

(1984) 08 GUJ CK 0005
In the Gujarat High Court
Case No : Special Civil Application No. 1163/87

P.K. Jain and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-08-1984

Acts Referred:

Railway Establishment Manual Rules — Rule 306, 309, 314

Citation : (1985) 2 GLR 1199 : (1986) 1 LLJ 264

Hon'ble Judges : S.A. Shah, J

Bench : Single Bench

Judgement

1. The petitioners" who are at present holding the post of Permanent Inspector of Ways (hereinafter referred to as "the Inspector") in the Civil Engineering Department of Western Railways in the scale of Rs. 250-380(A)/425-700(R), have by this petition challenged the final seniority list of the cadre of Inspectors wherein their names are shown at serial nos. 185 and 186 respectively, on various grounds, and are claiming higher seniority on the basis of their earlier selection held in 1968.

2. The relevant facts, inter alia, are that the petitioners were initially appointed as Assistant Permanent Way Inspectors (hereinafter referred to as "the Assistant Inspectors") in years 1960 and 1961 respectively. The next avenue for promotion is the post of Inspector. The post of Inspector is a selection post as shown in Appendix to the India Railway Establishment Manual, and at the relevant time seniority was maintained on the Divisional basis. There were eight different divisions constituted in the Western Railway for administrative purposes, and the seniority was regulated division-wise. Since the post of Inspector was a selection post, the Selection Board of the Western Railway announced a selection test in June 1968 for the purpose of preparing a panel of selected candidates for promotions to the post of Inspectors in the scale of Rs. 250-380(A). The petitioners were Assistant Inspectors in the scale of Rs. 205-280(A), and they appeared at the above selection test. Thereafter, by a memorandum dated 10th

October, 1968 result was announced and the petitioners were declared successful and, therefore, their names were placed on the panel of Inspectors at serial nos. 6 and 7 respectively. The memorandum further mentioned that the selection had the approval of the competent authority. A copy of the said memorandum dated 10th October, 1968 is produced at Annexure "A" to this petition, and it clearly contains the aforesaid averments. The panel was made effective from 8th October, 1968. In paragraph 6 of the petition, the petitioners have averred that pursuant to the said empanelment, they were promoted to officiate against non-fortuitous vacancies for various periods, and are continuously officiating as Inspectors from 12th January 1970 and 30th August, 1970 respectively. There is no dispute raised by the respondents in respect of the averments of the petitioners.

3. It appears that the Rajkot Divisional Office of the Western Railway declared that in terms of instructions contained in paragraph 2(3) of the letter dated 25th July, 1967 of the General Manager (E) C.C.G., the unoperated portion of the panel for promotion to the posts of Inspectors in the scale of Rs. 250-380(A) declared under Rajkot Divisional Office Memorandum dated 10th October, 1968, as on 19th June, 1969, is treated as cancelled, and the employees whose promotion orders have been issued on or after 19th June, 1969, if any, will be treated as fortuitous. With the said declaration there was a copy of the letter of the General Manager dated 25th July, 1969, wherein it was stated that the promotions, reversions and transfers to staff in the category of Inspectors in the scale of Rs. 250-380(A), including the selections was being done at the Division Level. However, as a result of the decision taken by the General Manager, the above category of the staff will thereafter be controlled at the Headquarters Level and the selection of the eligible Assistant Inspector in the scale of Rs. 205-280(A) to the post of Inspectors in the scale of RS. 250-380(A), their transfers and promotions on whole railway basis, etc. will be arranged at the Headquarter level and with a view to implementing the above decision instructions contained in the said letter were issued for information and guidance. I will refer to the said instructions at an appropriate stage.

4. After the said declaration dated 11/14th August 1969 of the Rajkot Divisional Office, which is produced at Annexure "I" to the affidavits-in-reply filed by Shri A. D. Pant, Senior Personal Officer (Engineering), Western Railway, Bombay on behalf of the respondent-Western Railway, a combined seniority list of Assistant Inspectors was published. Since the employees of all the divisions of Western Railway were integrated, it was decided to publish seniority lists of both the cadres.

5. It is alleged in a paragraph 8 of the petition that by a letter dated 9th October, 1970, a combined seniority list of Assistant Inspectors for all the Divisions was notified, and the petitioners' names were not shown therein since the petitioners were promoted. The said letter dated 9th October, 1970 is produced at Annexure "B" to the petition, and therein in the last paragraph it is stated :

"..... The names of those APWIs, who have already been promoted to the scale of Rs. 250-380(A) after due selection by the Divisions have not been included in this list."

