

UNION OF INDIA AND OTHERS

v.

MISS PRITILATA NANDA
(Civil Appeal No. 5646 of 2010)

JULY 16, 2010

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

SERVICE LAW

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959:

s.4 – Appointment – Vacancies to be notified to Employment Exchanges – A handicapped candidate registered in Employment Exchange, though selected, yet denied appointment stating that she did not get her name sponsored by the Employment Exchange – HELD: The condition embodied in the advertisement that the candidate should get his/her name sponsored by the employment exchange cannot be equated with a mandatory provision incorporated in a statute, the violation of which may visit the person concerned with penal consequence – Section 4 makes it clear that even though the employer is required to notify the vacancies to the employment exchanges, it is not obliged to recruit only those who are sponsored by the employment exchanges – The authorities concerned committed grave illegality by denying appointment to the claimant only on the ground that she did not get her name sponsored by an employment exchange – It was neither the pleaded case of the authorities nor any evidence has been produced by them to prove that the notification/advertisement was sent to all the employment exchanges including the special employment exchanges in the State of Orissa – By denying appointment to the claimant, despite her selection and placement in the merit list, the employer violated her right

- A *to equality in the matter of employment guaranteed under Article 16 of the Constitution – Constitution of India, 1950 – Article 16.*

SERVICE LAW

- B *Backwages and seniority – Appointment illegally denied to a handicapped candidate – High Court directing appointment of claimant from the date the candidate below her in merit list was appointed, with full back wages and seniority – Held: While the High Court was fully justified in*
- C *directing the employers to appoint the claimant from the date the persons lower in merit were appointed, but, the direction given for payment of full salary with retrospective effect cannot be approved – High Court should have directed the employers to notionally fix the pay of the claimant with effect*
- D *from the date the person placed below her in the merit list was appointed and give her all monetary benefits with effect from that date – The seniority of the claimant shall be fixed in accordance with her position in the merit list – If during the intervening period, any person junior to the claimant has been*
- E *promoted on the next higher post, then her candidature shall also be considered for promotion and on being found suitable, she shall be promoted with effect from the date any of her junior was promoted, with all consequential benefits – Since the claimant has been deprived of her rights for almost*
- F *21 years, the employers are directed to pay her cost of Rs.3,00,000/- – Costs.*

- Union of India v. N. Hargopal* **1987 (2) SCR 911=(1987) 3 SCC 308**; *Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao and others* **1996 (5) Suppl. SCR 73=(1996) 6 SCC 216**; *Susanta Kumar Kar v. Registrar (Judicial), Orissa High Court, Cuttack* **83(1997) CLT 335, relied on.**

- Jacob M. Puthuparambil and others v. Kerala Water*
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Authority and others 1990 (1) Suppl. SCR 562=(1991) 1 SCC 28, referred to. A

Case Law Reference:

1990 (1) Suppl. SCR 562 referred to	para 5	B
1996 (5) Suppl. SCR 73 relied on	para 10	
83(1997) CLT 335 relied on	para 10	
1987 (2) SCR 911 relied on	para 16	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5646 of 2010. C

From the Judgment & Order dated 05.08.2008 of the High Court of Orissa at Cuttack in Original Jurisdiction Case No. 9958 of 2001. D

Mohan Jain, D.K. Thakur, Rohini Mukherjee, Subhash Kaushik, A.K. Sharma, Sushma Suri for the Appellants

The following order of the Court was delivered

O R D E R E

1. Leave granted.

2. The only question which arises for consideration in this appeal filed by the Union of India and four functionaries of South Eastern Railway against the order of the Division Bench of Orissa High Court is whether respondent – Miss Pritilata Nanda, who is physically handicapped, could be denied appointment on Class III post despite her selection by the competent authority only on the ground that she did not get her name sponsored by an employment exchange. F G

3. Since the inception of mankind, many lacs have suffered from different types of physical handicaps (today about 600 million people suffer from such handicaps), but many of them H

