

**P.K. Mukherjee and ors. Vs. Bimal Kumar Mukherjee and ors.**

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**Court :** Kolkata

**Decided On :** Jan-03-1972

**Reported in :** (1973)ILLJ592Cal

**Judge :** P.B. Mukharji, C.J. and ;S.K. Mukherjee, J.

**Appellant :** P.K. Mukherjee and ors.

**Respondent :** Bimal Kumar Mukherjee and ors.

**Advocate for Pet/Ap. :** Mr. N. C. Chakravarti

**Judgement :**

**S.K. Mukherjee, J.**

1. This is an appeal from an order made by Mr. Justice D. Basu on 20th May, 1969, making a rule absolute. The petitioners before his Lordship were assistant drivers who had come over to the electric traction section from the steam traction section of the Eastern Railway after they had exercised the option which was given to firemen serving in the steam traction section under a circular issued by the Chief Personnel Officer on November 13, 1958. The option was given to firemen of both Grades 'A' and 'B' in the steam section. The appellants who were respondents Nos. 9 to 11 in the rule were in Grade 'A' while the respondents Nos. 1 to 14, the petitioners in the rule, were in Grade 'B'. Other firemen of Grade 'A' were invited to appear on the record of the proceedings by a notice issued under

Order 1, Rule 8 of the Code of Civil Procedure.

2. The question is how the seniority among assistant drivers is to be determined.

3. By his order, the learned Judge has directed the respondents Nos. 15 to 22 that is to say, the Union of India, the General Manager, the Chief Personnel Officer, the Chief Electrical Engineer, the Divisional Superintendent, Sealdah, the Divisional Superintendent, Asansol, the Divisional Superintendent, Dhanbad and the Divisional Superintendent, Danapur, Eastern Railway, to frame and publish a consolidated list of assistant drivers in the electric section according to the principle laid down in paragraph 12 of the circular being Annexure 'A' to the petition and then to regularise all promotions made from the rank of optees to the post of assistant drivers since the time when the circular came into force. The appellants are all assistant drivers promoted from the rank of Grade 'A' firemen. They contend that they have been prejudicially affected by the order.

4. The pattern of recruitment and channel of promotion of firemen in the Transportation Department are dealt with in Rule 129 of Chapter 1, S. 'B' of the Indian Railway Establishment Manual. There are two divisions of first firemen or leading firemen, namely, firemen Grade 'A' and firemen Grade 'B'. First firemen Grade 'B' are promoted from the rank of second firemen Grade 'C' who are promoted from the rank of engine cleaners, first firemen Grade 'A' are recruited from direct trainee firemen of matriculation or any equivalent qualification. It appears from Rule 129 that 75% of first firemen are recruited as first firemen Grade 'A'. The balance 25% of first firemen come up by promotion to the rank of first firemen Grade 'B'. First firemen Grade 'A' are promoted to the rank of shunters Grade 'A' and first firemen Grade 'B' are promoted to the rank of shunters Grade 'B'. Thereafter the promotion is from shunters Grade 'A' and shunters Grade 'B' to drivers Grade 'C'. At that stage, the two divisions coalesce.

5. Rule 129 contemplates recruitment and promotion in the steam section. There are no assistant drivers in the steam section. In the case before us, the petitioners as well as the respondents Nos. 9 to 11 in the rule are all assistant drivers. The petitioners were promoted to the rank of assistant drivers from the rank of first firemen Grade 'B'. The respondents Nos. 9 to 11, the first firemen Grade 'A', were

also promoted to the rank of assistant drivers. There is no dispute that the petitioners and the respondents have all been duly appointed assistant drivers. The only point of dispute is how seniority among them is to be determined.

