraph 4(a) therein. The letters of appointment also would clearly indicate that they are required to pass the test within the period of probation for confirmation. Since they did not pass the prescribed test within the time or extended attempts, their services came to be terminated by individual proceedings issued against them. Impugning those proceedings, the O.As. came to be filed. The Tribunal in the impugned orders dated 31.7.1991 etc. held that the circular of the Railway Board dated 24.6.1986 prescribing the conditions under which the respondents are required to pass the tests, was in conflict with para 167 of IREM.
- D
- E Accordingly, it quashed the termination orders. Thus these appeals.
- F

- Shri Altaf Ahmed, learned Additional Solicitor General, contended that para 167(1) of the I.R.E.M. and the circular do not run in collision course; the circular is supplementary to para 167 of IREM and that the Tribunal committed grievous error of law in holding that the circular is inconsistent with para 167 of IREM. Shri P.P. Rao, learned senior counsel and the counsel following him submitted that the respondents were appointed by direct recruitment to the posts of Accounts Clerk Grade I there is no provision in para 167 which gives power to terminate the services of the respondents. Even though they did not pass the prescribed test, they would be entitled to continue as unconfirmed probationers and the
- G
- H

Tribunal was right in its conclusion. In support thereof, they placed reliance on *State of Karnataka v. B.V. Thimmappa*, [1994] Supp 1 SCC 124. The question, therefore, is whether the circular issued by the Railway Board is in conflict with para 167 (1) of IREM. A

Relevant part of para 167 reads thus :

"Directly recruited clerks Grade I will be on probation for one year and will be eligible for *confirmation only after passing the prescribed departmental examination* in Appendix II. Necessary facilities will be given to them to enable them to acquire the knowledge of the rules and procedure." B C

(Emphasis supplied)

Para 4(a) Of Appendix-II reads thus :

"4(a) Normally no railway servant will be permitted to take the examination more than thrice, but the Financial Adviser and Chief Accounts Officer may in deserving cases permit a candidate to take the examination for a fourth time, and in very exceptional cases the General Manager may permit a candidate to take the examination for the fifth and the last time." D

The circular dated 24.6.1986 reads as under: E

"Under the extant orders on the subject, directly recruited clerks grade I are required to be given maximum of two chances, to appear at the Appendix 2 (IREM) examination within a period of three years from the date of entering service, and those who fail to qualify themselves within these two attempts render themselves eligible for discharge from service. In a few cases, additional chance was given to some candidates on the basis of the recommendation of the FA & CAO/GM of the Railways. However, with a view to bring in uniformity, as also to make the concerned employees fully aware of the extant rules in this respect (so that the availability of additional chance is not taken for granted) Board under their letters No. 84-AC.III/20/34 dated 4.9.1985 and 10.2.1986, reiterated the position, and directed the Railways that they may approach the Board for retaining the staff in service F G H

A beyond three years, or for permitting them to sit in Appendix 2 (IREM) examination beyond three years or for the third time in the said examination relaxation of the extent rules, provides there were compelling reasons for such relaxation."

B The aforesaid shows that para 167 prescribes that directly recruited Accounts Clerks Grade I will be on probation for one year and will be eligible for confirmation only after their passing the prescribed departmental examinations specified in Appendix-II. The letters of appointment clearly indicate the condition subject to which the respondents are required to be confirmed. They read thus :

C "You have been selected in Accounts Department of N.Rly for appointment in temporary post of Jr. Accounts Asstt. (CGI) in scale Rs. 1200-30-1560-EB40-2040 (NPS). As such it is proposed to appoint you in this office temporarily on a temporary post under the following terms & conditions :-

D (A) You will be on one year probation from the date of your appointment and will be confirmed after qualifying Appendix 2A (IREM) Exam.

E (B) During the probation period you will have to undergo a three months condensed training. During this training period you will be entitled for Rs. 1200 as salary & allowance admissible under the rules.

F (C) If you don't qualify the exam. as mentioned in (A) above and if your progress is unsatisfactory the period of training may be extended. However, if you don't qualify the above said exam. in two chances within a period of three years of your service you may be terminated from railway service."

