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CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH: CUTTACK

ORIGINAL APPLICATION NO: 135 OF 1989

Date of decision: 27.6.91

Anadi Charan Behera : Applicant

Versus

Union of India and others : Respondents

For the applicant : M/s.A.K.Bose, P.K.Giri,  
Advocate.

For the Respondents : Mr. Tahali Dalai, Addl.  
Standing Counsel (Central)

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CORAM:

THE HON'BLE MR. B.R. PATEL, VICE CHAIRMAN

A N D

THE HON'BLE MR. N. SENGUPTA, MEMBER (JUDICIAL)

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1. Whether re orders of local papers may be permitted to see the judgment? Yes.
  2. To be referred to the reportess or not? *yes*
  3. Whether Their Lordships wish to see the fair copy of the judgment? Yes.

(12)

JUDGMENT

N.SENGUPTA, MEMBER (J) The applicant's grievance relates to the promotion to the rank of Statistical Assistant in the Directorate of Census Operations, Orissa and to declare him senior to Respondent Nos. 2 to 28.

2. Before stating the facts averred by the applicant relating to the reliefs that he has claimed it is worthwhile to give an indication of the back ground in which the present application has been made. In the Census Directorate there are posts of Computers and Statistical Assistant, for appointment by promotion as Statistical Assistant, the feeder grade is computer. Census Operations are carried out through out India and there is a Central Office i.e. that of Director General of Census. In that office also posts of Statistical Assistants are there. The posts of Statistical Assistant in the office of D.G. were under the rules non-selection but the posts of Statistical Assistants under the Regional Director were treated as selection posts. In O.J.C. 444 of 1983 in the High Court of Orissa, this differential treatment of the Statistical Assistant in the offices of the Director General of Census Operations and the State Directorate of Census was questioned and it was contended in that case that such differential treatment violated Article 14 and 16 of the Constitution of India. The said writ stood transferred to this Tribunal and was numbered as T.A. 301 of 1986 which was disposed of on 30.4.1987. Prior to the filing of the OJC some promotions from the rank of computer to that of Statistical Assistant were made on the basis that the posts of Statistical Assistant were selection posts. In that OJC the propriety of those promotions

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was also questioned. This Tribunal in T.A. 301 of 1986 held that the Recruitment Rules relating to Group 'C' and 'D' posts prior to amendment <sup>was</sup> ~~was~~ discriminatory and as such struck down those provisions. This Tribunal in the operative part of the judgment delivered in that T.A. 301 of 1986 gave following direction: "We would direct that the Director of Census Operations and Ex-officio Superintendent of Census Operations, Orissa, i.e. Respondent No. 3 convene a review DPC meeting to consider afresh the cases of the petitioners for promotion to the posts of Statistical Assistants yearwise according to the instructions of the Department of Personnel and Administrative Reforms vide No.22011/3/86-Estt.(D) dated 24.12.1980 with effect from the date, the vacancies have arisen and grant them whatever service benefits are admissible under the Rules". OM No.22011/3/76-Estt(D) dated 24.12.1980 relates to selection posts as in the direction given in TA 301 of 1986 a reference was made to that OM, some doubt arose and for removal of the doubt, applications for review RAs 9 to 26 of 1986 were filed and they were disposed of by a common judgment delivered on 21.9.1988 directing to expunge 'according to the instructions of the Department of Personnel and Administrative Reforms, vide their letter no.22011/3/76-Estt(D) dated 24.12.1980'.

3. The applicant's case is that in response to an advertisement calling for application for the posts of Statistical Assistant he made an application for that post and was asked to appear at the test for the said post but