Therefore, another combined seniority list of Assistant Inspectors was notified by the Divisional Office vide its letter dated 9th August, 1971, and the said list also did not contain the names of the petitioners in view of the fact that the petitioners were by then already promoted to the posts of Inspectors. This fact has not been denied in the affidavit-in-reply filed by respondent-railway, but only arguments have been made showing the reasons.

6. In paragraph 9 of the petition the petitioners have further alleged that on 8th October, 1974 respondent No. 2 circulated a provisional combined seniority list of Inspectors wherein the names of the petitioners were shown at serial Nos. 185 and 186 respectively, and many other persons who were far juniors to the petitioners by virtue of the fact that because the petitioners were selected in the selection held in 1968, and those persons were selected in the selections held in 1969 as well as 1973, were shown senior to the petitioners in direct violation of rules 306 and 314 of the Indian Railway Establishment Manual, which provide for the principle for fixation of seniority. The petitioners have, therefore, raised objection against the provisional seniority list, but no change was made in the final seniority list and, therefore, they have filed this petition to quash and set aside the said final seniority list dated 13th January, 1977, as mentioned in paragraph 12 of the petition, wherein the names of the petitioners have been shown respectively at serial Nos. 185 and 186.

7. Mr. P. M. Thakker, learned Advocate for the petitioners, has challenged the final seniority list dated 13th January 1977 on the following grounds :

(1) The final seniority list has been prepared in contravention of rule 306 read with rules 309 and 314 of the Indian Railway Establishment Manual, which are statutory rules.

(2) The petitioners were selected for the panel in 1968 and were actually promoted from time to time and are holding higher post since 1970 till this date, and by no stretch of imagination the said promotion can be said to be fortuitous. In any view of the matter, the petitioners cannot be denied the benefit of their continuous officiation.

(3) By not including the names of the petitioners in the cadre of Inspectors for a number of years and treating them as Inspectors, the respondent-railway is now stopped from treating the petitioners as Assistant Inspectors.

(4) The petitioners were not heard before their panels were cancelled by the concerned authority, the cancellation is, therefore, arbitrary and violates the principles of natural justice.

8. Alongwith the aforesaid affidavit-in-reply filed by Shri A. D. Pant, declaration dated 11/14th August, 1969 of the Rajkot Divisional Office has been produced.

The extract of the letter dated 25th July, 1969 of the General Manager quoted in the said declaration shows that the powers of promotions, reversions and transfers of the Inspectors which were controlled at the Divisional level will thereafter be controlled at the Headquarters level, and selection of eligible Assistant Inspector for the posts of Inspectors will be arranged at the Headquarters level on the whole Railway basis. The declaration does not mention that the previous selection or promotion or panels are cancelled. However, with a view to implement the aforesaid declaration instructions are issued for information and guidance. Instructions (2) and (3), being relevant for our purposes, read as under :

"(2) Where the selections have already been arranged at the Divisional level and not approved by the competent authority before 19th June, 1969 the date on which General Manager has approved of the revised procedure the selections will be treated as cancelled."

It is now not disputed that the selection of the petitioners was made prior to 19th June, 1969 and the same was also approved by the competent authority. Therefore, this instruction No. 2 will have no application to the facts of the instant case, and their selection cannot be said to have been cancelled.

"(3) In the cases of selections where the panels formed by the Divisional Officers have been approved before 19th June, 1969 and a part of a panel has been operated such panels will be honoured to the extent operated, and the unoperated portion as on 19th June, 1969 will be treated as cancelled."

It is not disputed that petitioner No. 1 was promoted on 18th October, 1968 and remained there till 2nd December, 1968, and again he was promoted on 9th December, 1968 and remained on promotional post till 23rd January, 1969. Again he was promoted on 28th January, 1969 and remained on the promotional post till 13th March, 1969, and thereafter he remained on promotional post from 23rd June, 1969 to 6th August, 1969.

9. So far as petitioner No. 2 is concerned, he was also officiating as Inspector from 3rd May, 1969 to 26th June, 1969. Thereafter, both the petitioners were again promoted in year 1970, and are holding the promotional post till today. It cannot, therefore, be said that the panel was not operated so far as the petitioners are concerned prior to 19th June, 1969. Both the petitioners were promoted prior to that date to the post of Inspectors.

