

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A. Nos.1127, 1157 to 1159 and 412 of 2004

Cuttack, this the 17th day of January, 2009
February,

C O R A M:

THE HON'BLE MR.JUSTICE K.THANKAPPAN, MEMBER (J)
A N D
THE HON'BLE MR. C.R.MOHAPATRA, MEMBER (A)

O.A. Nos.1127, 1157 to 1159 of 2004

1. Surendra Kumar Patra, S/o. Sri Bansidhar Patra aged about 38 years, presently working as Inspector of Central Excise and Customs, O/O the Commissioner, Central Excise and Customs, Bhubaneswar II Commissionerate, C.R.Building, Rajaswa Vihar, Bhubaneswar -751 007.
2. Asis Kumar Panda, S/o. Sri Sarat Chandra Panda, aged about 36 years, presently working as Inspector of Central Excise and Customs, O/O the Commissioner, Central Excise and Customs, Bhubaneswar-I Commissionerate, C.R.Building, Rajaswa Vihar, Bhubaneswar-751 007.
3. Rabinarayan Mahapatra, S/o. Sri Baidyanath Mahapatra aged about 36 years presently working as Inspector of Central Excise and Customs, O/O the Commissioner, Central Excise and Customs, Bhubaneswar-II Commissionerate, C.R.Building, Rajaswa Vihar, Bhubaneswar-751 007.
4. Subhendu Mohanty, S/o. Sri Pramod Kumar Mohanty aged about 36 years, presently working as Inspector of Central Excise and Customs, O/O the Commissioner, Central Excise and Customs, Bhubaneswar-I Commissionerate, C.R.Building, Rajaswa Vihar, Bhubaneswar-751 007.

.....Applicants

Advocate for Applicants : M/s. A.K.Mishra, J.Sengupta,
D.K.Panda, G.Sinha , A.Mishra.

-Versus-

1. Union of India represented through the Secretary to Government of India, Department of Revenue, Ministry of Finance, North Block, New Delhi-110 001.
2. The Chief Commissioner, Central Excise & Customs, Bhubaneswar Zone, Central Revenue Building, Bhubaneswar, Dist. Khurda, PIN-751 007.
3. The Commissioner, Central Excise & Customs, Bhubaneswar-I Commissionerate, Central Revenue Building, Bhubaneswar, Dist. Khurda, PIN 751 007.
4. The Commissioner, Central Excise & Customs, Bhubaneswar-II Commissionerate, Central Revenue Building, Bhubaneswar, Dist. Khurda, PIN-751 007.

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5. The Assistant Commissioner (P&V), Central Excise & Customs, Bhubaneswar-I Commissionerate, Central Revenue Building, Bhubaneswar, Dist. Khurda, PIN-751 007.
6. Shri Ghanashyam Mallick, aged about 40 years, presently working as Superintendent, Central Excise and Customs, Sambalpur-I Division, Dist. Sambalpur.
7. Shri Kumar Bharosa Nandan, aged about 36 years presently working as Superintendent, Central Excise and Customs, Kalunga-I Range, Rourkela, Dist. Sundergarh.
8. Sri Abanindra Kumar Sethi, aged about 37 years, presently working as Superintendent, Central Excise & Customs, Customs House, Paradip, Dist. Jagatsinghpur.
9. Sri Prafulla Kumar Behera, aged about 35 years, presently working as Superintendent, Central Excise & Customs, Jajpur Range, Jajpur Road, Dist. Jajpur.

..... Respondents

Advocate for Respondents: Mr. U.B.Mohapatra, SSC;

Mr.Ashok Das (Res.No.9)

Mr.S.B.Jena, ASC (Res.Nos.1 to 5).

O.A.No. 412 of 2004

Suresh Chandra Praharaj, aged about 39 years, S/o Dwarika Nath Praharaj, At-Naranpur, P.O.-Patapur, P.S.- Kakatpur, Dist.- Puri, presently working as Inspector of Central Excise & Customs, Commissionerate-I, Rajaswa Vihar, Bhubaneswar, Dist.-Khurda.

