

21

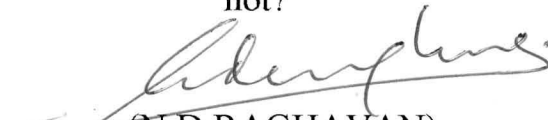
CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No.150 of 2004
Cuttack, this the 30th day of August 2007.

Akshaya Kumar Parida ... Applicant
Versus
Union of India & Others ... Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not? *No Yes.*
2. Whether it be circulated to all the Benches of the CAT or *Yes.*
not?


(N.D.RAGHAVAN)
VICE-CHAIRMAN


(K.N.K.KARTHIAYANI)
MEMBER (A)

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No.150 of 2004
Cuttack, this the 30th day of August 2007.

C O R A M:

THE HON'BLE MR. N.D.RAGHAVAN, VICE-CHAIRMAN
AND
THE HON'BLE MRS.K.N.K.KARTHIAYANI, MEMBER (A)

Shri Akshaya Kumar Parida, aged about 57 years, son of late Keshab Chandra Parida, Village/Po-Bilikana, Ps-Aul, Dist.-Kendrapara, at present Senior Auditor, Office of the Principal Accountant General (Audit-I & II), Orissa, Bhubaneswar, Dist. Khurda.

..... Applicant.

By legal practitioner: In Person.

-Versus-

1. Union of India represented through the Principal Accountant General (Audit-I), Orissa, At/Po-Bhubaneswar, Dist. Khurda.
2. The Accountant General (Audit-II), Orissa, At/Po-Bhubaneswar, Dist. Khurda.
3. The Senior Deputy Accountant General (Administration), Office of the Principal Accountant General (Audit-I), Orissa, At/Po-Bhubaneswar, Dist. Khurda.
4. Gagan Chandra Samal, Assistant Audit Officer, Office of the Principal Accountant General (Audit-I), Orissa, At/Po-Bhubaneswar, Dist. Khurda, Qrs.No.Type-III-382, New AG Colony, Nayapalli, At/Po-Bhubaneswar, Dist. Khurda.
5. Surendra Nath Padhy, Assistant Audit Officer, Office of the Senior Deputy Accountant General (Works Audit), At/Po/Dist. Puri (Puri).

- 227
6. Govinda Chandra Sahoo, Assistant Audit Officer, Office of the Principal Accountant General (Audit-I), Orissa, Bhubaneswar, Qrs. No. Type-II, 579, New A.G. Colony, Nayapalli, At/Po-Bhubaneswar, Dist. Khurda.]
 7. Keshab Chandra Barik, Senior Auditor, Admn.-I Section, Office of the Principal Accountant General (Audit-I), Orissa, Bhubaneswar, Qrs.No.Type-II-619, New AG Colony, Nayapalli, At/Po-Bhubaneswar, Dist. Khurda.
 8. Gadadhar Senapaty, Assistant Audit Officer, Office of the Principal, Accountant General (Audit-I), Orissa, At/Po-Bhubaneswar, Qrs.No.Type-III-314, New A.G. Colony, Nayapalli, At/Po.Bhubaneswar, Dist. Khurda.
 9. P.Gopal Krishan, Senior Auditor, at present Cashier, Office of the Principal Accountant General (Audit-I), Orissa, At/Po-Bhubaneswar, Dist. Khurda.

...Respondents.

By legal practitioner: Mr.U.B.Mohapatra, SSC.

