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**Central Administrative Tribunal
Principal Bench**

OA No.2420/2004

New Delhi this the 2nd day of April, 2007.

Hon'ble Mr. Shanker Raju, Member (J)
Hon'ble Mrs. Neena Ranjan, Member (A)

O.N. Mathur,
S/o Shri J.N. Mathur,
R/o A-141, Priyadarshini Vihar,
I.P. Extension,
Delhi-110 092.

-Applicant

(By Advocate Shri S.K. Gupta)

-Versus-

1. Union of India,
through Secretary,
Ministry of Environment & Forests,
Govt. of India,
Paryavaran Bhawan,
C.G.O. Complex,
Lodhi Road,
New Delhi-110 003.

2. Central Pollution Control Board,
through its Member Secretary,
Privesh Bhawan,
East Arjun Nagar,
Shahdara,
Delhi-110 032.

-Respondents

(By Advocates Shri T.C. Gupta and Shri S.M. Arif)

1. To be referred to the Reporters or not? Yes

2. To be circulated to other Benches of the Tribunal or not? Yes

S. Raju
(Shanker Raju)
Member (J)

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Corrected vide order
dated 28.5.07 in
MA 826/2007.
29/5/07

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ORDER**Mr. Shanker Raju, Hon'ble Member (J):**

Applicant has sought for the following reliefs:

- "(i) to quash and set aside the action of the respondents in adopting the composite method while filling up the post of Finance & Accounts Officer; and consequently quash and set aside the column No.10 and 11 of the Recruitment Rules for the post of Finance & Accounts Officer [Annexure A-3];
- (ii) to direct the respondents to adopt the promotional method as first mode while filling up the vacancy of Finance & Accounts Officer and consider the case of the applicant for promotion in accordance with either the earlier DPC or by way of fresh DPC and if the applicant is fit or found to be fit, he may be promoted with all consequential benefits from the date of the DPC;
- (iii) to pass such other and further order which this Hon'ble Tribunal may deem fit and proper."

2. An interim order passed on 6.10.2004 maintained *status quo* as to continuance of applicant as Finance and Account Officer (F&AO).

3. A brief factual matrix transpires that applicant was appointed as Junior Accounts Officer (JAO) on 19.8.1980. He was further promoted as ~~E~~^J&AO on 1.5.1983. The post was later on upgraded w.e.f. 2.1.1987 and applicant was further promoted as F&AO on ad hoc basis. DPC for regularization convened from time to time ultimately recommended the case of applicant for regular promotion as F&AO on 20.7.2001. However, a circular issued on 21.7.2003, whereby the post of F&AO was to be filled through transfer on deputation basis and an advertisement was issued to this effect on 29.7.2003. The aforesaid was challenged in OA-2442/03. An order passed on by the Tribunal on 29.7.2004 rejected the request of applicant for regularization and recruitment to the post, taking cognizance of the statutory rules held that recruitment rules do not prescribe first mode of induction as promotion, failing which transfer on deputation. On *suo motu* reliance on DoP&T OM dated 3.10.1989, according to which where the field of promotion in the feeder category is adequate, promotion is to be adopted as first method, holding that the position is in consonance with the OM, OA was dismissed with an

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observation that applicant would be considered along with other candidates.

4. The aforesaid was challenged before the High Court of Delhi in CWP No.14571/2004, wherein an order passed on 3.9.2004, disposed of the matter with the following directions:

"We find no difficulty in granting petitioner's prayer to that extent. Accordingly, this petition is dismissed as withdrawn with liberty to petitioner to file a fresh O.A. limited to issue whether provisions of O.M. dated 3.10.1989 envisaged filling up of more than one post by separately earmarking its mode either by promotion or by transfer on deputation.

Meanwhile, it is also directed that petitioner's present status as on today shall be maintained for six weeks to enable him to approach the Tribunal and till Tribunal considers his plea and also any other plea for ancillary relief."

5. CMP No.11914/2004 moved for modification of order dated 3.9.2004, was disposed of on 22.7.2005, without modifying the directions.

6. Learned counsel of applicant, at the outset, states that the guidelines issued by the DoP&T on 3.10.1989 pertain to prescription of transfer on deputation as a method of

recruitment and procedure to be followed, *inter alia*, in paragraph 7.1, observed as under:

"7.1 In a situation where the field of promotion consists of only one post, the method of recruitment by transfer on deputation (including short-term contract)/promotion is prescribed so that the departmental officer is considered along with outsiders. If the departmental officer is selected for appointment to the post, it is treated as having been filled by promotion. Otherwise, the post is filled by deputation/contract for the prescribed period. In other cases, where the field of promotion is adequate, i.e., there are adequate number of sanctioned posts in the feeder grade, promotion is provided as the first method or certain percentage of vacancies is earmarked for promotion and certain percentage for appointment by transfer on deputation or direct recruitment. In such cases, departmental officers in the feeder grade are considered for promotion when they are fully qualified for discharging the responsibilities of the higher post and satisfy the eligibility criteria. If the departmental officer is not considered eligible or fit for promotion, it will not be proper to consider him again for appointment by transfer on deputation. Deputation is actually an appointment outside the normal line. It has, therefore, been decided that the departmental officer in the feeder category who, according to the provisions in the notified recruitment rules, are in direct line of promotion should not be considered for appointment by transfer on deputation. Similarly the deputationists shall not be eligible for being considered for appointment by promotion."