.....Applicant

Advocate(s) for the Applicant- M/s. P.Jena, S.Jena, S.Das
Versus

1. Union of India represented through its Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi.
2. Chairman, Central Board of Excise & Customs, North Block, New Delhi.
3. Chief Commissioner of Central Excise and Customs, Bhubaneswar Zone, Rajaswa Vihar, Bhubaneswar, Dist-Khurda.
4. Commissioner, Customs & Central Excise, Bhubaneswar-I Commissionerate, Rajaswa Vihar, Bhubaneswar, Dist-Khurda.

..... Respondents

Advocate for the Respondents – Mr. U.B.Mohapatra.

ORDER

Per- HON'BLE MR.C.R.MOHAPATRA, MEMBER(A)

There are altogether five Applicants in these OAs. All of them were working as Inspector of Central Excise & Customs in the

Commissionerate situated at Bhubaneswar. By efflux of time, all of them have been promoted and became the Superintendent of Central Excise and Customs. They have commonly prayed to quash the order under Annexure-A/1 dated 17.03.2004(in OA No.1127/2004), direct the Respondent-Department to promote them from the date their juniors were promoted to the post of Superintendent, Central Excise and Customs i.e. w.e.f. 23.09.2002 and 27.08.2004 and grant them all consequential service and financial benefits retrospectively. Since common question of facts and law are involved in these OAs, though we have heard the matters separately, this common order is passed which will govern all these cases.

2. In nut shell, the contention of the Applicants in all these cases is that vide order dated 05.06.2002, 54 existing posts of Inspector of Central Excise and Customs were up-graded under restructuring of the cadre strength of the Bhubanesar I & II Commissionerate. Time and again various courts including the Hon'ble Apex Court have held that principles of reservation are not applicable while filling up of the up-graded posts in any department. There was no shortfall in the representations of SC, ST and OBC in the posts of Inspectors. 54 posts of Inspector were up-graded and therefore, the existing employees ought to have been given the benefits of up-gradation. But in violation of the well propounded law that there would be no reservation in up-gradation, the Respondents 2 & 3 have promoted some of the reserved candidates who are admittedly junior to the Applicants while filling up of the said 54 up-graded posts thereby depriving the applicants to get the benefit of such up-

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gradation. By doing so, Respondents 2 and 3 virtually applied the principles of promotion although it is trite law that up-gradation is not promotion. Further stand of the Applicants are that some of their juniors, who were promoted earlier, belong to Scheduled Castes and Scheduled Tribes. As they have already availed the concession/relaxation, they are not entitled to claim/get further concession of reservation in promotion or while filling up of the posts consequent to up-gradation. In order to fortify this stand that they are not entitled to get further concession, they have relied on the decision of the Hyderabad Bench of this Tribunal in the case of B.C.K.Raju and Another v Chief Commissioner of Central Excise, Andhra Pradesh zone and others (O.A. 251/03 disposed of on 31.07.2003). The next contention of the Applicants is that as per the Rules 15% & 7.5% posts/vacancies are reserved for SC/ST community candidates. But in the instant case, by application of the principles of reservation while filling up of the 54 up-graded posts, there has been excess of the percentage of reservation so far as SC/ST employees are concerned. By the wrong application of the reservation principles, Respondents 6 to 9 who are juniors to the Applicants, have superseded and representation submitted by Applicants have been rejected by the Respondents, without due application of mind.

3. The Respondents by filing counter have strongly opposed the contentions raised by the Applicants. They have averred that it is incorrect to state that there has been up-gradation of 54 posts of Inspector on restructuring of cadre. It has been contended that in fact 55 new posts of Superintendent were sanctioned/created due to the

upward revision of total strength of Superintendent, Central Excise and Customs in Bhubaneswar-I & II Commissionerate vide Ministry's letter F.No.A-60011/23/2002-Ad.II (B) dated 26.06.2002. In the letter under reference it was directed to fill-up all the posts (i.e. 55 + two existing and anticipated) by holding of DPC from amongst the feeder grade employees. After sanction of new posts, the strength of the Superintendent in both the commissionates was fixed at 164. As such, as per the instructions of DOP&T OM dated 02.07.1997 (Annexure-R/4) directing follow up 'post based roster' in the matter of promotion, out of 162 posts of Superintendent 24 and 12 were to be filled by SC and ST employees. Accordingly, DPC was held in which 54 names were released for promotion to the grade of Superintendent and one name could not be released as it was in sealed cover due to pendency of vigilance case. These posts of Superintendent have been filled up by promotion as against the vacancies created on restructuring of the cadre. Names appearing at Sl. Nos. 49 to 54 of the order of promotion dated 23.09.2002 belong to reserved community of SC & ST. They have duly been promoted against the vacancies falling under respective quotas according to reservation roster in force. The Respondents have further clarified at paragraph 15 of their counter that the quota fixed for SC and ST categories against 164 posts is as per rule, which provides as under:

"In fact the total sanctioned strength in the grade of Superintendent of Bhubaneswar-I and Bhubaneswar-II Commissionerates having common cadre, is 164. As per post based roster register maintained in terms of DOPT's O.M. No. 36012/2/96-Estt.(Res.) dt. 02.07.1997 the quota fixed for SC and ST

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categories against 164 posts of
Superintendents is as follows:

Scheduled Caste :24

Scheduled Tribe :12

As per abstract for the recruitment year
2002-2003 shortfall/excess of SC/ST officers
in the grade of Superintendent is as under:

SC ST

(A) Quota fixed 24 12

(B) Actually working 23 12

(C) Balance 1(Shortfall) NIL

In terms of DOPT's O.M. dated
11.07.2002, SC and ST Officers promoted on
merit as follows have been shown/adjusted
against unreserved/general points and not
against (B) above.

Merit Points

SC :2

ST :5

Thus, the allegation of the applicant
regarding mis-adjustment of roster points is
baseless..."

The Respondents further contend that the order of
Hon'ble CAT, Hyderabad Bench in O.A. 251/03 is not applicable to
this case as the instructions contained in DoPT Office Memorandum
letter dated 11.07.2002 are scrupulously followed. The said O.M. does
not prohibit the SC & ST candidates to get further concession in the
matter of promotion in case they have availed the same earlier.
Accordingly, the Respondents pray for dismissal of this OA.

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5. The applicants by filing rejoinder have reiterated the stand already taken in the O.A. and have stressed the point that there was no correct interpretation of DoPT O.M. dated 11.07.2002 given by the Respondents while allowing concession to the SC & ST employees who are juniors to the Applicants.

6. Respondents have filed their reply to the rejoinder and have stuck to their stand by pointing out as under:

"The reservation policy/principle would apply to fill up the posts. So, the order of the Hon'ble Supreme Court in case of Union of India vs V.K.Sirohota (Civil Appeal No. 3622 of 1995 with 9149 of 1995), Union of India & Others vs. All India Non SC/ST Employees Assn. & another (Civil Appeal No. 1481 of 1996 with 5830 & 5831 of 1998) and All India Non SC/ST Employees Assn(Railway)(Cont Pat(Civil) 304/1999 in civil appeal No. 1481/1996) may not be applicable to this case.

7. Learned Counsel appearing for respective parties have reiterated their stand taken in their pleadings and we feel no need of recording those arguments, especially after recording their stand taken in the pleadings. However, after hearing them at length, we have perused the materials placed on record.

8. We are of the considered opinion that there was no upgradation of the existing posts. Rather there was creation of new posts of Superintendent in both the Commissionerates as a result of restructuring of the cadre as per the decision of the Board. This being the situation, the plea of the Applicants that there should be no application of the principle of roster/reservation is not sustainable in view of the recent decision of the Hon'ble Apex Court which has not

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been controverted by the Learned Counsel for the Applicants during the argument of this case. In view of the settled law, the principles of reservation would apply to the new posts at higher level created due to the restructuring of the cadre.