ORDER

SMT.K.N.K.KARTHIAYANI, MEMBER (A)

Applicant, an ex-serviceman was appointed as an Auditor in the Office of the Accountant General Orissa, Bhubaneswar under ex-serviceman quota and he joined the said post on 19-03-1980 (F/N). He is aggrieved by the promotion order issued by the competent authority on 15-09-1989 (Annexure-A/1) in which 11(eleven) persons junior to him were promoted to the post of Senior Auditor. His claim is that he should have been promoted at Sl.No.5 of the said promotion order. But his juniors

11/3

found places at Sl. Nos. 5 to 11 in the promotion order dated 15-09-1989. Applicant submits that on a representation made by him about his non-promotion, the Respondent No.3 informed him that he was not considered for promotion to the Senior Auditor since departmental proceedings was pending against him. However the Disciplinary proceedings initiated against him, he was exonerated vide order dated 22.04.1991. He again represented to the competent authority to promote him to the post of Senior Auditor with effect from 15.09.1989 the date on which his juniors were promoted. As the Respondents did not consider his request favourably, he filed Original Application No.659 of 1992 in this Bench of the Tribunal. He, however, wished to withdraw the same on account of his illness and, this Tribunal vide order dated 13-07-1999 disposed of the aforesaid OA for not being pressed. After recovery from illness, he made further request to the Senior Deputy Accountant General (Respondent No.3) to promote him with effect from 15-09-1989 instead of with effect from 01.01.1993. As the Respondent No.3 did not respond his request, he filed an application under Rule 23 of the CCS (CCA) Rules, 1965 before the Principal Accountant General (Audit-I)/Appellate Authority, Orissa, Bhubaneswar against the action/inaction of the Appointing Authority

87
(Respondent No.3). The order-dated 21.01.2004 (Annexure-A/4) was passed by the Respondent No.3 during the pendency of the appeal before the Respondent No.1. Hence, it is alleged that the said order dated 21st January 2004 (Annexure-A/4) being without jurisdiction is liable to be quashed. The case in a nutshell is that when the Applicant has been exonerated from all the charges leveled against him, the Respondents should have convened a review DPC and allowed him promotion from the date his juniors were promoted. As the Respondents did not consider his request, he has filed this Original Application under section 19 of the Administrative Tribunals Act, 1985 seeking following directions:

“RELIEF (S) SOUGHT:

Necessary order/orders/directions be issued to the Learned Respondents directing to promote the applicant to the post of Senior Auditor with effect from his juniors are allowed the same as per Annexure-A/1 i. e 15.09.1989 instead of 01.01.1993 and also pass necessary directions to allow the service/financial benefits as his juniors are allowed and quash the order of the learned respondent No.3 dated 21.01.2004 Annexure-A/4 since the same is illegal and passed against the provisions of law and also pass any other suitable order/orders as the Hon'ble Tribunal deems just and proper.”

2. Relying on the decisions of the Hon'ble Apex Court in the cases of Bhoop Singh vrs. Union of India (1992) 3 SCC 136,


P-1 and in the case of Ramachandra vrs. State of Kerala (1997) 7 SCC 556, the Respondents in their counter have made the preliminary objection that this Original Application being hopelessly barred by limitation is liable to be dismissed *in limine*.

3. Besides, as regards various contentions raised by the Applicant in his Original Application, the Respondents submit that the promotion to the cadre of Senior Auditor is given on the basis of seniority-cum-fitness as per the provisions of the relevant Recruitment Rules. The fitness of an individual for promotion is considered by the DPC on the basis of annual Confidential Reports for the preceding five years. The Applicant was considered not fit for promotion to the cadre of Senior Auditor by the DPC set up for the panel year 1989 to 1992. However, the DPC for the panel year 1993 (held in 1992) considered him fit for such promotion and he was promoted as Sr. Auditor on 01.01.1993. They have stated that the decision of the appropriate authority on the application of the Applicant for promotion with effect from the date his juniors were promoted was communicated vide order dated 21.01.2004. The order was issued by the Sr. Deputy Accountant General (Admn.) with the approval of the Principal Accountant General (Audit-I, Orissa after due consideration of the appeal and no illegality or

irregularity has been committed by the Senior Deputy Accountant General (Admn.). Moreover, Senior Deputy Accountant General (Admn.) is the authority to give promotion to the Group 'C' cadre as also the Disciplinary Authority so far as Gr. C cadre employees are concerned,


4. As disciplinary proceedings against the Applicant were pending, recommendations of the relevant DPC held during the year 1989 to 1991 were kept in sealed covers which were opened on 17.09.1991 on completion of the disciplinary proceedings. On opening of the sealed covers it was seen that the DPC had found him unfit because of adverse entries in his CR during the aforementioned period. However, DPC held in 1992 considered him fit for promotion to be made during 1993 (1993 panel year) and accordingly, he was promoted to the post of Sr. Auditor on 01.01.1993. Therefore, his claim for promotion from 15.09.1989 is not tenable.