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however, respondent no.1 gave an appointment in the cadre of computer though he was made to do the work of a Statistical Assistant. After the judgment in T.A. 301 of 1986 and in RAs 9 to 26 of 1986, meeting of review D.P.C. was held and by the order dated 3.2.1989, respondents, 2 to 8, his juniors, were given regular promotion to the rank of Statistical Assistant against the vacancies of the year 1980 and respondents 9 to 28 against the vacancies for the year 1981. Prior to <sup>the</sup> his order dated 3.2.1989 he (the applicant) had been officiating as Statistical Assistant and he was allowed to continue as such Statistical Assistant till 28.2.1989. In May, 1980 he was given adhoc promotion to the rank of Statistical Assistant, but he was reverted to the feeder grade of computer. After this order of reversion passed on 8th April, 1981, he made a representation on 27.4.1981 vide Annexure-4 (at page 50 of his file). Subsequently there was a meeting of the DPC in June, 1982 and he was recommended for promotion as Statistical Assistant. On 29.9.1982, an order promoting him as Statistical Assistant was passed and since then he had been continuing as Statistical Assistant till the impugned orders dated 3.2.1989 and 6.2.1989 were passed. The applicant has prayed for quashing the promotion of respondents 2 to 28 to the rank of Statistical Assistant and to promote him (the applicant) retrospectively with effect from 1980 when vacancy occurred and to give him all incidental service benefits including seniority. He has also added that he should be treated as continuing to work as Statistical Assistant from 23.5.1970, the day when he first joined

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service.

4. The respondent no. 1 in its counter has maintained that after this Tribunal passed judgment in TA 301 of 1986 and the Review applications Nos. 9 and 26 of 1988, meetings of the DPC were held on 6.1.1989 and 31.1.1989. In those meetings the DPC, considering the cases of the eligible candidates, empaneled them for promotion against the vacancies of 1980, and 1981. During the years 1982 to 1987 there was no vacancy. The case of the applicant was not recommended so he could not be promoted against the vacancies that occurred in 1980 and 1981. The applicant was continuing on adhoc basis as a Statistical Assistant and his case was to be considered in respect of the vacancies that arose in 1988. With regard to the case of the applicant relating to he being called to appear at the test for appointment of persons as Statistical Assistant respondent No.1's case is that no doubt he was asked to appear at such a test but in view of his performance in that test, he was asked to join as a computer and in fact he joined in May, 1970 as a Computer. On 6.5.1980 he was given adhoc promotion but he was reverted on 18th February, 1981 due to unsatisfactory work. Though again on the earlier recommendation of a DPC the applicant was given promotion but the review DPC after considering the service records of the applicant and taking into account the period of reversion of the applicant to the post of Computer, did not recommend his case for promotion to the rank of Statistical Assistant against the vacancies of the years 1980 and 1981. Respondent no. 1 has also taken the plea of resjudicata averring that the applicant was party to the

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earlier application T.A. 301 of 1986, he not having challenged his reversion in that application, cannot now question that reversion or his non-promotion of regular basis to the rank of Statistical Assistant against the vacancies of 1980 and 1981.

5. We have heard Mr. A.K. Bose, the learned counsel for the applicant and Mr. Tahali Dalai the learned Addl. Standing Counsel (Central) for the respondents and there has been really no appearance on behalf of other respondents. As would be evident from the statement of cases of the parties, the questions that really arise for consideration are; whether any of the juniors to the applicant in the rank of computer was promoted, whether by such promotion the applicant has been discriminated against ~~and~~ whether the applicant can be treated to have been working as a Statistical Assistant from May, 1980.

6. The last of the questions may be taken up first. No doubt the Director of Census Operations, Orissa requested the Employment Exchanges for sponsoring names of candidates for the post of Statistical Assistant and held written and viva-voce test on 30.4.1970 and 4.5.1970 and the Employment Exchange, Cuttack having sponsored the name of the applicant, he was informed to appear at the test vide Annexure-1 dated 16.4.1970, but the offer that was made to the applicant was to join as Computer vide Annexure\_R/3. The applicant accepted that offer made on 13, May, 1970 joined duty as a Computer on 22.5.1970. There is no allegation of any fraud having been played on the applicant and in fact as can easily be found from the submissions made by the learned Counsel

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for the parties, in the previous application i.e. TA 301 of 1986, to which the applicant was a party, this question was not raised. Apart from these facts, since the grievance, if at all it be so called, arose in May, 1970 no relief can be granted it being barred under Section 21 of the Administrative Tribunal Act, 1985.