6. Relying on the circular dated 13th November, 1958, Mr. N. C. Chakravarti, counsel for the petitioners, contends that the question of seniority among the assistant drivers should be determined by reference to the date when they were appointed leading firemen irrespective of the grades they belong to. In other words, the argument is that it is a matter of no consequence at which point of time they were appointed assistant drivers or whether they have come from Grade 'A' or Grade 'B' leading firemen. The appellants who represent Grade 'A' leading firemen contend that as regards seniority among the assistant drivers the test should be the date when a particular assistant driver was taken in on the electric traction section as an assistant driver. They maintain that there is nothing in the circular which supports the argument of the petitioners. The circular dated 13th November, 1958 was issued by the Chief Personnel Officer, Eastern Railway. It was addressed to the Divisional Superintendent, Eastern Railway, Asansol/Dhanbad/Danapur/Howrah/ Sealdah. It is on the subject of volunteers for electric traction on Ondal-Gaya section ('C' Grade driver in scale Rs. 80-5-135-EB-10-185 and assistant drivers in scale Rs. 75-3-105). Although it appears that the circular was addressed to all the Divisional Superintendents of the Eastern Railway, it is expressly concerned only with volunteers for electric traction on Ondal-Gaya section. It may be pointed out that by the term 'volunteers' the optees who have opted for electric traction are to be understood. It is not stated in the petition that the petitioners or the respondents are volunteers for electric traction on Ondal-Gaya section. Strictly speaking, on that ground alone, the petition is demurrable. It is demurrable, because the petitioners rely almost entirely, if not entirely, on the circular. Before the learned Judge as also before us, arguments proceeded on the basis that the circular is applicable to all sections of the railway which have gone over entirely or partially to electric traction and it is on that basis that we are deciding this appeal.

7. The learned Judge has directed that the seniority list be prepared in accordance with the principles laid down in paragraph 12 of the circular. Paragraph 12 of the

circular may now be set out in full :

Seniority of assistant drivers.- ' seniority of volunteers from leading firemen Grade 'A' (scale Rs. 75-105) and leading firemen Grade 'B' (scale 50-80) for the posts of assistant drivers will be fixed with reference to the date of their promotion to the posts of leading firemen.

8. The learned Judge says in his judgment :

It is true that para 12 of the circular at Annexure 'A' laid down that seniority amongst the assistant drivers recruited by the aforesaid option will be fixed with reference to the date of their promotion to the posts of leading firemen. This principle has evidently been violated by the subsequent promotions as shown in columns 7-8 of the Schedule to the petition.

9. What is said in paragraph 12 is that the seniority of volunteers for the posts of assistant drivers will be fixed with reference to the date of their promotion from the posts of leading firemen. The paragraph does not deal at all with seniority amongst the assistant drivers inter se. As we read paragraph 12, it merely says that for the purpose of appointment to the posts of assistant drivers the seniority will be determined according to a particular principle. It is silent on the question of seniority amongst the assistant drivers inter se after they have been appointed assistant drivers. The learned Judge, it seems, fell into error in construing paragraph 12. He construed the words 'for the posts of assistant drivers' as 'amongst the assistant drivers' which makes all the difference. The preposition 'for' cannot and does not mean 'amongst'.

10. The petitioners cannot, therefore, in our opinion, draw any sustenance from paragraph 12 in support of their argument that under paragraph 12 of the circular seniority amongst assistant drivers is to be determined with reference to the date of their appointment to the posts of leading firemen. The learned Judge has disposed of the rule on the basis of paragraph 12 of the circular. There are other provisions in the circular which, in our opinion, throw light on the question before us. Paragraph 6 deals with the question of avenue of promotion. It is said :

It has been decided that the staff who will be posted in the electric services, will continue to retain their lien on the steam side and their promotion, etc., will be regulated according to their due turn and on passing the promotional examination prescribed for the running staff of the steam locomotives at the Technical School, Jamalpur, till such time as they are confirmed against the posts when the same are made permanent.

11. The fact that the volunteers will retain their lien on the steam side and their promotion will be regulated according to their due turn and on passing the promotional examination, shows what the scope of the circular is. It shows that the volunteers will continue to be regarded as Grade 'A' or Grade 'B' firemen for the purpose of retaining their lien. This principle is further reinforced by paragraph 10 of the circular which specifically deals with the question of seniority. The paragraph provides as follows:

Seniority.-It may also please be known to the staff that their seniority on the electric traction will be based on their relative seniority on the steam side on the date they were sent for training.

12. Training precedes appointment to the post of assistant drivers, or for that matter, any appointment on the electric traction section. The seniority that paragraph 10 has in contemplation is seniority for the purpose of appointment in the rank of assistant drivers on the electric traction section and not seniority amongst assistant drivers inter se.

13. The position is made clearer by a note which accompanies the copy of the circular from the Chief Personnel Officer to the District Superintendent, Asansol. The note is to be found in the circular itself. It says :

So long as the cadre of electric traction continues to be temporary these men retain their lien on the steam side. They should undergo the normal promotional course and examination as per steam shunters and also be promoted under the 'next below rule but the same will be given effect to only on being returned back to the steam side.'