9. The next contention by relying on the decision of the Hyderabad Bench of this Tribunal (supra) of the Learned Counsel for the Applicants is that SC & ST employees appointed/promoted on concession due to being reserved community should not be once again allowed the said benefits in the matter of promotion. For taking a view on this aspect of the matter it is necessary to extract the prayer/issues involved and findings reached by the Hyderabad Bench of the Tribunal. The relevant portion of the order is extracted herein below:

PRAYER:

"a) Direct the Respondents herein to adjust such of those SC/STs who have availed the benefit of reservation while being promoted/appointed by direct recruitment to the feeder cadres to the post of Inspector of Central Excise and who are occupying the unreserved slots in the cadre of Inspectors of Central Excise into the slots actually meant for them and even by ...

b) Consequently direct the Respondents herein to promote the Applicant here in as inspectors of Central Excise to the said unreserved posts of Inspectors of Central Excise with all consequential benefits and attendant benefits;

c) Hold the action of the Respondents herein in promoting such SC/ST candidates who have availed the benefit of reservation to unreserved slots while denying promotions to the Applicants to the said slots as bad illegal arbitrary, discriminatory, irrational illogical contrary to office memorandum dated 11.07.2002 and violative of Articles 14, 16 and 21 of the constitution of India."

On the basis of the materials and various judge-made-laws placed before it, the Hyderabad Bench of the Tribunal came to the following findings:

16. We therefore find sufficient strength in the Applicants' case that these SC/ST candidates have already availed the benefit of reservation in one form or the other and as such they cannot take their place against the vacancies meant for unreserved candidates and as such they have to be considered and accommodated only against the reserved vacancies, which are meant for them within the stipulated percentage. The Office Memorandum dated 11.7.2002 is nothing but a clarification to the earlier Office Memorandum dated 2.7.1997 dealing with such SC/ST candidates who are promoted on their own merit. Paragraph 2 of the said Office Memorandum states that if there is unreserved vacancy and if there is such an SC/ST candidate who is within the zone of consideration he cannot be denied promotion on the ground that the said post is not reserved and that he has to be treated as general candidate. Such a candidate can be accommodated in the unreserved points.

17. It appears that the respondent no.1 has somehow misinterpreted and wrongly applied the directives as contained by the Office Memorandum dated 2.7.1997 to the effect that every SC/ST candidates whether he is promoted on his own merit or against unreserved points is against the very object and purpose of issuance of the Office Memorandum. By doing so and by misinterpreting the said Office Memorandum no distinction is drawn by the respondents among the SC/STs between those who have been promoted on their own merit and those who have been promoted due to availing the benefit of reservation. Thus, several SC/ST candidates who have availed the benefit of reservation in the way or the other and are within the normal zone of consideration have been wrongly accommodated and promoted against the unreserved posts thereby denying the unreserved candidates like the applicants their slots. This has resulted that all the SC/ST candidates have been accommodated against the unreserved posts leaving the roster points meant for them unfilled due to non-availability of SC/ST candidates.

18. The OM dated 2.7.1997 has been rather misinterpreted by the respondents and have given effect that all SC/ST candidates, whether promoted in his own merit or promoted due to benefit of reservation are considered against unreserved points is against the very object and purpose of the issuance of this memorandum and in utter contempt to the base OM dated 2.7.1997

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issued as a consequence to the judgment of the Hon'ble Supreme Court in R.K.SABHARWAL v. STATE OF PUNJAB. As a result of the said callous misinterpretation, several SC/ST candidates who have availed the benefit of reservation have been accommodated and promoted against the unreserved points denying unreserved slots for the general candidates. This action of the respondents is contrary to the very concept and object of the office memo dated 2.7.1997 read with the clarificatory memo dated 11.7.2002 and the following judgments which explain to draw distinction between the SC/STs who are appointed and promoted on their own merit and SC/STs who have availed the benefit of relaxation:-

1) BIR SINGH AND OTHERS v. UNION OF INDIA AND OTHERS dated 30.7.2002 - held that it has to be examined whether the SC/ST candidates standards has received the benefit of reservation in lower grade posts held by them resulting in their accelerated promotion.

2) SIBRAM ADAK v. UNION OF INDIA AND OTHERS (Kolkatta CAT Bench) dated 31.1.2001 - held that once a SC/ST candidate availed accelerated promotion in their reserved category he cannot change the line and ask for promotional avenue as a general category candidate;

3) RAM SINGH v UNION OF INDIA AND OTHERS (Patna CAT Bench) dated 4.8.1999- held that a SC/ST candidate who has availed relaxation/concessions has to be adjusted against reserved vacancy only despite securing high position in the select list on his own merit.

Contrary to the above judgments of this Tribunal, 40 SC/ST candidates who have availed of the benefit of reservation/concessions in the lower cadres at the time of appointment were promoted against the unreserved slots.