10. Instruction No. (4) which is also pressed into service, reads :

"(4) The combined seniority of A.P.W.Is scale RS. 205-280(A) will hereafter be maintained at the Headquarters level which will be formed on the basis of length of service in the grade of Rs. 205-280(A). While forming the combined seniority list of all Divisions, the following principles will be observed."

The principles which are mentioned thereafter in regard to maintain the seniority at the Headquarters level are prejudicial to the interest of the petitioners, and

being contrary to the provisions of statutory rules are subjected to challenge.

11. Shri R. P. Bhatt, learned Advocate for respondent No. 1, Western Railway, does not dispute that rules 306 and 314 of the Indian Railway Establishment Manual are statutory rules. It is also not disputed that the petitioners were selected and promoted as Inspectors, and their selection was approved by the competent authority, i.e. the Divisional Superintendent, Mr. Bhatt, however, submits that the respondent-railway has power to integrate the services and seniority, transfers and promotions; so far as both the cadres were concerned, which were at the Divisional level were integrated and changed to Circle level, i.e. entire Western Railway, and the Headquarters had become the competent authority for promotions, transfers, selections, etc. Mr. Thakker does not want to enter into this controversy. His submission is that assuming that the General Manager has power to integrate the services of the staff from Divisional Level to Circle Level, even then the General Manager is bound by the statutory provisions of the rules so far as selection and seniority of the petitioners are concerned.

12. Mr. R. P. Bhatt has contended that though the selection of the petitioners made before 19th June, 1969 has not been treated a cancelled under the provisions of aforesaid instruction No. (3), if the same is not operated on or prior to 16th June, 1969, part of that panel will be treated as cancelled. It is not disputed that the petitioners were promoted prior to that date, and they were promoted only in accordance with their seniority on the panel. However, Mr. Bhatt has contended that these promotions were fortuitous promotions and not promotions on regular basis and, therefore, is cannot be said that the panels were operated so far as the petitioners were concerned.

13. In my opinion, the argument of Mr. Bhatt is totally misconceived. First of all, instruction No. (3) does not make any difference between the promotion on the basis of the panel for fortuitous vacancy or regular vacancy. Those words are nowhere found in any of the said instructions. This question may be viewed from another angle also. Suppose the petitioners are promoted on regular vacancy, then the question of cancelling the panel will not arise because they are not in the panel at all.

14. Mr. Bhatt has invited my attention to instruction No. (4), and the principles of seniority required to be observed. The principles to be observed are as under :

"If an APWI, scale Rs. 205-280(A) who had been placed on the panel for the post of PWI scale Rs. 250-380(A) by one Division and has officiated on the basis of his panel position on that division but happens to be junior to another APWI of another Division who has not been placed on the panel because of a selection not being held or because he was too junior on that Division to be called for such a selection, then the APWI who has been placed on the panel and had officiated as PWI, scale Rs. 250-380(A) will not be required to appeal for the selection for the post of PWI scale 250-380(A) which will be arranged by this office. He will be given protection on the panel. This promotion, as PWI scale Rs. 250-380(A) will

however, be treated as fortuitous till such time his seniors are called for the selection to the said category. His name will, however, be interpolated in the panel to be framed by the office on the basis of his seniority position as APWI on all railway basis."

These principles of seniority framed by the General Manager of respondent-railway may be laudable, but there are in direct conflict with statutory rules 306 and 314 of the Indian Railway Establishment Manual. Rule 306 reads :

"306. Candidates selected for appointment at an earlier selection shall be senior to those selected later irrespective of the date of posting."

It is not disputed that the petitioners were selected at an earlier selection than the persons who are selected during 1969-1973. Therefore, there is substantial change in respect of the seniority made by the General Manager. Instruction No. (2) of the said instructions in terms does not state that the selection made before 19th June, 1969 is cancelled. Instruction No. (3) cancels the unoperated panel without cancelling the selection. Therefore, it creates contradiction. Principle of seniority under rule 306 is based upon selection, and earlier selected candidates are treated as senior to the latter selected candidates, even though they had officiated earlier. This is made clear by rule 314 of the said Manual. It reads :

314. Seniority in selecting post : The seniority of two or more officiating Railway servants selected at different selections for a particular selection post should be fixed with reference to the date of selection, that is to say, Railway servants borne on an earlier panel shall be senior to those selected later even though the latter may be continuously officiating in the selection posts a local arrangement from a date prior to the date of promotion of the former or the latter may be substantively senior to the former."

