

(1967) 02 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 269 of 1965

Nirode Chandra Roy

APPELLANT

Vs

General Manager, N.F. Railway, Pandu and Others

RESPONDENT

Date of Decision : 04-02-1967

Acts Referred:

Constitution of India, 1950 — Article 226, 309

Railway Establishment Code, 1959 — Rule 157, 158, 18, 20, 21

Citation : AIR 1967 Guw 44

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : G.H. Goswami and B.M. Goswami, for the Appellant; D.N. Medhi, G. Bhattacharjee, N.M. Lahiri and S. Medhi, for the Respondent

Final Decision : Allowed

Judgement

1. This is a petition by one Nirode Chandra Roy, who is working in the N.F. Railway Claims Department. The Petitioner was appointed as a clerk in the office of the District Mechanical Engineer, Lumding Assam Railway on 30-7-48. Subsequently he was transferred to the office of the Deputy Chief Mechanical Engineer, Assam Railway, Pandu and confirmed in this post on 26th February, 1952. When there was re-grouping of Railways he was transferred to the Regional Superintendent, Mechanical Branch, N.E. Railway, Lucknow in the month of May, 1952. By a letter of the Deputy General Manager, N.E. Railway dated Gorakpur the 14-10-57 the employees who were willing to go on transfer to the area covered by new zone were asked to apply by the 31st October, 1957 for such transfer. The Petitioner applied to the Senior Personnel Officer intimating his option for transfer to Pandu Head Quarters. The Petitioner was thus by letter dated the 4th December, 1957 transferred to join at Pandu by 2nd Jan. 1958. The Petitioner was released by letter dated 21st December, 1957 when the bifurcation took place and this new N.F. Railway came into existence from 15th January, 1958. The Petitioner on coming here was directed to report in the office of the Superintendent (Mechanical) Pandu for duty by 6th January 1958. By

another letter dated the 30th January 1958 the Petitioner was re-posted from the office of the Chief Mechanical Engineer to the office of the General Manager, N.F. Railway, Pandu. On the 26th April 1958 the Petitioner wrote to the Deputy General Manager that he would be surplus to requirement and he may be transferred to his parent Department. The Petitioner then by an order dated 8th May 1958 was transferred to the Statistical Department and he was asked to report in that office. By a letter of the Deputy General Manager (P), N.F. Railway, Pandu dated 19th May 1958 the Petitioner was re-transferred to the office of the District Commercial Superintendent Office, Pandu. In terms of the above orders the Petitioner joined the District Commercial Superintendent-Claims Office on 2nd June 1958 and since then he has been working in this office.

2. The Petitioner on the 25th June 1958 wrote to the Deputy General Manager (P), N.F. Railway, Pandu to promote him to the rank of Senior Clerk with effect from 16th January 1958 in the Claims Office subject to his appearing and passing suitability test and/or transfer him back to his parent Mechanical Branch in the Chief Mechanical Engineer's Office, Pandu, over which he had the lien. Otherwise his seniority was likely to be affected. The Chief "Traffic Superintendent/Pandu by letter dt. 10th July 1958 informed the Petitioner about the Departmental Test Examination to be held on 13th July 1958 and he was asked to appear in the said test. The Petitioner appeared in that examination but he could not succeed. By letter dated 4th December 1959 the District Commercial Superintendent Pandu terminated the lien of the Petitioner along with the other for the first time and the Petitioner was given lien as Junior Clerk in the scale of Rs. 60-130/- in the Claims Branch with effect from the 15th January 1958. The effect of this termination of his lien was that the juniormost employees in the Mechanical Branch were promoted to Senior Clerk with effect from 16th January 1958 while the Petitioner continued as junior clerk in the Claims Department though he had requested to be transferred to his parent Department. On the 27th September 1959 another Departmental examination was held in which the Petitioner came out successful and topped the list. The results were duly published. Shri Karuna Sankar Bhattacharjee arrayed as opposite party No. 4 in this petition, whose name appeared in Serial 37 in No. 727, could not come out successful in the examination. This examination, however, was subsequently declared as null and void by another notification. Another Department Test Examination was then held on the 8th May 1960 and the Petitioner also came out successful in that examination, the result of which was announced by a notification dated the 25th June 1960. The Petitioner and Sri Karuna Sankar Bhattacharjee opposite party No. 4 were promoted to the Senior Clerk in the scale of Rs. 80-220/- with effect from the 8th May 1960. On the 8th November 1962 Sri Karuna Sankar Bhattacharjee was again promoted to the Head Clerk though he passed the selection Test Examination on 8th May 1960 along with the Petitioner. Sri Karuna Sankar Bhattacharjee is a junior employee as a Clerk as he was approved to the appointment. on 30-11-49 and the departmental examination dated 8th May 1960 was passed together by both Sri Karuna Sankar Bhattacharjee and the