7. Having regard to the above, learned counsel would contend that as per DoP&T OM if the feeder category is of adequate strength and in the present case there are three posts of Accounts Officer then in the matter of operation of recruitment rules despite the same prefer deputation, failing which by promotion, as the method of filling up the posts of F&AO, yet the method of promotion has to be adopted first and these rules which are not in consonance with the guidelines, which are mandatory, the recruitment rules are not in accordance with law. Reliance has been placed on a decision of the Apex Court in **Jagmal Singh v. M. Ramayya & others**, 1977 (1) SLR 423 as well as **A.K. Subraman and others v. Union of India and others**, 1975 (1) SLR 380.

8. Learned counsel would further contend that as the DoP&T OM of 1989 was not considered by the Tribunal the liberty given to applicant though earlier in the context of two posts, yet when an application has been made to modify the directions when not modified, the OA is open for admissibility of DoP&T OM of 1989 to the present case.

9. In the above backdrop, learned counsel would also contend that recently a move has been made to hold a DPC meeting for promotion to the posts of ^{F&AO ↓}AO and in such an event deputation would not be resorted to.

10. On the other hand, learned counsel appearing for respondent No.1 took a preliminary objection as to *res judicata* by contending that once OM of 1989 has been considered, applicant has misrepresented before the High Court, apprising that two posts of ^{F&AO ↓}AO are available, whereas it is a lone post.

11. Learned counsel would further contend that once this issue has been rested in OA-2442/2003, raising the same issue, which has attained finality, would bar this OA on the principle of *res judicata*.

12. Learned counsel appearing for respondent No.2 has also vehemently opposed the contentions and stated that as per the statutory rules adoption of criteria is in consonance with the rules and the DoP&T guidelines would not override the effect of the statutory rules. It is also stated that on recruitment

held earlier one of the incumbents was taken on deputation and on his repatriation one vacancy has arisen, which is yet to be filled up.

13. We have carefully considered the rival contentions of the parties and perused the material on record.

14. Insofar as making of a false statement before the High Court is concerned, we find that though the petitioner in CWP has made a statement that there are two posts of ^{F&AO, ↓} AO, yet by filing CMP when modification has been sought only then it has been rectified and the High Court has taken cognizance of the same by not modifying the order, clearly shows that there is no misrepresentation by applicant.

15. Insofar as *res judicata* is concerned, the principle would have application when an issue has been finally settled between the parties and raised in another proceeding, would be barred by *res judicata*. From the perusal of the order of the Tribunal we find that OM dated 3.10.1989, which provides adequate number of sanctions posts if exist in the feeder category in a composite method of filling up posts, avenue of

promotion is to be adopted first. However, there is a finding as to the methodology adopted by the respondents in consonance with the OM, yet this was not so, as instead of following the first mode of promotion, transfer on deputation has been adopted by the respondents. The High Court of Delhi in this context gave liberty to applicant to raise the issue of OM dated 3.10.1989, envisaging filling up more than one post by separately earmarking this mode by transfer on deputation and once the fact of only one post in the category brought to their notice, by not amending the order and modifying it the liberty accorded to applicant to raise the grievance pertaining to OM dated 3.10.1989 in a separate proceeding would give him a fresh lease to assail the order and *res judicata* would have no application.

16. On merits, what we find is that though the statutory rules for the post of AO provide transfer on deputation/promotion, yet the departmental Accounts Officer when selected the post would be treated to have been filled by promotion. In the light of the DoP&T OM of 3.10.1989, which envisages, as guidelines, which are supplementary in enacting the statutory

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rules to this effect in a composite method of recruitment that if a sanctioned strength of a feeder category is large, as in the present case, cadre of Accounts Officer consists of three posts, in such view of the matter, the mode though on composite method envisaged in the statutory rules, yet the mode of promotion has to be adopted first, failing which it would be transfer on deputation. The aforesaid has an object sought to be achieved, as a trite law developed, i.e., when a right of consideration for promotion is a fundamental right to create avenue for promotion and to avoid stagnation, if for three posts of AO there is no promotional avenue, then taking persons from outside when the competent persons are available in the establishment would be highly illogical. In such view of the matter, the recruitment rules though challenged here need not be amended but the guidelines which are supplementing the rules, the mode of filling up the posts should be altered in consonance with the guidelines.

17. In the light of the above, as we find that deputationist has been repatriated to his parent department and the post is lying vacant, this OA is disposed of with a direction to

respondents to adopt the methodology, as envisaged under OM dated 3.10.1989, to fill up this posts and to adopt the promotional method and in such view of the matter applicant shall also be considered for promotion as ^{FLAO}PAO, within a period of two months from the date of receipt of a copy of this order.

No costs.

Neena Ranjan
(Neena Ranjan)
Member (A)

S. Raju
(Shanker Raju)
Member (J)

'San.'