- A overcame all kinds of handicaps and achieved distinctions in various fields. Sarah Bernhardt – French actress was disabled by a knee injury. Her leg was amputated in 1914 but she continued to work on stage until just before her death. Beethoven was deaf when he composed his 9th symphony.
- B Winston Churchill, Walt Disney, Thomas Edison, Albert Einstein, Alexander Graham Bell, Nelson Rockefeller, George Washington and many others had learning disability. Stevie Wonder who was blinded during his childhood became world famous pianist and singer. Braille, who was blind, had the distinction of inventing script for the blind. With the aid of Braille script, a large number of physically handicapped (blind) made tremendous achievement in life. Dr. Hellen Keller who was blind became an international figure because despite her handicap, she discovered the world through her finger tips. Her achievements of difficult goals and her loving kindness made her life an inspiration for countless people all over the world. Expressing his admiration for Dr. Hellen Keller, Eleanor Roosevelt wrote “in her life and happiness in life, Miss Keller has taught an unforgettable lesson to the rest of us who would not have had such difficulties to overcome. Ralph Barton Perry in his introduction to Dr. Keller’s book ‘The Story of My Life’ wrote “it is true that Hellen Keller is handicapped as indeed, who is not but that which distinguishes her is not her handicap but the extent to which she has overcome it and even profited by it. She calls for sympathy and understanding and not pity.
- E No one can know her or read her without feeling admiration and gratitude. Soordas and Milton, both of whom were blind made poetry great by their brilliance and richness of thoughts and language. Edison, a great scientist and inventor was deaf. Byron, a great poet of England and Taimoor Leng, Mongolian warrior were lame. Maharaja Ranjit Singh, a great warrior and administrator was handicapped in eye sight. Mr. Mukat Behari Lal, a renowned and eminent advocate of the country, who became blind at a young age acquired phenomenal memory and argued cases after cases with extraordinary brilliance. He also remained member of Parliament for two decades and did

not face any difficulty in discharging his role in that capacity. A

4. The framers of the Constitution recognized the necessity of providing assistance to the physically challenged by making it obligatory for the State, within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. (Article 41). B

5. In *Jacob M. Puthuparambil and others v. Kerala Water Authority and others* (1991) 1 SCC 28, this Court highlighted the importance of both, Part III and Part IV of the Constitution in the following words: C

“The Preamble of our Constitution obligates the State to secure to all its citizens social and economic justice, besides political justice. By the Forty-second Amendment, the Preamble of the Constitution was amended to say that ours will be a socialistic democracy. In furtherance of these promises certain fundamental rights were engrafted in Part III of the Constitution. The Constitution guarantees ‘equality’, abhors discrimination, prohibits and penalises forced labour in any form whatsoever and extends protection against exploitation of labour including child labour. After extending these guarantees, amongst others, the Constitution makers proceeded to chart out the course for the governance of the country in Part IV of the Constitution entitled ‘Directive Principles of State Policy’. These principles reflect the hopes and aspirations of the people. Although the provisions of this part are not enforceable by any court, the principles laid down therein are nevertheless fundamental in the governance of the country and the State is under an obligation to apply them in making laws. The principles laid down therein, therefore, define the objectives and goals which the State must endeavour to achieve over a period of time. Therefore, whenever the State is required to make laws it must do so consistently D
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A with these principles with a view to securing social and
economic freedom so essential for the establishment of
an egalitarian society. This part, therefore, mandates that
the State shall strive to promote the welfare of the people
by minimising the inequalities in income and eliminating
B inequalities in status, facilities and opportunities; by
directing its policy towards securing, amongst others, the
distribution of the material resources of the community to
subserve the common good; by so operating the economic
system as not to result in concentration of wealth; and by
C making effective provision for securing the right to work as
also to public assistance in cases of unemployment, albeit
within the limits of its economic capacities. There are
certain other provisions which enjoin on the State certain
duties, e.g. securing to all workers work, a living wage, just
and humane conditions of work, a decent standard of life,
D participation in management, etc. which are aimed at
improving the lot of the working classes. Thus the
Preamble promises socio-economic justice, the
fundamental rights confer certain justiciable socio-
economic rights and the Directive Principles fix the socio-
E economic goals which the State must strive to attain. These
three together constitute the core and conscience of the
Constitution.”

6. In last about six decades, the Parliament and State
F Legislatures have enacted several laws for giving effect to the
provisions contained in Part IV of the Constitution but
implementation of these legislations has been extremely tardy
and intended beneficiaries of such legislations have to struggle
hard and, at times, seek intervention of the Court for getting
G their dues.