7. From what has been stated in this judgment as background of the case, it can be found that the post of a Statistical Assistant in the office of the Director of Census Operations, Orissa is a non-selection post. Mr. Dalai, learned Standing Counsel (Central) for the respondent no. 1 has very vehemently urged that no person has a right to be promoted, all that he is entitled to is a consideration for promotion and ~~wh~~ DPC which met on 6.1.1989 and 31.1.1989 on a consideration of the service records did not find the applicant suitable for promotion. The implication of non-selection post is that there would not be any inter-personal comparison amongst the eligible candidates but the promotion would be according to seniority subject to elimination of the unfit. As on behalf of Respondent No.1 it has been urged that the DPC found the applicant unfit for promotion, we thought it fit to peruse the ACRs of the applicant to see if the applicant could be found to be unfit for being promoted. We would add that we are conscious of the fact that fitness or otherwise of a person to be promoted is a matter coming within the exclusive jurisdiction of the administrative authority of the office in which the person works. We thought of referring to the ACRs of the

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applicant, to see whether there was any violation of any accepted principles of natural justice. Mr. Dalai has argued that there were reports against the applicant while he was working as a Statistical Assistant in the office of the Deputy Director of Census Operations, Regional Tabulation Office, Bhubaneswar and in consequence of those reports dated 23rd March, 1981 and 20th May, 1981 (Vide Annexures-R/7 and R/8), he was reverted to the feeder post of Computer on 18.4.1981 vide Annexure-R/6. There is nothing on record to show that in fact the reports dated 23.3.1981 and 20.5.1981 were brought to the notice of the applicant and Annexure-R/6 makes no mention of these two reports. Mr. Dalai has further contended that the DPC which met on 6.1.1989 and 31.1.1989 thoroughly considered the service records of the applicant, therefore, it is not be permissible on the part of this Tribunal to reach a different conclusion. The learned Counsel for the respondent no. 1 on our request has made available the minutes of the DPC meeting held on 6.2.1981 and 28.6.1982 and the one held in January, 1989 and also the file of ACRs of the applicant. Since the meeting dated 6.2.1981 and 28.6.1982 were held prior to the judgment of this Tribunal in TA 301 of 1986, it is not very necessary to refer to the minutes of those meeting of the DPC. We would be referring to the minutes of the meeting of the DPC held on 6.1.1989 and 31.1.1989. The reasons for not recommending the case of the applicant for promotion were stated and they may be quoted :

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"2. SHRI A.C. BEHERA: There are adverse remarks like 'slow worker' not suitable for survey work and routine type of work in 1980 which was being agreed upon by the Reviewing Officer



and remark as "no yet fit". On the remarks of the capable, insincere and inefficient hand by the Controlling Officer on the observation of his work and deeds during 1980 he was reverted back by the appointing authority in the year 1981 and promoted to the junior incumbent to which Shri Behera accepted his faults in toto and not represented too. Adverse remarks in his CR was also noticed consecutive year for 1980 and 1981 also. Hence the DPC considering the merit of the case and same remarks noted consistently by two different officers. Don't recommend his case for promotion".

From what has been quoted above, it would be apparent that the DPC proceeded on the assumption that the applicant did not make any representation against the observations on his work and accepted his fault. This assumption was wrong, in fact after his reversion in the year 1981, he made a representation for promoting him to the post of Statistical Assistant after receipt of the order of reversion passed in April, 1981 and this representation was made within ten days from the passing of the order of reversion. When a recommendation or a non-recommendation is based on a wrong assumption, without doubt it should be deemed to be vitiated. On behalf of respondent No.1 reference has been made to ACRs for the years 1980 and 1981 and it has been contended that in view of the remarks that the applicant was not suitable for survey work and was a routine type of worker (ACR of 1980) and average worker not yet fit and was slow in disposal of work (ACR of 1981) the applicant could not be promoted to the next higher rank of Statistical Assistant. Admittedly for a major part of the year 1980 the applicant was working as a Statistical Asstt. and for a part of the year 1981 he was also working as a Statistical Assistant. When the ACR of 1981 was written

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(8.2.1982), the applicant was working as a Statistical Assistant therefore, the remarks for these two years have really no practical bearing on the question whether the applicant could be promoted as Statistical Assistant. In this connection it is also to be taken note of that in the ACRs for the years from 75 to 79, the remark was that the applicant was fit to be promoted.