19. The respondents are accordingly directed to put the 45 officials as per the list furnished by the respondents counsel from the unreserved slots to the reserved slots. In the vacancies so arising in the unreserved slots, the respondents are further directed to promote the applicants herein as Inspectors of Central Excise to the said unreserved posts of Inspectors of Central Excise with all consequential benefits. The SC/ST candidates who are wrongly holding the posts of Inspectors of Central Excise against unreserved vacancies may however not to be reverted as their are several SC/ST slots left unfilled due to non-availability of eligible SC/ST candidates. This exercise should be completed by the respondents within one month from the date of this order."

As it reveals when the Applicants claimed the benefit of the decision of the Hyderabad Bench, the Respondents informed the Petitioners under Annexure-1 as under:

"In this connection it is to inform that the order dt.31.7.2003 of Hon'ble CAT, Hyderabad Bench passed in OA No. 251 of 2003 is to be implemented with respect to petitioners only and it cannot be implemented as a general policy since it has already been clarified accordingly by Board earlier under similar circumstances.

Hence, the said order dated 31.7.2003 may not be implemented in your case unless and until Ministry's instruction/direction is received to implement the same at this end."

10. Through the order the Hyderabad Bench of the Tribunal interpreted the instructions issued by the Department of Personnel & Training it is applicable to all the Commissionerates in the Department. As such this decision of the Hyderabad Bench can safely be presumed to be the judgment in *rem* making it applicable to all the commissionerates unless it is set aside which is not the case of the Respondents. In view of the above, the letter under Annexure-A/1 dated 17.03.2004 is hereby quashed with direction to the Respondents to follow the principles decided by the Hyderabad Bench in the aforesaid case so far as the Applicants are concerned. This view is expressed by relying on the decision of the Hon'ble Apex Court in the case of **Maharaj Krishan Bhatt and Another v State of Jammu and Kashmir and Others**, (2008) 2 SCC (L&S) 783.

11. The last contention of the Applicants is that there was no proper application of the principle of reservation thereby exceeding the number of quota for SC/ST candidates than the percentage provided for them. According to the Applicants during 2001-2001 the total cadre

strength of Superintendent was 107. On 23.09.2002 55 additional posts on restructuring was made available making the total cadre strength of Superintendent as 162. As against 162 vacancies according to roster 24 posts are reserved for SC&ST but physically there has been 26 SC&ST in position. S/Shri P.C.Das and A.C.Jena both belonging to SC community were promoted on their own merit. Hence two more SC candidates S/Shri K.B.Nandan and A.K.Sethi were promoted on 31.12.2002 and 23.09.2002. On 18.09.2002 27 new posts including two posts meant for direct Recruitment (export) were made available making the total cadre strength of Superintendent as 191. Shri P.C.Das and Shri A.C.Jena considered as occupying SC points of the roster by transferring them from UR points and hence two more UR candidates were promoted. In view of the above, according to the Applicants there was no need to keep Shri P.C.Das and A.C.Jena both belonging to SC in UR points and consequently there was no need to promote S/Shri K.B. Nandan and A.K.Sethi both belonging to SC w.e.f. 23.09.2002 vide order dated 31.12.2002 superseding the Applicants who are senior to them. After hearing the parties and going through the record, we find some force on the above contentions and therefore, the Respondents are hereby directed to examine/re-examine whether there has been any excess of reserved candidates (SC&ST) as on the date S/Shri K.B.Nandan and A.K.Sethi belonging to SC community were given promotion and if it is found that the Promotion of S/Shri Nandan and Sethi was in excess of the quota provided in the Rules and though they are junior to the Applicants but promoted by virtue of being reserved candidate, then

the Respondents should take step to ante-date the date of promotion of the Applicants with effect from the date they were given promotion but in that event the Applicants shall not be entitled to any back wages except fixation of their pay notionally. The entire exercise shall be completed by the Respondents within a period of 60(sixty) days from the date of receipt of copy of this order.

11.. With the aforesaid observation and directions these OAs

stand disposed of. No costs.

K APPAN

(JUSTICE K. THANKAPPAN)
MEMBER (JUDICIAL)

(C.R.MOHAPATRA)
MEMBER (ADMN.)

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