7. In one of her lectures, Dr. Hellen Keller said: Science
may have found a cure for most evils; but it has found no remedy
for the worst of them all – the apathy of human beings. This
H appeal is one of many cases illustrative of lack of sensitivity

on the part of those entrusted with the task of doing justice on the administrative side which is sine qua non for good governance. The respondent, who suffers from paralysis of lower limbs, has become a victim of constitutionally flawed approach adopted by the officers of South Eastern Railway and has been deprived of her legitimate right to be appointed on a Class III post. The respondent appears to have become so frustrated that even though she succeeded in convincing the High Court to issue a direction to the competent authority to appoint her on a Class III post with retrospective effect, she has not thought it proper to appear and contest this appeal filed against order dated 5.8.2008 passed by the Division Bench of Orissa High Court in O.J.C. No.9958/2001.

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8. In response to notification / advertisement dated 31.1.1987 issued by the office of Railway Divisional Manager, South Eastern Railway, Khurda Road, the respondent applied for appointment as Class III employee. At the relevant time, she possessed the qualification of B.A. (Economics with Hons.) and was registered with Employment Exchange, Pun with registration No.CW/750/87 (Code No.XOI/30).

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9. The competent authority entertained the respondent's application and allowed her to appear in the written test held on 2.7.1989. On being declared successful in the written test, the respondent was called for viva voce test. She was finally selected and her name was placed at serial No. 11 in the merit list. Notwithstanding this, she was not appointed against one of the advertised posts and those placed at Sl. Nos.12 and 13 were offered appointment. The respondent represented her grievance before the higher authorities of South Eastern Railway, but without success. She then filed O.A. No. 112 of 1996 in Cuttack Bench of the Central Administrative Tribunal (for short, 'the Tribunal'). The Tribunal passed an interim order and made it clear that any future appointment of physically handicapped candidate will be subject to the result of the O.A. During the pendency of the case, the respondent's father was

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A informed by General Manager, South Eastern Railway, Calcutta that his daughter's case would be considered only if the O.A. is withdrawn. Thereupon, the respondent withdrew O.A. No. 112 of 1996. However, her candidature was not considered necessitating filing of O.A. No. 198 of 1997 in which she prayed for issue of a direction to the concerned authorities of South Eastern Railway to appoint her on a class III post. In the counter filed by the appellants herein, it was pleaded that even though the respondent had been selected, she was not offered appointment because her candidature had not been sponsored by any special employment exchange or any ordinary employment exchange.

10. By an order dated 3.5.2001, the Tribunal dismissed O.A. No.198/1997 by observing that respondent's candidature was not sponsored by any employment exchange. The Tribunal distinguished the judgments of this Court in *Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao and others* (1996) 6 SCC 216 and of the Orissa High Court in *Susanta Kumar Kar v. Registrar (Judicial), Orissa High Court, Cuttack*, 83(1997) CLT 335 by making the following observations:

"In support of his contention the learned counsel for the petitioner has relied on the decision of the Hon'ble High Court of Orissa in the case of *Susanta Kumar Kar vs. Registrar (Judicial), Orissa High Court, Cuttack*, 83(1997) CLT 335. In that case, going by the decision of the Hon'ble Supreme Court in the case of *Excise Superintendent, Malkapatnam, Krishna District, Andhra Pradesh vs. KBN Viweshwara Rao and others*, 19965 (7) SCC 201, the Hon'ble High Court have held that for the post of Junior Assistant in the High Court of Orissa, compulsory sponsoring arrangement by employment exchange, if insisted upon, affects interests of those candidates who have not been able to register their names or are awaiting to be so registered, and therefore, the opposite parties

were directed to consider the cases of those candidates who have applied directly to the High Court. IN the instant case, the respondents in their counter have stated that applications were invited in 1987 and written test held on 2.7.1989 and viva voce was held on 28.8.1989 and 6.11.1989. Thus, the selection process in this was undertaken much before the decision of the Hon'ble Supreme Court and therefore the law as laid down by the Hon'ble Supreme Court in the above case is not applicable to the present case. We accept the above stand of the respondents.”

11. The respondent challenged the aforesaid order in O.J.C. No.9958/2001. The Division Bench of the High Court referred to the pleadings of the parties and observed:

“In view of the aforesaid stand taken by the Railway authority, the averments made by the petitioner remain uncontroverted and are affirmed. The recruitment process started in the year 1987 through an advertisement and thereafter, written test and viva voce test were held in the year 1989 and the select list of candidates was published on 14.1.1992. It is indeed necessary to note the very sorry state of affairs of the manner in which the authorities concerned are dealing with the life and livelihood of common citizens. It needs to be reiterated that whereas physical handicapped candidates are required to be approached with a more compassionate manner, the authorities seem to have acted in a callous and heartless manner.