5. Applicant has filed rejoinder refuting the contention of the Respondents that this Original Application is barred by limitation. His contention is that the Respondents have lost sight of the contentions of the applicant made in this OA in paragraphs 4.7 and 4.8 where he has stated about the withdrawal on 13.07.99 of the OA No.659/92



filed by him.. His contention is that after withdrawal of the OA filed by him in this Tribunal, he preferred an appeal to Respondent No.1, which was disposed of on 21.1.2004. Thereafter he has filed this OA during April 2004 well within one year of disposal of the appeal and, therefore, this OA is not barred by limitation as stated by the Respondents in their counter. He has stated that the DPC convened during 1989 to 1992 have not considered the case of applicant on the plea that the disciplinary proceedings were pending against him. When the disciplinary proceedings were closed by exonerating the applicant, the respondents should have convened a review DPC to allow promotion to the applicant from the date his juniors were promoted i.e. 15.09.1989; instead the Respondents have promoted the applicant only with effect from 01.01.1993. He has stated that mere pendency for the disciplinary proceedings is not absolute bar for considering the case of an employee for promotion.

6. The next contention raised by the Applicant in the rejoinder is that while the appeal against the non action of the appointing authority under rule 23 of CCS (CCA) Rules, 1965 has been filed before the appellate authority (Respondent No.1) the appellate authority has to dispose of the appeal as per rule 27 of



CCS (CCA) 1965 and the order of the appellate authority must be speaking order and he has to dispose of the appeal by a reasoned order on each point raised in the appeal and that when the appeal has been filed to Respondent No.1 under rule 23 of the CCS (CCA) Rules, 1965 against the order of appointing authority Respondent No.3 has no jurisdiction to pass any order. However, the order at Annexure-A/4 has been signed neither by Respondent No.3 (Appointing Authority) nor by Respondent No.1 (Appellate Authority). Even assuming that the order is of Appellate Authority, it is a biased order as the order is not disposed of as per rule 27 of CCS (CCA) Rules, 1965. All the points raised in the appeal have not been considered and it is a non-speaking order. Finally, in the rejoinder it is stated that "while the sealed cover procedure was adopted for ensuing departmental proceedings as mentioned in the counter, it is not understood as to how the DPC did not 'found'(sic) fit for adverse entries in the CR". It has been stated that there is no Rule or law empowering the authority to keep the recommendation of the DPC in a sealed cover if there are adverse entries in the CR of an employee.

7. Heard Mr. Akshaya Kumar Parida the applicant in person and Shri Uma Ballav Mohapatra, Learned Senior Standing Counsel for the Respondent Nos.1 to 3 and perused the materials placed on record. Neither other Private Respondents have appeared in this case nor filed their counter though notices were duly served on them.

8. During argument, Applicant has cited a number of decisions of the Hon'ble Apex Court, High Courts and of the CAT in support of various contentions raised by him and they are discussed herein below:

(a) Pendency of disciplinary proceedings is not a bar for consideration of an official for promotion:

1. S.S.Rana vs. Harayana State Electricity Board and Others, 1996 (1) SLR 135 (P&H);
2. T.Ganga Rao vs. Chairman, Karim Nagar District Cooperative Central Bank Ltd, 1996 (4) SLR 263 (AP);
3. Digambar Lal Jain vs. State of Harayana and othes, 1982 (2) SLJ 536 (P&H);
4. Union of India and others vs. Janki Raman and others, AIR 1991 SC 2010;

(b) Senior has to be considered for promotion from the date his junior was promoted:

1. Ram Swarup and others v. State of Punjab and others, 1982 (2) SLR 362 (P&H).

(c) Appellate order must be a speaking one and should be in accordance with the instructions contained in rule 27 of the CCS Rules, 1965:

b.

