

CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH: CUTTACK.

ORIGINAL APPLICATION NO: 495 OF 1990.

Date of disposal: 23.2.1993

M.K.Birabar Deo and others Applicants

Versus

Union of India and others Respondents.

"A N D"

ORIGINAL APPLICATION NO: 5 OF 1991.

Gagan Bihari Jena and others Applicants

Versus

Union of India and others Respondents.

For the Applicants ... Mr. G.A.R.Dora,
(both the cases) Advocate.

For the Respondents ... Mr. Ganeswar Rath,
(both the cases) Standing Counsel (Central).

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C O R A M:

THE HONOURABLE MR. K.P. ACHARYA, VICE-CHAIRMAN

&

THE HONOURABLE MR. C.S. PANDEY, MEMBER (ADMN.)

1. Whether reporters of local news papers may be allowed to see the fair copy of the judgment? Yes.
2. To be referred to the reporters or not? Yes.
3. Whether Their Lordships wish to see the fair copy of the judgment? Yes.

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JUDGMENT

K.P. ACHARYA, V.C.

In Original Application No. 495 of 1990

there are altogether 16 petitioners and in Original Application No. 5 of 1991 there are altogether four Petitioners. In both these applications, the petitioners were serving in the Engineering Department, of the State Government of Orissa in different capacities.

Opposite Party No. 2, in both these applications, namely the Accountant General, Orissa, selected the petitioners for appointment as Emergency Divisional Accountants.

According to the Petitioners, the Divisional Accountants are constituted in a separate cadre under the Administrative Control of Opposite Party No. 2. Recruitment is made by the Respondent No. 2 by selection through

a qualifying test from P.W.D. clerks, Upper Division Clerks of the Audit Offices and from open market.

Petitioners were recruited as Emergency Divisional Accountants from different offices of the Public Works Department. As per the office order No. WM-47-V.O.-2873 dated 1st March, 1987, contained in Annexure 1, the

petitioners are required ^{to} pass D.A. Grade Examination (Divisional Test Examination) within six chances with effect from April, 1987. It is maintained by the

Petitioners in both these cases, that none of them have ~~not~~ availed six chances of the examination as after appearing in some of the examinations and having cleared up some papers they were not given intimation regarding further examinations. Vide

Annexure 2, containing copy of the Memo bearing

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No.4380-N/43-86/11 dated 23rd December, 1986 issued by the Comptroller and Auditor General of India, certain guidelines have been enumerated as to how many chances should be given to the petitioners to qualify in the examination and in case they do not qualify, they are to be reverted back to their parent Department. Thereafter Annexure 4 was issued calling upon volunteers from amongst the State Public Works Deptt. to be taken on deputation for a period of one year as Divisional Accountant in different Public Works Division with certain other stipulations and it was ordered that applications and copies of the Confidential Rolls should reach the concerned office by 30th November, 1990. In view of issuance of Annexure, 4, both these applications have been filed with the aforesaid prayer.

2. In their counter, the Opposite Parties maintained that the Emergency Divisional Accountants were appointed by the Opposite Party No.2 due to dearth of qualified Divisional Accountants and that they were required to clear the Divisional Accountants Grade Examination within the prescribed number of chances from the date of their eligibility to appear at the said examination. It is further maintained that when the Emergency Divisional Accountants fails to clear the Divisional Accountants Grade Examination within three chances and/or six chances, within the

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discretion to be exercised by the competent authority then he is required to be reverted to their Parent Department. The Opposite Parties further maintained that the post of Emergency Divisional Accountants is an ex-cadre post, as decided by the Central Administrative Tribunal, Cuttack Bench while disposing of Original Application No. 242 of 1988 on 6th April, 1990. The Post of Emergency Divisional Accountants being an ex cadre post and the petitioners not having qualified themselves in the prescribed Divisional Accountant Grade Examination, the competent authority had no other option but to revert them to their Parent Department. Hence it is finally maintained by the Opposite Parties that the case of the petitioners in both these cases being devoid of merit is liable to be dismissed.

3. Both these cases were heard one after other and in both these cases we have heard Mr. G. A. R. Dora learned counsel appearing for the petitioners and Mr. Ganeswar Rath learned Standing Counsel appearing for the Opposite Parties at a considerable length.