\* \* \*Regarding the seniority of volunteers drawn from both leading firemen Grade 'A' and Grade 'B' for the posts of assistant drivers this will be fixed with reference to the date of their promotion to the post of leading firemen as already mentioned in the circular referred to above. Their complaint that Grade 'B' firemen who have been selected and found suitable came into their rank and derived special benefits, has, therefore, no basis.

14. The concluding portion of the note seems to represent the correct position.

15. The affidavit used by respondents Nos. 1 to 8 and affirmed by Gajinder Bit Singh, Senior Personnel Officer, Eastern Railway, makes the position abundantly clear. In paragraph 4, the deponent says:

Firemen Grade 'A' or firemen Grade 'B' (both are called leading firemen Grade 'A' and 'B') are borne on two different cadres and they are combined at the stage of drivers 'C' in the avenue of promotion.

16. The distinction between firemen Grade 'A' and firemen Grade 'B' persists up to the stage of drivers 'C', or up to the analogous stage of assistant drivers on the electric traction side.

17. In paragraph 5, Officer says: the Chief Personnel

The posts of assistant drivers were filled up or are being filled up by transferring men from steam side.\* \* \*

18. The intention of the railway administration was/is to form a separate cadre in the traction side but no separate cadre in the traction side has yet been formed or created in the said traction side. It is to be stated further that so long as a separate and independent cadre is not created or formed-in the traction side, the avenue of promotion available in the steam side is being strictly followed in the interest of the transferred steam side men.

19. In paragraph 6 of the affidavit, the Chief Personnel Officer goes to the heart of the matter. He says that the circular letter relates to the filling up of the posts, viz., drivers Grade 'C' and assistant drivers. In other words, the circular is not

concerned with the question of seniority among the assistant drivers at all. It is concerned only with the filling up of the posts of drivers Grade 'C' and assistant drivers.

20. In paragraph 7, the deponent rejects the 'contention of the petitioners that the seniority of the assistant drivers is to be fixed with reference to the date of their promotion to the posts of leading firemen.

21. In paragraph 8 it is represented that no new cadre has yet been formed in the traction side.

22. In paragraph 9, the deponent highlighted the fact that the avenue of promotion in the steam side is followed as an interim measure in the interest of the employees and the procedure laid down is to continue until a cadre is created on the traction side. No member of the staff is likely to suffer prejudice.

23. The assurance is given in paragraph 10 that the staff so far transferred and absorbed in the traction side will continue to be governed by their basic seniority position obtaining on the steam side. This is another way of saying that their lien will continue which has been said in an earlier paragraph. In one of the concluding paragraphs of the affidavit that is, paragraph 20, it is said:

The petitioners' cases would be considered in due course strictly according to the seniority basis available on the steam side. The allegation that the petitioners would be superseded by the leading firemen Grade 'A' is unfounded and is denied. The apprehension that they will be junior to leading firemen Grade 'A' has no basis at all.

24. Mr. S. K. Roy Chowdhury appearing on behalf of the respondents Nos. 1 to 8 in the Rule did not support the case of the railway as made in the affidavit or before the learned Judge. He threw overboard the case made in the affidavit of the Chief Personnel Officer and tried to forge an argument of his own which was indistinguishable from the arguments made on behalf of the respondents Nos. 1 to 14. We have not been able to appreciate the volte face for a volte face it is. Mr. Roy Chowdhury submitted that he was supporting the petitioners on instructions.

Be that as it may, the case has to be decided on a fair and proper construction of the circular. The construction, in our opinion, does not present any difficulty. The learned Judge, if we may say so with respect, permitted to misdirect himself by construing the preposition 'for' as 'amongst' in reading the circular. He did not, we say again with respect, appreciate the scope of the circular. In preference to Mr. Roy Chowdhury's arguments we accept the case made by the Chief Personnel Officer in his affidavit.

25. It was contended by Mr. Ghosh, learned advocate appearing on behalf of the appellants, that if the constructions sought to be put to paragraph 12 by Mr. Chakravarti is accepted, that is to say, that seniority among assistant drivers is to be determined with reference to the dates of their promotion to the posts of leading firemen, the issue of the circular will be beyond the competence of the General Manager and, therefore, of the Chief Personnel Officer who, in issuing the circular, ostensibly acted as a delegate of the General Manager. Mr. Ghosh relied on Rule 158 of Chapter I in Volume I of the Indian Railway Establishment Code (Revised Edition) which provides as follows:

The General Manager 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.