1. Mahabir Prasad Santosh Kumar vs. State of UP, AIR 1970 SC 1302;
2. Ram Chander vs. Union of India and others, AIR 1986 SC 1173;
3. R.P.Bhatta vs. Union of India and others, AIR 1986 SC 1040;
4. R.K.Singh vs. Union of India and others, 1996 (2) SLJ 460;
5. M.Abdul Karim vs. Deputy Director General, NCC (K&L), Trivanidrum, 1993 (1) SLJ 519 (CAT, Ernakulam Bench);

(d) Promotion is to be made on the basis of seniority alone despite adverse remarks in the CRs:

1. T.N.Sankar Sundaram vs. Director of Stationary & Printing Madras & Others, 1983 (2) SLR 183 (Madras);

(e) Officials against whom investigation is pending should be considered for Ad-hoc promotion:

1. K.S.Kanitkar vs. Union of India and others, 2001 (3) SLJ 131 (Mumbai);

(f) When Promotion is based on seniority cum merit it should not be converted to merit cum seniority:

1. R.Gandhi v. A.K.Gramya Bank and othes, 2000 (5) SLR 564 (Raj.);

(g) ACR cannot be used as an instrument to punish:

1. State of Maharastra vs. R.B.Sharma and others, 2001 (3) SLJ 465 (Delhi):

(h) On exoneration, an employee is entitled to all benefits according to Rules:

1. S.K.Dutta vs. Union of India and others,
1993 (3) SLJ 131 (CAT, Guwahati);

(i) Sealed cover procedure by DPC for the reason that vigilance case is under investigation was unjustified:

1. Ram Chander vs. Registrar, Co-Operative Society , 1990 (6) SLR 309 (CAT, Simla);

(j) Adverse entry is not a penalty;

1. Dr.Gurdeep Singh vs. Union of India and others, 2001 (3) SLJ 330 (CAT, Lucknow);

(k) On exoneration, promotion is due from the date when juniors were allowed such promotion:

1. Rup Lal vs. State of HP and Others, 1980 (2) SLR 262 (HP);

(l) Pending disciplinary action, the cases of employees will have to be considered for promotion without reference to the pending proceedings.

1. C.Munneswar Rao vs. Director of Postal Service and others, 1980 (3) SLJ 343 (AP);

(m) When sealed cover procedure adopted during pendency of the disciplinary enquiry, if the employee is exonerated after the enquiry sealed cover will be opened and benefits will be allowed:

1. Delhi Jal Board vs. Mohinder Singh, 2000 (5) SLR SC 274;

(n) An employee is entitled to back wages for the period of deemed promotion on account of adjustment of seniority:

1. A.S.Bhatia vs. Union of India and others, 1993 (3) SLJ 52 (CAT (Bombay));

37

(o) Persons should be promoted from due date:

1. N.Karamta vs. Union of India and others,
2001 (3) SLJ 74 (CAT, Ahemadabad);

(p) If an allegation made is not denied in the reply statement by stating 'no comments' the allegation is deemed to have been admitted:

1. Gopa Ram vs. Union of India and others,
1987 (2) SLR 100 (CAT, Jodhpur).

(q) When an appeal is rejected OA should be filed within one year from the date of rejection –AT Act, 1985-Section 21 – Limitation:

1. Prafulla Kumar Mishra vs. Union of India and others, 93 (2002) CLT 7 ATC;

9. Applicant argued at length citing the above decisions on each of the points put forth by him in the Original Application.