4. At the outset, Mr. Rath learned Standing Counsel appearing for the Opposite Parties relied upon a judgment of the Central Administrative Tribunal, Allahabad Bench passed in connection with Original Applications Nos. 906 of 1990, 912 of 1990, 913 of 1990 914 of 1990, disposed of on 12th February, 1991. The Allahabad Bench in similar nature of cases dismissed the applications of the petitioners before the the Bench

Allahabad Bench and held that under the circumstances

no right had accrued to the petitioners to hold the post of Emergency Divisional Accountants. Accordingly Mr. Rath learned Standing Counsel appearing for the Opposite Parties submitted that both these cases being similar in nature to the cases disposed of by the Allahabad Bench, same view should be taken in regard to the cases at hand and the applications should be dismissed. Before we express our opinion, in regard to the above contention of Mr. Rath, it is worthwhile to mention that exactly similar cases came up for consideration before the Central Administrative Tribunal, Guwahati Bench forming subject matter of Original Application Nos. 196 of 1990, 197 of 1990 202 of 1990, 203 of 1990, 104 of 1990 and O.A. 8 of 1991 in which one of us (Acharyya) was a party to the judgment. The Guwahati Bench while disposing of these cases by its judgment dated 17th May, 1991 relied upon the judgment passed by the Central Administrative Tribunal Jabalpur Bench in Original Applications Nos. 172 of 1988, 174 of 1988, 175 of 1988, 177 of 1988, 178 of 1988, 183 of 1988, 184 of 1988, 185 of 1988, 195 of 1988, 196 of 1988, 197 of 1988, 219 of 1988, 280 of 1988, 598 of 1988 and O.A. 387 of 1988 involving similar issues. There cannot be any dispute that the cases decided by the Guwahati Bench, Jabalpur Bench and Allahabad Bench of the Central Administrative Tribunal are exactly ^{of} in the same nature. The Guwahati Bench considered all the arguments advanced by the parties and following the view taken by the Jabalpur Bench at paragraphs 8, 9, 10 &

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11, the Guwahati Bench observed as follows :

" Having heard both the parties of these cases and perusing the materials on record, we carefully went through the judgment and order passed by the Jabalpur Bench. Although the applicants in those cases were drawn on deputation from both the State PWD as well as State Accounts and Audit Offices on deputation under A.G., Madhya Pradesh, substantially the facts of those cases are the same as they seven cases before us. The learned Members of the Jabalpur Bench of this Tribunal have made an extensive analysis of the various pleadings and rules on the subject and found that most of claims made on the side of the Petitioners could not be sustained. However, some reliefs were given to the Petitioners extending substantial natural justice. In paragraph 15 of that judgment the main grounds which weighed with the Members of the Jabalpur Bench were : i) the long and satisfactory services of the Petitioners while on deputation; ii) the hardship that would be caused on their repatriation; iii) and that they were sought to be repatriated without prior notice and without prior consultation with the parent department and iv) and the authority's non-insistence on passing of the departmental examination for a long time. All these conditions exist in the cases before us. Undoubtedly, we agree with Mr. Ali that in view of the complicated and responsible nature of duties of the D.A. it is necessary that their professional knowledge should be of a high order. We also agree that before absorption the attainment of professional knowledge to the desired extent should be tested and therefore we find that the condition of passing off the Departmental test for the EDA before they can be regularly appointed as DA does not suffer from either arbitrariness or any other infirmity in law. But at the same time it has not been disputed before us that even after this pre-condition was laid down in the Manual of standing orders for many years the EDAs be retained till their superannuation and not repatriated without insisting their qualifying in the departmental test. Looking from another angle we feel that while the responsibility of acquiring the desired level of professional knowledge primarily rests on the EDAs the establishments under C.A.G. has also some moral obligation for extending the necessary facilities in the shape of training and coaching facilities. In fact the CAG's circular dated 2.2.1989 has enjoined the AG's to extend this facility

In the present cases, after the circular was issued not enough time was given to the respective A.G.'s for extending these facilities in an organised and systematic manner. The first lot of repatriation orders under challenge were issued in October, 1990 and it covered the petitioners like Shri Chandras Singh who is 56 years of age and had already spent 24 years of his career working as DA. All other petitioners before us have worked as DA for more than 10 years and some of them on repatriation will have to move out to distance places in addition to loss of emoluments which is common to all the applicants. These practical problems cannot be excluded from consideration as equity and fair play has to be extended to an employee by his employer. That apart, it was conceded before us that the fresh recruits who would occupy these posts after the petitioners are repatriated do not have any better qualifications than the present petitioners. Those fresh recruits have not passed any tests. Therefore in our opinion the long experience of the present petitioners in the complicated accounting matters should be preferred to those persons who do not have any experience for the public interest. In fact the dynamics of service jurisprudence in this country as reflected in several pronouncements of the Apex Court lends support to our approach for adjudicating this dispute in the manner indicated hereunder.