Once the petitioner's application was accepted by the authorities and she was allowed to appear in the written and viva voce tests and after name find mention at serial No.11 of the merit list, it was no longer open to the authorities concerned to raise any question relating to petitioner's application for the purpose of dis-entitling her from the benefit of issuing her with an appointment letter.

A We consider it to be a gross abuse of the statutory power.
In the case at hand, the plight of the petitioner is writ large
in the averments contained in the writ application and
accompanying documents and unfortunately, the utter
callous attitude of the authorities are writ large in the
B counter affidavit filed on behalf of Opp. Party No.5. It is
indeed unfortunate that a physically handicapped female
candidate who had applied in the year 1989 and more
than 20 years have lapsed by now, has been denied
appointment by the Railway authorities which is none else,
C but the Union of India, which is supposed to be an ideal
employer.”

12. The Division Bench then referred to the two judgments
on which reliance was placed by the respondent and observed:

D “It is reiterated herein that once the Court has held that
compulsory sponsoring arrangement by Employment
Exchange, if insisted upon, affects interest of those
candidates who have not been able to register their names
or are awaiting to be so registered, the same principle is
E final and binding on all courts and Judicial Tribunals and
would apply fully to any pending case. We are of the view
that the Tribunal, in the present case has approached the
subject in pedantic manner by treating the aforesaid
judgment has only prospective operation even though the
F challenge was pending before it even after the judgments
were pronounced both by the Hon’ble Supreme Court and
the High Court. It is averred by the petitioner and not
denied by the Opp. Parties that the petitioner had
registered her name in the Employment Exchange, Puri
and had been granted a Registration number. Apart from
G it, all necessary certificates in support of her being a
handicapped candidate has been appended to her
application along with her certificates of educational
qualification.

H We are of the view that the petitioner satisfied all

requirements of the advertisement inviting applications by the Railways and after accepting her application and ultimately preparing a select list which contained her name, not issuing appointment letter to her amounts to travesty of justice.”

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13. The Division Bench finally allowed the writ petition in the following terms:

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“In view of the discussions made herein above, the writ application is allowed and the order impugned under Annexure-1 is quashed and we direct Opp. Parties 4 and 5 to issue the petitioner with necessary letter of appointment and such appointment shall be given effect to from the date on which her juniors have been given appointment. We further direct that the petitioner shall also be entitled to full back wages and seniority. The letter of appointment be issued to the petitioner within a period of 30 (thirty) days from the date of this judgment and all arrears be computed and paid to the petitioner within a period of six months from today.”

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14. Shri Mohan Jain, learned Additional Solicitor General referred to the advertisement issued by the office of Divisional Railway Manager to show that the names of the candidates were required to be sponsored by any special or ordinary employment exchange and argued that the appellants rightly refused to appoint the respondent because her name had not been sponsored by the employment exchange. Learned Additional Solicitor General further argued that even though the application of the respondent was entertained without insisting on sponsoring her name by the employment exchange and her name was included in the merit list, she did not acquire a to be appointed against the advertised post and the High Court committed serious error by ordaining her appointment with retrospective effect along with monetary benefits.

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15. In our opinion, there is no merit in the arguments of the

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A learned Additional Solicitor General. In the first place, we consider it necessary to observe that the condition embodied in the advertisement that the candidate should get his/her name sponsored by any special employment exchange or any ordinary employment exchange cannot be equated with a

B mandatory provision incorporated in a statute, the violation of which may visit the concerned person with penal consequence. The requirement of notifying the vacancies to the employment exchange is embodied in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (for short, 'the

C 1959 Act'), but there is nothing in the Act which obligates the employer to appoint only those who are sponsored by the employment exchange. Section 4 of the 1959 Act, which provides for notification of vacancies to employment exchanges reads as under:

D "4(1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be

E prescribed.

(2) The appropriate government may, by notification in the Official Gazette, require that from such date as may be specified in the notification, the employer in every

F establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed, and the employer shall thereupon comply with such requisition.

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(3) The manner in which the vacancies referred to in sub-section (1) or sub-section (2) shall be notified of the employment exchanges and the particulars of employments in which such vacancies have occurred or are about to

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occur shall be such as may be prescribed.

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(4) Nothing in sub-sections (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchanges to fill any vacancy merely because that vacancy has been notified under any of those sub-sections."