10. Per-contra, Learned Senior Standing Counsel for the Respondents strongly argued that the Original Application is barred by limitation and on that point alone this Original Application is liable to be dismissed. Even on merits, the applicant has no case as his case for promotion was duly considered by the DPC and the findings were kept in sealed covers. When Applicant was exonerated on conclusion of the disciplinary proceedings, the sealed covers were opened and the recommendations of the DPC were that the applicant was unfit for promotion. When the

3


applicant was subsequently adjudged suitable for promotion he was promoted with effect from 01.01.1993. It has been argued by the Ld.SSC that the applicant's reference to CCS (CCA) Rules, 1965 has no relevance, as Respondent No.3 has disposed of only the representation about non promotion and it could not be termed as an appeal under Rule 23 of CCS Rules 1965. Thus, he has argued that on merit also this OA is liable to be rejected.

11. We shall now consider the various points raised by Applicant. Regarding limitation, the Applicant states that he had filed OA no. 659 of 1992 in this Tribunal, which was admitted, and notices were sent to the Respondents. However, due to illness, Applicant did not want to pursue the matter and had sought for permission to withdraw the same. Respondents did not make any objection on such prayer of the Applicant and ultimately, in order dated 13.07.1999 the Original Application was disposed of by this Tribunal as not being pressed. The Respondents have not refuted these submissions in the OA. Therefore, we are of the opinion that the Respondents have admitted the stand of the Applicant that he was seriously ill during the said period. Applicant has further stated that when he recovered from illness he made a representation-dated 20.01.2003 to the Respondent No.3 praying to allow him promotion with effect from


89
15.09.1989. The impugned order at Annexure-A/4 dated 21.01.2004 is in reply to a representation-dated 25.07.2003 regarding antedating his date of promotion. Applicant has filed this OA in October 2004, which is within one year from the date of the impugned order at Annexure-A/4. Therefore, we have no hesitation to hold that this Original Application is within the period of limitation prescribed in section 21 of the Administrative Tribunals Act, 1985.

12. Examining this Original Application on merits, it is seen that the decisions cited by the Applicant on the point at sub para 8 (a) above only lay down that when disciplinary proceedings is pending against an official his case has to be **considered for promotion**. Respondents have clearly stated that from 1989 to 1992 the case of applicant was **considered** by the DPC and the recommendations of the DPC were kept in sealed coves as disciplinary proceedings were pending against him. On exoneration of the charges, the sealed covers were opened and it was found that the DPC had not recommended the case of applicant for promotion and, therefore, he could not be promoted against the vacancies from 1989 to 1992. Applicant in his rejoinder has only tried to confuse the issue by stating that due to pendency of —————→

113



Disciplinary proceedings his case was not considered by the DPC. He has not disputed that there were no adverse entries in his CRs; nor has he stated that no such adverse entries in his CRs had ever been communicated to him (during the period DPC considered him unfit for promotion). Therefore, it can safely be assumed that the applicant admitted the fact that there were adverse entries in his CRs for the relevant period for which the DPC did not find him fit for promotion. As the applicant has not even raised murmur against the fact of adverse entries in his CRs we do not deem it necessary to call for the CRs and see whether such adverse entries were recorded in the CRs of the Applicant. (The Applicant has also not prayed in the OA that the CRs may be called for and perused by us) Similarly, cases cited and noted at sub para 8(e), (f), (g) and (h) are not applicable to this case. In the case at sub para (e) it was a case of Ad-hoc promotion whereas the applicant's case is that of regular promotion. The case at sub para (f) is about changing the promotional method from seniority cum merit to merit cum seniority whereas it is not in dispute that in the present case the promotion is based on seniority cum fitness as per provisions of relevant rules. It is averred in the counter that the DPC has also adhered to the procedure of considering the cases as per seniority




34
8

cum fitness and the Applicant does not challenge this. The decision cited at sub para (g) is in the context of the purpose of writing of ACRs and the decision cited at sub para (h) is with regard to entitlement of benefits on promotion according to rules. In the present case according to Rules, the applicant was found unfit for promotion and, therefore, he was not entitled to the benefits which would have been available to him under Rules. Therefore, the above decisions are of no help to the Applicant.