8. The question that arises for consideration is whether could the applicant be refused promotion for some adverse entries made in his ACR for the years 1980-81. It is not the case of ~~the~~ <sup>he</sup> respondent no.1 that any communication of any adverse remark was made to the applicant. In Gurudayal Singh Vs. State of Punjab reported in AIR 1979 SC 1622 the effect of noncommunication of adverse remarks came up for consideration and Their Lordship's of Hon'ble SC observed :

"The Principle is well settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to <sup>improve</sup> ~~promote~~ his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by by the person concerned, whether the adverse report is justified ...."

These observations of the Hon'ble SC are sufficient to show that no promotion can be withheld for an adverse remark if such adverse remarks was not communicated to the person concerned. A matter similar to the present case came up before the Karnataka High Court in the case of

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H.Veerabhadrappe Vs. Deputy Commissioner, Raichur reported in 1980 (2) SLR 462 that was a case relating to awarding of selection grade time of scale of pay. In that decision also a reference was made to Gurudyal Singh Fijji Vs. State of Punjab's case and on referring on the said decision the learned judge observed that as by that date, on which some of the juniors to the applicant before his Lordship had been given the scale, there was no communication of adverse remarks to the applicant, his case could not be ignored. In Dr. Mrs. Sumati P. Shere Vs. Union of India and others reported in 1989 SC 1431 the Hon'ble SC were dealing with a case of termination of service of an adhoc employees on ground of unsuitability. We are referring to this case as for a nonselection post a consideration of suitability i.e. fitness is required. In that case the Hon'ble SC observed:

"The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies; indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability".

There is of course a single judge decision of Madras High Court T.N. Sankarasundaram Vs. The Director of Stationery and Printing, Madras and others reported in 1983 (2) SLR 183 which has gone to the length of saying that when the promotional post is not a selection post, promotion is to be made on the basis of seniority alone despite adverse entry, we have our reservation about this proposition laid down by this Lordships Padmanavan but

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in view of what has been stated above, it is not necessary on our part to enter into a detailed discussion about the question whether adverse entries cannot at all be taken into account while considering promotion to a nonselection post.

9. From the copy of the gradation list of computers working in the <sup>office of the</sup> Director of Census Operations, Orissa it would be found that respondents 2 to 28 are all juniors to the applicant and they were promoted to the rank of Statistical Assistant with effect from the dates mentioned against their names in Annexure-2. Respondent 2 whose name appears at Sl.no. 19 of the gradation list was promoted with effect from 1.3.1981. The name of the applicant is at Sl. no. 18 of the gradation list of computers i.e. respondent no. 2 is a person immediately junior to the applicant.

10. To sum up our conclusions they are, there was no communication of any adverse remarks to the applicant, therefore, those adverse remarks could not have been taken into consideration in refusing promotion to the applicant, the consideration made by the DPC in its meeting in January, 1989 was vitiated by an error of fact, the applicant was found fit to be promoted to the rank of Statistical Assistant during all the years from '75 to '79 and was in fact promoted on adhoc basis as Statistical Assistant on 6.5.1980 and continued to work as Statistical Assistant from December, 1981 after reversion in April, 1981 till the

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date of filing of this application and his immediate junior was promoted with effect from 1.3.1981.

Therefore, the applicant should be given promotion to the rank of Statistical Assistant with effect from 1.3.1981 and all the service benefits including his seniority should be determined according to rules. The applicant substantially succeeds but, however, in the circumstances of the case we do not pass any order as to costs.

*B. Mohanty* 27.6.91  
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VICE CHAIRMAN



*M. S. Enopli* 27-6-91  
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MEMBER (JUDICIAL)

Central Administrative Tribunal,  
Cuttack Bench: K. Mohanty.