26. He submitted that the construction of paragraph 12 of the circular for which the respondents contend, if adopted, will be inconsistent with Rules 302, 320 and 311 made by the Railway Board and published in the Railway Establishment Manual.

27. Rule 320 provides :

\* \* \*320(a) A railway servant, once promoted against a vacancy, which is non-fortuitous, should be considered as senior in that grade to all others who are subsequently promoted.

28. Rule 302 provides:

Unless specifically stated otherwise, the seniority among the incumbents of a post in a grade is governed by the date of appointment to the grade.

29. Rule 311 provides:

Seniority of railway servants on transfer from one cadre to another in the interest of the administration is regulated by the date of promotion or date of appointment to the grade as the case may be.

30. It is made quite clear by Rule 311 that whether it is a case of promotion or a case of direct appointment, seniority will be decided by the date of appointment, to the grade.

31. As we have found that on a proper construction, there is nothing in the circular which is contrary to any rule or provision in the Railway Establishment Code or the Railway Establishment Manual, it is not necessary for us to deal with the argument that the Chief Personnel Officer as a delegate of the General Manager was not competent to issue the circular.

32. Mr. Ghosh further contended that the circular, in any event, cannot be enforced by a writ Court as it lacks the force of statute. Mr. Chakravarti appearing on behalf of the petitioners drew our attention to a passage in the judgment of D.N. Sinha, J., in *Union of India v. Santi Kumar Banerjee and Ors.* 0043/1967 : (1968) IILLJ203Cal . At paragraph 4 of the judgment, the learned Judge observed: 'the rules made by the Railway Board, which are made effective by issuing circular or letters have statutory authority.' Mr. Chakravarti contended that the General Manager, and, by delegation, the Chief Personnel Officer, can exercise the powers of the Railway Board to make rules by issuing circulars or letters which have the same statutory force as those issued by the Railway Board. The circular, therefore, Mr. Chakravarti argues, has the force of statute. Having regard to the construction of paragraph 12 of the circular which we have adopted, it is not necessary for us to pronounce on the question whether the circular has statutory force or not. It may, however, be pointed out that the Chief Personnel Officer has not indicated in the circular by what authority he has issued the circular. We are unable to subscribe to any general proposition that any letter or circular, order or instruction containing a directive and emanating under the signature of the Chief Personnel Officer or the Deputy General Manager or the General Manager has the force of a statute. The power to make rules has not only to be conferred but has

also to be invoked and exercised. There is no indication in the circular that it has been issued in exercise of powers conferred on the General Manager. As I said before, the case may very well be decided without deciding whether this circular has any statutory force. If the circular lacks statutory force, then no writ will lie. The learned Judge in course of his judgment observed:

There is no question of the statutory force or otherwise of the circular of 1958 when both sides are relying upon it.

33. The learned Judge, in our opinion, fell into error in holding impliedly that by consensus or consent of parties a writ will lie in a matter where it does not lie. If by consent jurisdiction cannot be conferred on a Court, by consent a writ will not run either.

34. Mr. Chakravarti argued that the respondents Nos. 9 to 11, who are the appellants before us, cannot challenge the validity of the circular having taken the benefit of its provisions. It is not necessary to go into that question having regard to our finding that the circular cannot be said to have been invalidated by non-compliance with or violation of any of the provisions of the Railway Establishment Code or the Railway Establishment Manual.

35. Mr. Chakravarti relied on Rule 11 of the Rules regulating seniority of non-gazetted railway servants (serial No. 4621). That rule provides:

The combined seniority list should be based on the length of service in comparative grades without, however, disturbing the inter se seniority of staff belonging to the same category.

36. The rule is concerned with seniority of candidates called up for filling up non-selection posts in the channel of promotion of staff of more than one seniority group. The rule is to the same effect as Rule 320(c) of the Indian Railway Establishment Manual which reads:

In respect of non-selection posts in the channel of promotion for staff in various categories combined, seniority list of employees passing the suitability test should be based on the length of service' in comparable grades without, however,

disturbing the inter se seniority of staff belonging to the same category.