This rule 314 reiterates that a person selected earlier will remain senior to the persons not only promoted on an officiating basis, but even if the latter is substantively senior to the former. This principle has been adopted in several statutory rules, viz, date of passing examination or date of selection is considered as criteria for fixation of seniority. This criteria which has been prescribed by the statutory rule has been given a total go-bye by the General Manager.

15. Mr. Bhatt explains this position by stating that the General Manager has the power to cancel the selection made by the lower authority, and he having cancelled the same, the petitioners cannot claim any right of seniority on the basis of their cancelled selection. I am unable to accept this contention of Mr. Bhatt, First of all, selection is not cancelled by the General Manager in clear terms. On the contrary, instruction No. (2) of the said Instructions states that the selections which are approved prior to 19th June, 1969 are not subject to cancellation. Now, if the petitioners were promoted substantively on a higher cadre, then the question of cancellation of the unoperated portion of the panel does not arise. However, Instruction No. (3) clearly provides that if the panel is

operated on 19th June, 1969, such panel will be retained and the unoperated panel will be cancelled. Therefore, it necessarily means that those persons whose names are in the panel and who have not been promoted at all, only their names will be treated as cancelled from the panel. Mr. Thakker argue that if the selections are not cancelled and the rest of the panel which is not operated is cancelled, it would only mean that the petitioners will not be entitled to seniority on the basis of panel position. This would amount of violation of rules 306 and 314 of the Indian Railway Establishment Manual. He, therefore, submitted that the Instructions (3) and (4) are ultra vires, the powers of General Manager, being contrary to the statutory rules. In my opinion, provisions of rules 306 and 314 are mandatory and the General manager has no power to change the principle of seniority which is contrary to the provisions of the said Rules. Generally, where services are integrated rule of continuous officiation is considered to be relevant for the cadre. But the persons who are selected and/or promoted cannot be denied their statutory rights and, therefore, their seniority should be fixed either in the promotional cadre or they should be treated as senior to the persons who are not selected. If the combined effected of the instructions issued by the General Manager is that even if the petitioners are treated as selected in year 1968, their seniority will be kept in suspense till each and every senior in other Divisions is called for selection, and if they are selected, their seniority will be fixed on the basis of the date of their promotion or selection in the lower cadre of Assistant Inspectors. The petitioners will also not get chance of further promotion till their seniority is decided. In fact, till 1974 their seniority remained under suspension.

16. Mr. Bhatt relies upon the decision of the Supreme Court in *Sham Sunder Vs. Union of India (UOI) and Others*, . In that case the facts were, that the General Manager, Northern Railway, called 152 enquiry-cum-reservation clerks to appear in the tests for selection to the posts of reservation supervision in the grade of Rs. 250-380. The petitioner in that case who ranked 13 in order of seniority was allowed to appear in the tests. As a result of the oral and written tests a panel of 38 persons was drawn up and was published in the Railway Gazette. The said petitioner was one of the selected candidates and his name was shown at No. 33 in the panel. A note at the foot of the panel intimated to the staff concerned that "the mere fact that their names are in the panel will not confer upon them any right for permanent absorption as a reservation supervisor". On the assumption that 38 persons must be on the panel, the General Manager called 152 persons, i.e. 4 times the number of candidates to be included in the panel on the basis of immediate vacancies and anticipated vacancies due to retirement and upgradation of posts. The Railway Board received several complaints and representations regarding the constitution of the panel, and by an order dated 16th September, 1965 the Railway Board decided that the panel of 38 persons was irregularly drawn up and that there should be a panel of 24 persons for promotion to the higher grade on the calculation of anticipated vacancies in accordance with the Rules. On that conclusion the Railway Board restricted the

panel to 24 persons, and decided that only 96 persons should be allowed to appear in the examination. The panel should therefore, be operated only in respect of 24 persons and the named of the remaining 14 persons should be deleted forthwith. The petitioner in that case who was in the panel at serial No. 33 and whose name was deleted challenged the action of the Railway Board. The Counsel for the petitioner in that case contended that the Railway Board or the General Manager had no power to amend the panel published in August, 1965. The said contention was rejected by the Supreme Court on the ground that such a contention was raised at the hearing of the petition only. The Solicitor General pointed out to the Court the letter dated 4th August, 1953 of the Railway Board, wherein, on the subject of cancellation or amendment of approved panels the Railway Board directed that "the panels once approved should not be cancelled or amended without reference to the authority next above the one that approved the panel". It was not disputed that the Railway Board had power to issue the said general direction under rule 157 of the Railway Establishment Code. In that case the General Manager was the authority approving the panel, and the Railway Board was the authority next above him. Therefore, it was found by the Supreme Court that the cancellation was in accordance with the Rules.