Petitioner. Sri D.P. Chakravarty opposite party No. 5 who also passed the same Departmental Examination on 8-5-60 and being junior in service to the Petitioner as he was appointed on 16th February 1950 only; could not be promoted in the post of Head Clerk, Claims office from 23rd September 1963 in preference to the Petitioner. A provisional Seniority List was published on the 31st November 1968 in which Sri Karuna Sankar Bhattacharjee was shown as No. 14 and the Petitioner's name was shown in serial No. 49 and he was shown as officiating. The list also showed Sri. D.P. Chakravarty in serial No. 52.

3. The Petitioner preferred an appeal against this list. The Petitioner was informed on the 12th March 1963 that he could not be placed above Sri Karuna Sankar Bhattacharjee because the Petitioner failed in the Departmental Examination held in July 1958 and that he passed only in the second chance i.e. in the Departmental Test Examination on 8-5-60 when Sri Karuna Sankar Bhattacharjee also passed in the first chance. That finally on 28th August. 1964 by an office order the final list of confirmation of Senior Clerks in the scale of Rupees 130-300/- in the Claims Branch was published and in this list Sri Karuna Sankar Bhattacharjee was shown in serial No. 22 and he was shown as officiating Head Clerk confirmed with effect from 8th May 1960 and the Petitioner was shown in serial No. 23 just below Sri Karuna Sankar Bhattacharjee and he was shown as Senior Clerk and date of Seniority was shown from 8-5-60. Shri D.P. Chakravarty was shown against serial 26 and he was shown as officiating Head Clerk and his date of final confirmation was shown as 8-5-60.

Again the authority published and circulated a seniority list by letter dated 31st December 1964 showing the seniority position in which Sri Karuna Sankar Bhattacharjee was shown in serial No. 13 and Sri Chakravarty in serial No. 14 and the Petitioner was shown in serial No. 51.

On the 8th March 1965 the Petitioner asked for review of this list. It is this list which is challenged before this Court by the Petitioner.

4. The validity of this list of seniority has been challenged by the Petitioner on various grounds. The contention is that Sri Karuna Sankar Bhattacharjee and Sri D.P. Chakravarty could not be placed in the list as senior to the Petitioner in violation of the rules governing the promotion of the subordinate staff. Admittedly the Petitioner has a longer length of service than both the opposite parties Nos. 4 and 5 and that all passed in the test dated 8th May 1960. As the Petitioner had claimed that he should be shown in the list against the name of Sri Karuna Sankar Bhattacharjee, which might have affected the other persons who are shown in the seniority list over the Petitioner, on the last date of hearing the Petitioner was directed to implead all those persons as party to this proceeding. Accordingly he impleaded all those persons as party to this petition and served them with notices and are all represented before us by the Counsel.

5. The contention raised by opposite party No. 1 General Manager, N.F. Railway, Pandu, No. 2. Chief Commercial Superintendent, N.F. Railway, Pandu, No. 3 Chief

Personnel Officer, N.F. Railway, Pandu and No. 4 Shri Karuna Sankar Bhattacharjee was that although Sri Bhattacharjee passed in the test on 8th May 1960, he was promoted to the post of Head Clerk and senior clerk earlier and shown senior to the Petitioner on the ground that he will be deemed to have passed in the test held on the 13th July, 1958. The ease taken up by the Railway in support of the claim of Sri Karuna Sankar Bhattacharjee appears to have varied from time to time. At the initial stage the ground taken was that as Sri Karuna Sankar Bhattacharjee passed at the first chance when he appeared on 8th May 1960 in the test while the Petitioner failed in 1958 and passed only in 1960, Sri Bhattacharjee was preferable to the Petitioner and was senior to him. At a subsequent stage in the counter-affidavit the position taken up is that Sri Bhattacharjee was initially appointed as an Assistant Station Master on 1st November, 1943. On being declared as a surplus there he was absorbed as a clerk of the Food Supply Department. His lien however was fixed in the Commercial (Claims) Department. He was transferred to the Claims Department in July 1957, but was not released from the Food Department to join in the Claims Department till 8th April, 1959; He was thus deprived of the chance of appearing in the suitability test for claims department held on 13th July, 1958. Thus he will be regarded as having passed in the earlier test than the one in which the Petitioner passed. Lastly in the counter-affidavit it is also added that his, date of appointment was earlier without specifying the details.

