

(2011) 11 CAL CK 0013**Calcutta High Court****Case No:** WPCT 251 of 2011

Union of India and Others

APPELLANT

Vs

Vikash Kumar Mishra

RESPONDENT

Date of Decision: Nov. 30, 2011**Hon'ble Judges:** Shukla Kabir (Sinha), J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Farook Razzak, Govt. Pleader, Mr. Swapan Banerjee and Mr. Rajendra Chaturvedi, for the Appellant; Arabinda Chatterjee and Ms. Kakali Dutta, for the Respondent**Final Decision:** Dismissed

Judgement

Ashim Kumar Banerjee, J.

The petitioner in the original application before the Tribunal, being the respondent herein, appeared in a regular recruitment process for the post of Assistant Signal Maintainer, Grade-III. He became successful in the process and was asked to appear before the Medical Board for appropriate medical test where he was unfortunately declared unfit, as he could not cross the medical eligibility criteria of B-1.

2. The petitioner made representations one after another, *inter alia*, asking for alternative employment where such medical fitness was not required. He referred to the earlier circulars of the Railways to the effect that alternative appointment could be given in such circumstance. The Railway, however, rejected the prayer on the strength of the Circular of 2009 that prevented the Authority to give alternative appointment in the given circumstance. The controversy, thus, came in a narrow campus before the Tribunal when the concerned candidate approached the Tribunal as to whether the Circular of 2009 would have retrospective effect or not. Pertinent to note, in case such Circular did not have retrospective effect, the applicant before the Tribunal would be entitled to the benefit of the earlier Circular claiming alternative appointment.

3. The Tribunal heard the parties and ultimately disposed of the matter vide judgment and order dated November 25, 2010, appearing at pages 91 - 94 of the petition. The relevant portion of the Tribunal is quoted as under:-

15. However, in the present case the applicant has stated that he was eligible to be considered for alternative appointment as per Railway circulars extant at the time he was applying for the post of Assistant Signal Maintainer, Grade-III and that the circulars of 2009 cannot have retrospective effect. We agree. Let the applicant represent to the authorities, respondent No. 3 within 15 days of the issue of our orders for alternative employment. On receipt of the same respondent No. 3 will consider the representation in the light of the instructions extant at the time that the applicant applied for the post in 2004. The respondents will come to a decision in the matter within a period of 3 months after the receipt of the representation from the applicant. Results should be communicated to the applicant by a speaking order.

4. We thus find that the Tribunal categorically held that the Circular could not have any retrospective effect. The Tribunal asked the Authority to consider his case in the light of the said decision. The Railway vide communication dated February 11, 2011, appearing at page 77-78 of the petition, rejected the prayer for alternative appointment on the ground that the Railway Board vide letter dated July 28, 2010 had regretted alternative appointment by observing "when the delegated powers ceased to exist with the issue of Board's instructions ibid, it is immaterial whether the case occurred before 25.5.2009 or after 25.5.2009. Therefore, in the above scenario, request for alternative appointment of medically unfit candidates should not be considered in any case."

5. Being aggrieved, the applicant approached the Tribunal in contempt.

6. The Tribunal, *prima facie*, held that the Authority violated the order of the Tribunal, however, given "last opportunity" by passing a fresh order of compliance.

7. Being aggrieved, the Railway has come up before us.

8. Learned Additional Solicitor General, appearing for the Railways, contends that the South Eastern Railway for whom he is appearing is guided by the instruction of the Railway Board. The Railway Board considered the issue and categorically rejected the applicant's claim for alternative appointment. Officers of the South Eastern Railway communicated such decision to the applicant. Hence, the Tribunal should not have held that the Authority committed contempt of Court.

9. Opposing the application, Mr. Arabinda Chatterjee, learned counsel, appearing for the applicant/respondent, submits that the order was clear on the issue of giving effect of the Circular of 2009. The Railway was thus not entitled to deny alternative appointment. Mr. Chatterjee has drawn our attention to the decision in the case of *T. Sudhakar Prasad Vs. Govt. of A.P & Ors.*, reported in (2001) SCC 516 to the effect

that once the Tribunal held the alleged contemnor guilty of the offence of violation of the Tribunal's order, the appeal would lie directly to the Apex Court and not to this Court.

10. Before we go into the controversy, let us first decide on the issue of maintainability. If we look to the order impugned herein particularly paragraphs 8, 9 and 10 thereof, we would find that the observation of the Tribunal was, *prima facie*, in nature and in any event the Tribunal granted liberty to purge the contempt and no final order was passed in the contempt proceeding. Hence, this application is maintainable.

11. We have carefully examined the parent order as discussed above. Rightly or wrongly, the Tribunal held that the Circular of 2009 would have prospective effect. It would be clear from the extract quoted (*supra*). Once, it was held as against the Railway, the Railway, without challenging the same, cannot turn around and observe contrary to the observation of the Tribunal. The Railway Board, in fact, did so. It is true that the South Eastern Railway Officers were bound by the instructions received from the Railway Board, at the same time it is their paramount duty to adhere to the order of the Court so long it subsists. The Tribunal directed the Railway to pass a speaking order, keeping in view, the observations made by the Tribunal in the said order. Once, the Tribunal categorically held that the Circular of 2009 would have prospective effect, the observation of the Railway Board quoted above would run contrary to such finding of the Tribunal.

12. The Tribunal once again gave the Railway an opportunity to comply with the order. We do not find any scope of interference.

13. WPCT 251 of 2011 thus fails and is hereby dismissed.

14. There would be no order as to costs.

15. We, however, extend the time to comply with the order for a period of three months from date.

16. Mr. Chatterjee appearing for the respondent assures this Court that his client would not insist upon the contempt proceeding to be proceeded with during the period stipulated above.

17. Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

18. I agree.