17. Relying upon the aforesaid decision of the Supreme Court, Mr. Bhatt has argued that in the instant case the panel was approved by the Divisional Superintendent and the said panel had been cancelled by the General Manager, who is the authority higher than the Divisional Superintendent, and, therefore he had the same power to cancel the same. Mr. Thakker for the petitioner does not dispute the power of the General Manager to cancel the panel. But his contention is that though the General Manager has power, he cannot exercise the same arbitrarily, and unless he finds, as it was found by the Railway Board in the case before the Supreme Court, that there was material irregularity in selection or that the proper procedure was not followed as contemplated by the Rules. I think there is considerable force in the argument of Mr. Thakker.

18. The aforesaid decision of the Supreme Court is in respect of laying down the power of the higher authority to cancel the panel, if it is found to be irregular or illegal. Since Mr. Thakker is not challenging the powers of the General Manager, the said decision will not help Mr. Bhatt. As stated earlier, I am not concerned with the cancellation of the panel, but with the rule of seniority. It is not disputed that the petitioners were selected according to the rules. Once that position is conceded, and if the selection is not cancelled, rule of seniority, viz. rules 306 and 314 of the Indian Railway Establishment Manual must operate. Secondly, even if the rule - Instruction No. (3) of the General Manager - is treated as cancelling the unoperated panel, then the said cancellation will be illegal on the ground that the power to cancel, according to Mr. Thakker, cannot be exercised unless there is illegality or irregularity, and before exercising such power the General Manager was bound to hear the petitioners. The order is, therefore, clearly in violation of the principles of natural justice.

19. Mr. Bhatt then submitted that the inclusion of the names of the petitioner in the selection panel does not create any vested interest in the petitioner and, therefore, it is an administrative act and can be cancelled at any time by exercising the powers as aforesaid. In such a case principles of natural justice will not arise. Mr. Thakker had invited my attention to the decision of this Court in *R. P. Jani v. Union of India* 24 GLR 85, which is also a Railway case. Therein the name of the petitioner was deleted from the selection list. It was observed therein :

"..... it is true that merely because a person's name is placed in the selection panel, he does not automatically get a vested right of promotion to the higher post. Being empanelled for promotion confers upon the person concerned limited right of being considered for promotion which is another way of saying that person who is put in the panel framed for promotion to a higher post is at the given moment considered eligible for promotion (vide *N.M. Siddique Vs. Union of India (UOI)*, . The fact remains that the petitioner having passed the written test and viva voce test was placed in the selection panel for being regularly appointed to Class III service and he was placed at serial No. 20. He, therefore, got the limited right of being considered for regular promotion to Class III service on the basis of this empanelment. In fact, he was already promoted since years on ad hoc basis as Class III servant and after empanelment not only he continued as such but his juniors also were promoted later on as their names appeared below the petitioner's name in the selection panel. Under these circumstance, if the name of the petitioner was to be deleted from the selection in fairness to him a hearing ought to have been given to the petitioner or at least an opportunity to point out his matter should have been afforded to the petitioner..... Consequently the impugned order must be held to be ultra vires and entirely contrary to the elementary principles of natural justice and fair play."

In the instant case, it is no doubt true that by cancellation of the panel the petitioners have suffered legal injury. In any case the order is prejudicial to the petitioners and before such panel is cancelled, if they had been given an opportunity of being heard, they could have pointed out that so far as they were concerned the panel was operated, or they could have also pointed out that their selection having been upheld and not cancelled; by virtue of rule 306 read with rule 314 if the Indian Railway Establishment Manual their seniority cannot be changed by unilateral cancellation of the rest of the panel. The respondent-Railway had patently committed breach of principles of natural justice and, therefore the impugned order, so far as the petitioners are concerned, is void, and the seniority list based upon such order, so far as the petitioners are concerned, requires to be quashed and set aside.

20. The petition is, therefore, allowed. The impugned seniority list, so far as the names of the petitioner are concerned, is quashed and set aside, and the respondent-Railway is directed to redetermine their seniority in accordance with rule 306 read with rule 314 of the Indian Railway Establishment Manual on the

basis of their selection and inclusion of their named in the panel in the cadre of Permanent Way Inspectors in year 1968, and to grant all consequential benefits arising in refixation of their seniority. The respondents-Railway is directed to determine the same within two months from the date of the receipt of the writ of this Court. Rule is made absolute with costs.

21. Petition allowed.