6. There is nothing in the rules which lays down that if a person who otherwise from the point of view of date of appointment, length of service and the date of confirmation is senior will be deprived of his seniority only because he passed the suitability test in the second chance while the one who has passed the suitability test in the first chance though otherwise junior, will be shown as senior. Realising this, the position was changed and it was urged on behalf of the opposite parties that as due to the administrative reasons Sri Bhattacharjee could not appear in the first test, he will be deemed to have passed the test and thus he passed earlier than the Petitioner in the first test. There is nothing in the rules which justifies such an assumption. It cannot be deemed] that a man who has not appeared in the test examination will be deemed to have passed that examination when he admittedly was asked to appear in the next examination and he did appear in the examination held on 8th May 1960. Regarding the contention raised by the opposite parties, that as Sri Karuna Sankar Bhattacharjee was appointed in the year 1943, his length of service was more than that of the Petitioner, it is not disputed that though he was appointed in 1943 he was approved for appointment in November 1949 after the Petitioner was approved. Thus it cannot also be said that the length of service of Shri Karuna Sankar Bhattacharjee was longer.

7. Regarding the case of Sri D.P. Chakravarty, his case has been set out in the order passed by the General Manager, N.F. Railway on the 19th August 1963. As in 1963 Sri D.P. Chakravarty was shown as junior, certain representation appears to have been made by him to the General Manager and he considered the

matter. In the order the General Manager has stated that he came on transfer to the Claims Office PNO on 23rd April 1958, he was promoted as Senior Clerk on 4-7-58 pending suitability test and immediately after his local promotion a test was held on 13th July 1958 in which he failed. Despite his failure he was allowed to continue as senior clerk and he passed the subsequent test held on 8th May 1960. Shri Chakravarty is fairly a senior hand and as he was new to the Claims Office when the first test was held and that he was allowed to continue to officiate as senior clerk even; though he had failed in the first suitability test on 13-7-58, he agreed, as a special case, which should not be quoted as a precedent, to restore the seniority position of Sri Chakravarty to his original position, which he would have otherwise acquired if he had passed the test on 13-7-58. This order clearly shows that Sri Chakravarty's date of appointment and date of transfer to this branch was later than the Petitioner, he failed in the first suitability test and passed in the suitability test only along with the Petitioner on the 8th May 1960. Thus there was no reason why his seniority as a special case should have been restored and he should have been shown senior to the Petitioner.

8. The contention of the Petitioner, thus, is that there has been a violation of Rules 20 and 21 of the rules regulating seniority of non-gazetted railway servants, which read as follows:

20. Date of passing the departmental examination test to regulate seniority.- (a) Except as provided for in Sub-paragraph (b) below, seniority of two or more railway servants, who pass the departmental examination test on different dates, not treated as one continuous examination, will be regulated entirely by the date of passing the examination or test.

(b) The seniority of Accounts Clerks, Grade I and Stock Verifiers is to be determined with reference to their substantive or basic seniority in Grade II irrespective of the dates they qualify for promotion as Clerks Grade I by passing the examination prescribed for the purpose.

21. Seniority on promotion to non-selection posts. Promotion to non-selection posts shall be on the basis of seniority-cum-suitability-suitability being judged by the authority competent to fill the post, by oral and/or written test or a departmental examination as considered necessary and the record of service. The only exception to this would be in cases where for administrative convenience, which should be recorded in writing, the competent authority considers it necessary to appoint a railway servant other than the senior most suitable railway servant to officiate in a short term vacancy not exceeding two months as a rule and 4 months in any case. This will, however, not give the railway servant any advantage not otherwise due to him.

At this stage Rule 18 may also be referred to, which reads as follows:

18. A railway servant who, for reasons beyond his control, is unable to appear in the examination/test in his turn along with others, shall be given the

examination/test immediately he is available and if he passes the same, he shall be entitled for promotion to the post as if he had passed the examination/test in his turn.