13. Similarly, the decisions referred to in sub para 8(c), are with regard to disposal of appeal under CCS Rules, 1965. Applicant says that he has filed an 'application' at Annexure-A/3 dated 09.09.2003 as per provision of Rule 23 of CCS (CCA) Rules, 1965. According to him, he has preferred the said 'application' for non reply, non-action and non promotion in spite of repeated requests by the Senor Deputy Accountant General (Admn.). Rule 23 of CCS (CCA) Rules deal with a list of orders against which appeal lies. For the sake of brevity we are not reproducing the orders listed in Rule 23 of the CCS Rules, 1965 Applicant himself admits that his grievance was against non-response to his earlier representation by the Respondent No.3 and "non-response to a representation" is not a matter against which an appeal lies as per

h



CCS (CCA) Rules, 1965. We agree, with the Senior Standing Counsel for the Respondents that such an “application” as at Annexure-A/3 does not come under rule 23 of the CCS Rules. It is mere a representation. Obviously the provisions of Rule 27 of CCS Rules will not apply . Instructions under Rule 27 regarding passing speaking order will not apply to a representation, which is not filed under rule 23 of CCS Rules. Moreover, it is clear from Annexure-A/4 that the same was in reply to a representation dated 25.07.2003 (copy not produced by applicant – but obviously addressed to Respondent No.3, as the first communication to Respondent No.1 was made only on 09.09.2003. It is clearly stated in Annexure-A/4 that it is issued with the approval of the Senior Deputy Accountant General (Admn.)/ Respondent No.3. Thus, there is no illegality at all in Annexure-A/4.

14. The Applicant’s request regarding review DPC also does not merit any consideration because as per instructions issued by DOP&T the proceedings of any DPC may be reviewed only if the DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC or if there have been grave errors in the procedure followed by the DPC which is not the case of the Applicant. Therefore, question of



39

directing the Respondents to convene review DPC does not arise. The case cited by applicant and referred to in sub para 8 (d) is also not applicable to the present case. The said case was of an employee challenging his non-promotion to the Deputy Works Manager under Tamil Nadu State and Subordinate Service Rules filed that case. In that case Rule 36 (b)(i) of the said Rules clearly provided that promotion is based in accordance with seniority unless (1) the promotion of a member has been withheld as a penalty or (2) a member is given special promotion for conspicuous merit and ability. It is not in dispute that in the present case the promotion is based on **seniority cum fitness**. As per the instructions issued by DOP&T CRs are the basic inputs on the basis of which assessment is to be made by the DPC . Thus, if there are adverse remarks in the CRs, the DPC is well justified in finding that the Applicant is not fit for promotion. At the cost of repetition, the case before the Hon'ble Madras High Court, ACRs were not one of the inputs for consideration for promotion and it was only on the basis of seniority (unless covered by the two exceptions).

15. The applicant has not alleged any mala fide against Respondent No.3. Respondent No.3 has certainly acted in good faith according to the recommendations of the DPC which were

13

40
accepted by him as the Appointing Authority. However on being found suitable in subsequent DPC, the Applicant was promoted to Senior Auditor with effect from 01.01.1993.

16. The only grievance left for the Applicant would be that his representation at Annexure-A/3 dated 09.09.2003 addressed to Respondent No.1 has not been disposed of. However, all the points raised in the said representation have been dealt with by us in the preceding paragraph. Therefore any direction to Respondent No.1 to dispose of the said representation will be redundant.

17. In the result, the irresistible conclusion is that there is no merit in this Original Application, which is accordingly dismissed by leaving the parties to bear their own costs.


(N.D.RAGHAVAN)
VICE-CHAIRMAN


(K.N.K.KARTHIAYANI)
MEMBER (A)