Our view gains support from the judgment of the Hon'ble Supreme Court reported in 1987 (Supply) Supreme Court cases 497 (Dr. A.K. Jain and others. Vs. Union of India & Ors.). The Petitioners before Their Lordships had filed an application under Article 32 of the Constitution challenging the order passed by the competent authority terminating the services of the Petitioners who were adhoc appointee as Assistant Medical Officer in the Railways and replacing them by fresh recruits. Prayer of the petitioners before Their Lordships was to order their regularisation. The Prayer of the petitioners was resisted by the opposite parties on the ground that the petitioners being adhoc appointees have to comply with the conditions of service that they have to clear the combined medical services examination held by the Union Public Service Commission (UPSC) and having failed in the examination they could not be regularised according to the prescribed rules and regulations for regular appointments and hence their services had to be terminated. Their Lordships after hearing the counsel for the parties directed that the Assistant Medical Officers of the Assistant Divisional Medical Officers appointed on adhoc

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basis shall be regularised in consultation with the UPSC on the evaluation of their work and conduct and such evaluation shall be done by the UPSC and it was further directed that those doctors who had been appointed on adhoc basis prior to 1.10.1984 and have been terminated, shall also be considered for regularisation and if found fit their services shall be regularised as if there were no break in the continuity of service. This view was taken by Their Lordships because of the long service rendered by those Doctors even on adhoc basis and even though they were required to pass out the tests to be conducted as per rules and many of them had not turned out successful. In our opinion the view taken by Their Lordships is perhaps for the purpose of extending substantial and natural justice to the petitioners before Their Lordships and especially because long service rendered by them which had enabled them to gain considerable experience. We are of opinion that the abovementioned view of Their Lordships apply in full force to the peculiar facts and circumstances of the present case. Incidentally, it may be mentioned that in a case disposed of by this Bench forming subject matter of O.A. Nos. 121 of 1988 and 122 of 1988, we had followed the views of Their Lordships in the case of Dr. A. K. Jain and had allowed the relief claimed by the petitioners in those cases. Therefore, in the present case we find no justifiable reason to make a departure from the view already taken in the said cases especially because of the views expressed by Their Lordships in the case of Dr. A. K. Jain.

Before we part with this case, we would fail in our duty if we do not state that Mr. S. Ali, the learned Sr. C. G. S. C. filed a xerox copy of the judgment passed in O.A. 906 of 1990 (L.C. Sharma Vs. UOI and Ors.), O.A. 912 of 1990 (R.P. Kala Vs. UOI & Ors.), O.A. 913 of 1990 (T.S. Biroria Vs. UOI and Ors.) and OA 914 of 1990 (Shri Mitra Nanda Vs. UOI & Ors.) disposed of by the Central Administrative Tribunal, Allahabad Bench in February, 1991. Hearing of these cases closed on 25.4.1991. The judgment of the Allahabad Bench was filed by Mr. Ali on 6.5.1991 and he urged that in cases of similar nature Allahabad Bench

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has dismissed the prayer of the petitioners in those original applications which should be adopted by this Bench.

The Petitioners before the Allahabad Bench had been repatriated to their Parent Department and they had been picked up from different cadres and departments to work as DA and they were also designated as E.D.A. Petitioners before the Allahabad Bench not having either appeared in the examination or being unsuccessful after appearing in the examinations, they were repatriated and therefore, the Allahabad Bench held that the Petitioners had no right to the post and they not having been either successful or not having appeared in the examination they have no right to continue and therefore, they are bound to be repatriated. The Jabalpur Bench also took the very same view so far as the rights of the incumbents are concerned and with which we have also no dispute but the Allahabad Bench had only considered the technicalities of the provisions contained in the manual and had not considered the aspects dealt by the Jabalpur Bench so far as the extending of substantial and natural justice is concerned. There is no indication in the judgment of the Allahabad Bench that the Hon'ble Judges had considered the experience the petitioners had gained and that their substitutes would also occupy the post without any experience and without having passed any test. Last but not the least the view of the Hon'ble Supreme Court in the case of Dr. A. K. Jain was also not noticed by the Allahabad Bench. Therefore, with our great respect to the Hon'ble Judges of the Allahabad Bench we are unable to follow the view taken by them and with respect we would follow the view taken by the Jabalpur Bench.