G Thus the circular is not in conflict with the para 167. It is not in supersession but supplemented the yawning gaps therein. It came to be issued for that purpose which envisages that direct recruit Accounts Clerks Grade - I are eligible for two chances to pass the examinations prescribed in Appendix-II within a period of three years from the date of entering into service. Thus failure to qualify in the examination within the two attempts

H

render them ineligible for confirmation. Thereby, they become liable to be discharged from service. It is true that Appendix II in para 4(a) as a general rule gives three normal chances to the railway servants to take the examinations and exceptions have been provided giving power to the Financial Adviser and Chief Accounts Officer to permit a candidate to take the examination for the fourth time and in deserving cases and in very exceptional circumstances the General Manager is given discretion to permit to take the examination for the fifth time and the last time. The last two chances cannot be taken to be automatic or as of right. They are exceptional and are within the discretionary zone. In the counter affidavit filed, the appellants sought to explain exceptional circumstances in which the power could be exercised by the Financial Adviser and the Chief Accounts Officer and the General Manager with which we are not concerned in these cases. The question is whether the circular is in conflict with para 167 of IREM. On a conjoint reading of the relevant rules, we find that there is no conflict and the circular is to supplement the rule to fill in the yawning gaps in para 167 of IREM.

It would appear that all the, except a few, respondents had availed of three chances and they did not pass the examinations prescribed in Appendix II of the Manual. It is not possible to accept the contention of Shri Rao that despite their failure to pass the test, they would continue as non-confirmed probationers and that the authority have no power to terminate or discharge their services. The letters of appointment clearly indicate that in the event of their failure to pass the prescribed examination within the time prescribed under the relevant para of IREM and the circular, they are liable to be discharged. The right to continue in service would arise only on their confirmation after passing the examination. Therefore, making an order of confirmation, on their passing the examination, would give a right to the direct recruit Accounts Grade I clerk to continue in service. On his failure to pass the examination within the prescribed chances, he becomes liable to be discharged from service.

The ratio in *Thimmappas's* case (supra) has no application to the facts in this case. Therein the respondents were already members of the service in lower cadre and they were promoted to the higher cadre and were required to pass the prescribed tests and the consequences for failure to pass the prescribed tests was provided. Therefore, on their failure to

A pass the tests, they were ineligible for further promotion. Considering the rule and the specified consequences this Court held that the promotee who did not pass the prescribed tests was not liable to be reverted to the substantive lower posts. They would remain as hang overs to the posts without further rights. The ratio therein cannot be applied to the direct recruit who is not a member of the service until he is confirmed in the service. The confirmation would come into effect only on passing the prescribed test. Therefore, the respondents are liable to be discharged from service. We find no illegality in the action taken by the appellants.

C However, in view of the fact that para 4(a) of the Appendix itself gives right to the employee to take three maximum normal chances for passing prescribed tests, we direct the appellant to give another chance as an exceptional circumstance to take the examination. The appellants are directed to give advance notice of the date on which the examination would be conducted and also should give reasonable facilities for preparation so that the respondents would adequately prepare for the examination. It is open to the appellant to the conduct the examination according to its procedure. Such candidates who pass the examination will be considered for confirmation. If they do not pass, appropriate orders would be issued to discharge them from service.

E It is brought to our notice that one Prem Shankar Sharma, Respondent No. 4 in one of the appeals, is a confirmed fitter as was ordered on 7.3.1984. He became a direct recruit as Accounts Clerk Grade I. He undertakes that he is willing to go back as a fitter, instead of appearing for the examination. We think that he being a confirmed fitter, justice would require that he may be permitted to revert back to his original post as a confirmed fitter and the appellants are directed to adjust him as a fitter maintaining his old seniority as a fitter.

G It is further brought to our notice that some of the respondents could not appear for examinations on medical grounds. It would appear that the authorities have counted that as one of the chances availed of. According to us, if it were a case where they had sought to appear but due to medical grounds could not actually take the examination, the authorities would not consider the same as one of chances availed of and appropriate benefit may be given to such candidates and that too on proof of medical certifi-

cate already filed by prescribed/competent doctor.

A

The appeals are allowed with modifications as indicated above. In the circumstances, parties are directed to bear their own costs.

I. As for substitution are allowed.

*C.A. 4338/95 @SLP(C) 3247/94:*

B

Leave granted.

The appeal is allowed in view of the above judgment and the appellant also is entitled to a further chance.

C

T.N.A.

Appeals allowed.