This rule only lays down that if for administrative reasons a person is not available to appear in the examination/test along with others, he alone will be given the examination/test as soon as he is available and if he passes the same, he can be treated to have passed the examination/test in his turn. In the present case even if it be accepted that Sri Karuna Sankar Bhattacharjee" was not for administrative reasons available in July 1958 for examination, he should have been asked to appear in a test one separately, soon after he was available. But as he was put up along with others on the 8th May 1960 for Examination/Test, it cannot be said that he was given the benefit of Rule 18, Rule 21 clearly lays down that the promotion to the post shall be on the basis of seniority and suitability judged by the authority competent to fill the post by written test and there are certain exceptions to this rule but the case of Sri D.P. Chakravarty does not come under any of these exceptions.

9. The point raised by the Counsel for Sri D.P. Chakravarty is firstly that the rules which are alleged by the Petitioner to have been violated are not statutory rules and thus this Court in a petition under Article 226 of the Constitution cannot direct the enforcement of these rules. There is no force in this contention. Under Rule 157 of Chapter 1 of the Indian Railway Establishment Code, Volume I (Revised Edition) 1959, which has been issued by the President in the exercise of his powers under Article 309 of the Constitution, it is laid down that the Railway Board have full powers to make rules of general application to non-gazetted railway servants under their control. Under Rule 158 the General Managers of Indian Railways have full powers to make rules with regard to non-gazetted railway servants under their control provided they are not inconsistent with any rules made by the President or the Railway Board. Thus the rules which were either issued by the Railway Board or by the General Manager have got statutory force.

10. It was then contended by the Counsel for the opposite parties that the Petitioner has asked for his own promotion in place of Sri D.P. Chakravarty and further that he should be given the same place in the seniority list as has been given to Sri D.P. Chakravarty. This relief cannot be granted to the Petitioner. Reliance is placed on the case of *State of Mysore v. K.N. Chandrasekhara* reported in AIR 1965 SC 532. There are two-fold answers to this contention. In the first place the Petitioner has challenged the list of seniority and in view of the decision cited above, he is entitled to a relief to the effect that the list should be cancelled and a fresh list should be prepared in accordance with the rules and if that relief is granted to the Petitioner it is not directing the opposite parties to place the Petitioner in a particular position. Such a relief, therefore, can be granted to the Petitioner under Article 226 of the Constitution. The question of promotion will be a consequence arising out of the correction of the list and once

the list of seniority is prepared in accordance with the rules, the question of promotion will have to be considered by the competent authority. The contention for the Counsel further was that once a man has been promoted, that promotion cannot be reopened. The order of the General Manager clearly shows that Sri D.P. Chakravarty was promoted as senior clerk on 4th July 1958 pending the suitability test. Thus his promotion on the 4th July 1958 was conditional on his passing the suitability test, which according to the General Manager's own order he did not fulfil, inasmuch as he failed in the test which was held on 13th July, 1958. There is, therefore, no force in the contention of the Counsel for D.P. Chakravarty that his promotion cannot now be reopened. According to the condition on which he was promoted, his promotion automatically came to an end when he failed to fulfil the term inasmuch as he did not pass the test held on 13th July 1958. By passing the test held in the year 1960 he cannot be said to have been promoted on the 4th July, 1958 legally. Even the General Managers order shows that as a special case his seniority was restored and not on the ground that his promotion could not be questioned in the year 1963 when he had in fact been promoted on the 4th July, 1958.

11. Mr. Lahiri on behalf of the opposite parties who are subsequently added, has supported the argument of the Petitioner that the list of seniority prepared in 1964 was not a valid list inasmuch as it was made in violation of the rules. But his contention is that the Petitioner's prayer that he should be restored to the position occupied by Sri Karuna Sankar Bhattacharjee cannot be granted inasmuch as before that is done, it will have to be considered that these opposite parties were senior to the Petitioner. Their case was that they had passed the earlier test in 1958 and thus they were senior to the Petitioner. It is not necessary for the purposes of this case to examine the respective seniority and the right of promotion of the Petitioner and the opposite parties who are subsequently impleaded.

12. Mr. Goswami for the Petitioner has candidly admitted that the relief which he is entitled to get is the cancellation of the list of 1964. We, therefore allow this petition in so far as that we cancel the seniority list dated the 31st December 1964 in which Sri Karuna Sankar Bhattacharjee is shown in serial No. 13, Sri D.P. Chakravarty is shown in serial No. 14 and the Petitioner is shown in serial No. 51 and issue a mandamus directing the opposite parties Nos. 1 to 3 to prepare a seniority list in accordance with the rules and give effect to that. We make no orders as to costs of this petition.