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16. A reading of the plain language of Section 4 makes it clear that even though the employer is required to notify the vacancies to the employment exchanges, it is not obliged to recruit only those who are sponsored by the employment exchanges. In *Union of India v. N. Hargopal* (1987) 3 SCC 308, this Court examined the scheme of the 1959 Act and observed:

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"It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the Employment Exchanges. Far from it, Section 4(4) of the Act, on the other hand, makes it explicitly clear that the employer is under no obligation to recruit any person through the Employment Exchanges to fill in a vacancy merely because that vacancy has been notified under Section 4(1) or Section 4(2). In the face of Section 4(4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the vacancies to the Employment Exchanges."

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"It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and to provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. *We are, therefore, firmly of the view that the Act does not oblige any*

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A *employer to employ those persons only who have been sponsored by the Employment Exchanges."*

(emphasis supplied)

B 17. In *K.B.N. Visweshwara Rao's* case, a three-Judge Bench of this Court considered a similar question, referred to an earlier judgment in *Union of India v. N. Hargopal* (supra) and observed:

C "It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

H 18. By applying the ratio of the above noted judgments to the case in hand, we hold that the concerned authorities of the South Eastern Railway committed grave illegality by denying

appointment to the respondent only on the ground that she did not get her name sponsored by an employment exchange. A

19. The issue deserves to be considered from another angle. It was neither the pleaded case of the appellants before the Tribunal and the High Court nor any evidence was produced by them to prove that notification/advertisement dated 31.1.1987 was sent to all the employment exchanges including the special employment exchanges in the State of Orissa. Before this Court also, no document has been produced to show that the advertisement was circulated to the employment exchanges in the State. In this backdrop, it is not possible to approve the stance of the appellants that the respondent was not appointed because she did not get her candidature sponsored by an employment exchange. B C

20. We also agree with the High Court that once the candidature of the respondent was accepted by the concerned authorities and she was allowed to participate in the process of selection i.e., written test and viva voce, it was not open to them to turn around and question her entitlement to be considered for appointment as per her placement in the merit list on the specious ground that her name had not been sponsored by the employment exchange. D E

21. In our considered view, by denying appointment to the respondent despite her selection and placement in the merit list, the appellants violated her right to equality in the matter of employment guaranteed under Article 16 of the Constitution. F

22. However, there is a small aberration in the operative part of the impugned order. While the High Court was fully justified in directing the appellants to appoint the respondent from the date persons lower in merit were appointed, but it is not possible to confirm the direction given for payment of full salary with retrospective effect. In our view, the High Court should have directed the appellants to notionally fix the pay of the respondent with effect from the date person placed at Sl. H

A No.12 at the merit list was appointed and give her all monetary benefits with effect from that date.

23. In the result, the appeal is dismissed. However, the operative part of the impugned order is modified in the following terms:

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(1) The concerned competent authority of the South Eastern Railway shall, within a period of two weeks from today, issue order appointing the respondent on a Class III post. The appointment of the respondent shall be made effective from the date person placed at Sl. Nos.12 in the merit list was appointed. The pay of the respondent shall be notionally fixed with effect from that date and she shall be given actual monetary benefits with effect from 5.9.2008 i.e., the date specified in the order passed by the High Court.

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(2) The pay of the respondent shall also be fixed in the revised pay scales introduced from time to time and she be paid arrears within a period of four months.

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(3) The seniority of the respondent among Class III employees shall be fixed by placing her below the person who was placed at Sl. No.10 in the merit list.

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(4) If during the intervening period, any person junior to the respondent has been promoted on the next higher post, then her candidature shall also be considered for promotion and on being found suitable, she shall be promoted with effect from the date any of her junior was promoted and she be given all consequential benefits.

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(5) The General Manager, South Eastern Railway is directed to ensure that the respondent is not victimised by being posted in a remote area. A

(6) Since the respondent has been deprived of her rights for almost 21 years, we direct the appellants to pay her cost of Rs.3,00,000/-. The amount of cost shall be paid within 2 months from today. B

24. The Divisional Railway Manager, South Eastern Railway, Khurda Road shall send compliance report to this Court on or before 22nd November, 2010. The Registry shall bring the report to the notice of the Court by listing the case on judicial side. C

25. Copies of this order be sent to General Manager, South Eastern Railway, Garden Reach, Calcutta, Divisional Railway Manager (P), Khurda Road, Jatni, District Khurda and respondent, Miss Pritilata Nanda, D/o Mr. Nityananda Nanda, Nanda Nivas-II, Dutta Tola, Post Office/District – Puri, Orissa. D

R.P.

Matter Adjourned. E