37. Reliance was also placed on Rule 321 of the Railway Establishment Manual which provides:

Relative seniority of employees in an intermediate grade belonging to different seniority units appearing for a selection non-selection post in higher grade: When a post (selection as well as non-selection) is filled by considering staff of different seniority units, the total length of continuous service in the same or equivalent grade held by the employees shall be the determining factor for assigning inter-seniority 'irrespective of the date of confirmation of an employee with lesser length of continuous service as compared to another un-confirmed employee with longer length of continuous service. This is subject to the proviso that only non-fortuitous service should be taken into account for this purpose.

38. It will appear from these rules that they are concerned with the question of seniority of employees of more than one seniority group. Rule 321 of the Railway Establishment Manual and Rule 11 of the Rules regulating seniority of non-gazetted railway servants specifically speak of more than one seniority group. Rule 32f)(c) also contemplates employees in various categories and speaks of 'length of service in comparable grades'. These rules, it seems to us, have no relevance on the question of seniority amongst one category of employees alone which is the case here. The question with which we are concerned is one of seniority amongst assistant drivers who constitute one and only one category of employees. These rules are, therefore, of no assistance in this case,

39. Before the learned trial Judge, as also before us, reliance was placed on behalf of the petitioners on the decision of the Supreme Court in *Roshan Lai Tandon v. Union of India and Anr.* : (1968)ILLJ576SC . The case, and in particular the observations made in paragraph 5 of the judgment to which we shall presently refer, go against the arguments of the counsel appearing on behalf of the petitioners. The case was concerned with two grades of train examiners who were ultimately promoted to Grade 'D'. The Supreme Court observed at page 1893 of the report:

At the time when the petitioner and the direct recruits were appointed to Grade 'D', there was one class in Grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'.

40. In the present case, once assistant drivers are appointed by direct recruitment or by promotion they form one class on their appointment and there can be no discrimination between them inter se for the purpose of seniority or for further promotion. In other words, the sense of the passage is that for the purpose of seniority or for the purpose of promotion what will count is the date of appointment and not the origins from which they came or the mode of their appointment. In our judgment, the Supreme Court case is not only of no assistance to the petitioners but is directly against the arguments made on their behalf.

41. Mr. Ghosh contended that the order made by the learned Judge for issue of notice under Order 1, Rule 8 of the Code of Civil Procedure has not been complied with. The notice, he claims, is defective. In fact, it is misleading. It states that an application has been made on behalf of some of Grade 'C' drivers in A. C. Electric Traction, Eastern Railway, disputing the legality of certain promotions to higher ranks which have been granted to firemen Grade 'A' superseding the claims of firemen Grade 'B' and in not drawing up a properly constituted seniority list of drivers Grade 'C'. The application, Mr. Ghosh rightly pointed out, is not by Grade 'C' drivers but by assistant drivers who have been promoted from the rank of firemen Grade 'B'. Moreover, the application has been made for drawing up a seniority list of assistant drivers, not of drivers Grade 'C'.

42. Mr. Ghosh then drew our attention to the fact that the notice invites any person who is a driver Grade 'C' in A. C. Traction, Eastern Railway, promoted from the rank of fireman Grade 'A' and who is Interested in the matter, to apply to the High Court to be made a party to the rule. The notice does not notify, as it should have

done, that assistant drivers who have been promoted from the rank of firemen Grade 'A' may apply for being made a party to the rule. The notice is, therefore, useless and is as good as not having been served at all.

43. Mr. Ghosh argued that the nature of the dispute in the proceedings has not been brought out in the notice. The description of the petitioners is wrong. In the result, the notice does not serve the purpose of giving an opportunity to assistant drivers who have been promoted from the rank of firemen Grade 'A' to decide whether they should apply for being made parties to the rule. The learned Judge, Mr. Ghosh submitted, was wrong in assuming that a proper notice has been served in compliance with Order 1, Rule 8 of the Civil Procedure Code.

44. Having regard to the view we have taken of this appeal we do not consider it necessary to express any views on the notice given under Order I, Rule 8 of the Code of Civil Procedure.

45. A point was taken by Mr. Chakravarti with regard to the maintainability of the appeal. He argued that the appellants are not persons aggrieved by the order made by the learned Judge. The rule was served on the appellants and they opposed the rule. We fail to see any merit in the objection.

46. In the view we have taken, the' appeal succeeds. The judgment and order of the learned Judge is set aside. The appeal is allowed. The rule is discharged.

47. There will be no order for costs.

P.B. Mukharji, C.J.

48. I agree.