We also note that C.A.G. has power to give an individual EDA additional chances beyond the maximum of six for appearing in the departmental test. It would appear from the table at page No. 5 that at least two petitioners have cleared the departmental test in part and all availed of at least one chance. We hope and believe that given another opportunity even those who did not prepare for the departmental test in right earnest so far, will put in their maximum efforts to do so now. At the same time we also hope that in consonance with C.A.G.'s circular dated 2-2-1989 the petitioners will be supported by the department through training programmes correspondence course and coaching etc. to improve their professional knowledge necessary for passing the test".

Finally at paragraph 12 of the judgment, the Guwahati Bench gave certain directions which are as follows:

"Keeping all these inview, particularly following the judgment and order of the Jabalpur Bench we are disposing all these cases with the following directions:-

- a) The respondents shall count the number of chances already physically taken by each of the applicants. The number of opportunities offered, but not availed of should be ignored.
- b) After counting the number of chances in this manner those who have physically availed of all the six chances shall be given one additional special chance for preparing in the test to be held in 1991 or in the first half of 1992. Out of the two aforesaid tests each candidate will be given the option to be exercised at least one month before the test of selecting only one of the tests.
- c) Those who have not availed of six physical chances shall be given the remaining chances so as to make a total of six chances for passing the departmental test. In their cases if they do not avail of any future chance they would be deemed to have appeared for the purpose of counting the total number of chances.
- d) If any of these applicants succeed in the test to be held infuture within the chances computed in sub-paragraphs (b and c) above he shall be considered for absorption as Divisional Accountant. Those who fail will be liable to be repatriated to their parent cadre and department.
- e) That interim orders passed in each of the cases stands merged with this final order and the impugned orders of repatriation already issued shall be held in abeyance for giving effect to the orders passed in sub paragraphs (a to d) above."

The Jabalpur Bench of the Central Administrative Tribunal also gave certain directions which are practically similar in nature to that of the directions given by the Guwahati Bench (quoted above). They are as follows:-

"It is however, not necessary to go into the controversy to the number of chances given to various applicants in terms of actual physical number of chances availed of or opportunity provided to appear in the DAGE. The spirit of the instructions contained in the Comptroller and Auditor General's circular of 2nd February, 1989 also is that even training could be provided to the existing EDAs to enable them to pass the DAGE. Under these instructions it is necessary for the EDAs to appear and qualify in the DAGE failing which they are liable to be reverted to their original position in the parent department. If some of the persons have completed or availed of their maximum six number of chances, then the Comptroller and Auditor General can further give an opportunity of another chance to appear in the examination.

Therefore we say that the instructions contained in the letter dated 2.2.1989 of the Office of the CAG should be enforced in the light of the policy decision of the C.A.G. The preamble of this letter dated 2.2.1989 states that:

"Earlier, qualifying the Divisional Accountant's Grade Examination was not compulsory for the Emergency Divisional Accountants. However, with the issue of this office letters No.4388-N.III/43-86-II dated 23.12.1986 read with letter No.3190-N.III/43-86-I dated 17.8.1987 it has been made compulsory for the emergency Divisional Accountants Grade Examination failing which they are liable to be reverted to their original position."

Further in regard to the need for giving training and guidance to the EDAs before they take the final chance for qualifying in the DAGE of this circular

clarifies.

"Although it is incumbent upon the E.D.As concerned to appear in the examination with full preparation, in order to help them in qualifying the examination it has been decided that a training programme through correspondence may be imparted to them. The training may consist of sending model answers to all the questions in different subjects for the past five Divisional Accountants Grade Examination held by your office. After a month of the issue of the said model answers, the Emergency Divisional Accountants may be asked (through correspondence only) to solve a set of questions in different subjects and forward the answers scripts to your office. These answer papers may be examined and mistakes committed by them pointed out specifically and the answer scripts be returned to them.

Accordingly, before reverting the EDAs to their original position they ought to be given the necessary training guidance for taking the final examination i.e. the D.A.G.E.

15. We are now left with a few other arguments advanced by the applicants which might deserve consideration.

It has been stated that most of the applicants have become somewhat old and may have even lost the capacity to pass the DAGE but their long and satisfactory service whatever may be the their status as a deputationist or otherwise, should not be ignored and they should not be repatriated merely on account of the failure of their passing the examination. This would involve hardship because several of the applicants would have to get reverted to the posts carrying lower pay. It has also been stated that they have been repatriated without notice and without prior consultation with the parent department. These applicants have been serving in various departments as EDAs for quite sometime. They have not only acquired experience but a presumption can be drawn that the performance of these EDAs in discharging their duties has been satisfactory. No contrary averments has been made by the respondents as far as the performance is concerned.

There is also some force in some of these miscellaneous arguments.

16. For the reasons discussed in the net result, we consider it reasonable and appropriate to direct as follows :-

(a) All those candidates who have exhausted their maximum number of six chances or even taken one more chance in terms of the A.G.M.P.'s letter

of 21.1.1987 quoted in para 4 of the judgment read with CAG's letter of 2.2.1989 should be given one more last opportunity as a one time measure. Even under the aforesaid existing instruction CAG is empowered to grant more than 6 chances. They should be allowed to appear in the next examination for Divisional Accountants likely to be held in March or September, 1991 and if they pass they should be considered for absorption as Divisional Accountants.

(a) All those candidates who have exhausted their maximum number of six chances or even taken one more chance in terms of the A.G.M.P.'s letter of 21.1.1987 quoted in para 4 of this judgment read with CAG's letter of 2.2.1989 should be given one more last opportunity as a one time measure. Even under the aforesaid existing instruction CAG is empowered to grant more than 6 chances. They should be allowed to appear in the next examination for Divisional Accountants likely to be held in March or September, 1991 and if they pass they should be considered for absorption as Divisional Accountants.

(b) All those applicants who have not yet exhausted their maximum number of six chances, counted physically, not in terms of opportunities given, should be allowed to avail of the opportunities of those chances. However, for counting these chances henceforth an opportunity given but not availed of will also be counted.

(c) If any of the applicants does not pass the test/s in the light of the above stipulations then he should be liable to be reverted to his parent department permanently.

(d) Before reverting the E.D.A.s to their original position they ought to be given the necessary guidance and training for taking the final examination i.e. the D.A.G.E.

(e) The tender shall also apply to all the applicants who have already been served orders of repatriation to their parent department. Such orders of repatriation will remain in abeyance. Those who have been already relieved shall be taken back on duty on their former post until the matter is resolved as above. Their interim period will be treated as leave as admissible including extraordinary leave, if necessary. Those who have joined in their parent department already shall continue to remain on their new posts in the parent department but the opportunity to appear in the test as in (a) above should be extended and if they pass they may be considered for absorption as Divisional Accountants

5. Indidentally, it may be mentioned that the Jabalpur Bench cases mentioned above were carried in appeal to the Hon'ble Supreme Court by the Union of India which formed subject matter of Special Leave to Appeal (Civil). Nos. 11192 to 11206 of 1991. Their Lordships were pleased to dismiss the Special Leave Petitions thereby upholding the view taken by the Jabalpur Bench. The order passed by the Hon'ble Supreme Court may not be strictly construed as a declaration of law under Article 141 of Constitution but the fact remains that the view of the Jabalpur Bench has been upheld by the Hon'ble Supreme Court. In the circumstances stated above, we are in respectful agreement with the views expressed by the Guwahati Bench and the Jabalpur Bench and we respectfully dis-agree with the view taken by the Allahabad Bench especially because the view of the Jabalpur Bench has been upheld by the Hon'ble Supreme Court. Therefore, to avoid conflict of opinion, we would adopt the directions given by the Guwahati Bench and the Jabalpur Bench and would direct the Opposite Parties in these two cases to follow the same procedure as indicated in the judgments passed by the Guwahati Bench and the Jabalpur Bench quoted above.

6. Thus, both these applications are accordingly disposed of leaving the parties to bear their own cost


S. C. S. P.
MEMBER (ADMINISTRATIVE)

Sd/K.P. Acharya.

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VICE CHAIRMAN

Central Admn. Tribunal,
Cuttack Bench/K. Mohanty.

23.2.1993.