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CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK

O.A.NO. 181 of 2005
Cuttack, this the 30th day of October, 2007

Sri Pradeep Kumar Patnaik ..... Applicant

Vrs.

Union of India and others ..... Respondents

FOR INSTRUCTIONS

1) Whether it be referred to the Reporters or not ? yes.

2) Whether it be sent to the Principal Bench of the Central Administrative Tribunal or not? yes.

(N.D.RAGHAVAN)
VICE-CHAIRMAN

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CENTRAL ADMINISTRATIVE TRIBUNAL,
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O.A.NO. 181 of 2005

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CORAM:

HON'BLE SHRI N.D.RAGHAVAN, VICE-CHAIRMAN

.....

Sri Pradeep Kumar Patnaik, agedabout 47 years, son of late Sri Chandra Sekhar Patnaik, working as Youth Officer, National Service Scheme, Regional Center, Bhubaneswar, At-754/1, Jayadev Vihar, Bhubaneswar 751013, Dist.Khurda

..... Applicant

Advocates for applicant - M/s Dr.M.R.Panda, M.K.Nayak, B.P.B.Bahali & C.Mohapatra.

Vrs.

1. Union of India, represented through its Secretary, Ministry of Youth Affairs and Sports, New Delhi, At/P.O-New Delhi.

2. The Director-cum-Programme Adviser, National Service Scheme, Ministry of Youth Affairs and Sports, Department of Youth Affairs and Sports, At-Shastri Bhawan, New Delhi 110 001.

3. The Assistant Programme Adviser, National Service Scheme, Regional Center, Bhubaneswar, At-754/1, Jayadev Vihar, Bhubaneswar, Dist. Khurda.

..... Respondents

Advocate for Respondents – Mr.P.R.J.Dash,ASC

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ORDER

SHRI N.D.RAGHAVAN, VICE-CHAIRMAN

This matter was placed before the Bench for hearing on 7.8.2006, 11.10.2006, 14.11.2006, 18.12.2006, 15.1.2007, 16.1.2007, 24.1.2007, 13.2.2007, 5.3.2007, 12.3.2007, 13.4.2007, 9.5.2007 and 27.6.2007 and was adjourned all the time at the request of the learned counsel for either party. On 27.6.2007 the O.A. was adjourned to 25.7.2007.

2. On 25.7.2007 the learned counsels M/s Dr.M.R.Panda, M.K.Nayak, B.P.B.Bahali and C.Mohapatra for the applicant and the learned Additional Standing Counsel Mr.P.R.J.Dash for the Respondents remained absent due to Advocates' strike on Court work before this Bench purportedly on the basis of the CAT Bar resolutions passed without substance or value but violating principles of natural justice too. In this connection, I would like to refer to the decision in the case of **Ramon Services Private Limited Vrs. Subash Kapoor and Others**, reported in JT 2000 (Suppl. 2) Supreme Court 546, holding as follows:

> "When the advocate who was engaged by a party was on strike, there is no obligation on the part of the court either to wait or to adjourn the case on that account. It is not agreeable that the courts had earlier sympathized with the Bar and agreed to adjourn cases during the strikes or boycotts. If any court had adjourned cases during such periods, it was not due to any sympathy for the strikes or boycotts, but due to helplessness in certain cases to do otherwise without the aid of a Counsel." (Judgment Paras-5 & 14)
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> "In future, the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. The litigant who suffers entirely on account of his advocate's non-appearance in court, has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts the party with costs for the failure of his advocate to appear, the same court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause, the court can certainly absolve him from such a liability. But the advocate cannot get absolved merely on the ground that he did not attend the court as he or his association was on a strike. If any Advocate claims that his right to strike must be without any loss to him but the loss must only be for his innocent client, such a claim is

repugnant to any principle of fair play and canons of ethics. So, when he opts to strike work or boycott the court, he must as well be prepared to bear at least the pecuniary loss suffered by the litigant client who entrusted his brief to that advocate with all confidence that his cause would be safe in the hands of that advocate."

(Para-15)

"In all cases where court is satisfied that the ex parte order (passed due to the absence of the advocate pursuant to any strike call) could be set aside on terms, the court can as well permit the party to realize the costs from the advocate concerned without driving such party to initiate another legal action against the advocate."

(Para-16)

"Strikes by the professionals including the advocates cannot be equated with strikes undertaken by the industrial workers in accordance with the statutory provisions. The services rendered by the advocates to their clients are regulated by a contract between the two, besides statutory limitations, restrictions, and guidelines incorporated in the Advocates Act, the Rules made thereunder and Rules of procedure adopted by the Supreme Court and the High Courts. Abstaining from the courts by the advocates, by and large, does not only affect the persons belonging to the legal profession but also hampers the process of justice sometimes urgently needed by the consumers of justice, the litigants. Legal profession is essentially a service oriented profession. The relationship between the lawyer and his client is one of trust and confidence."

(Para-22)

"No advocate could take it for granted that he will appear in the Court according to his whim or convenience. It would be against professional ethics for a lawyer to abstain from the Court when the cause of his client is called for hearing or further proceedings. In the light of the consistent views of the judiciary regarding the strike by the advocates, no leniency can be shown to the defaulting party and if the circumstances warrant to put such party back in the position as it existed before the strike. In that event, the adversary is entitled to be paid exemplary costs. The litigant suffering costs has a right to be compensated by his defaulting Counsel for the costs paid. In appropriate cases, the Court itself could pass effective orders, for dispensation of justice with the object of inspiring confidence of the common man in the effectiveness of judicial system. Inaction will

surely contribute to the erosion of ethics and values in the legal profession. The defaulting Courts may also be contributory to the contempt of this Court."

(Paras-24, 27 & 28)

Keeping in view the aforesaid case law laid down by the Hon'ble Supreme Court, condemning severely such strike as contempt of Court particularly Hon'ble Supreme Court itself and leaving the Ld.Counsels including those representing Government at the peril of facing the consequences thereof, the available record on hand has been perused for adjudicating the issue as below.

3. By filing this Original Application under Section 19 of the Administrative Tribunals Act, 1985, the applicant, working as Youth Officer under the Respondent-Department, has prayed for quashing the order dated 9.3.2005 (Annexure 2) issued by the Under Secretary to Government of India, Ministry of Youth Affairs & Sports, New Delhi, directing recovery of the amount of arrears of pay and allowances paid to the applicant on account of retrospective promotion granted to him to the post of Youth Assistant Grade I which was subsequently found to be irregular.

4. Brief facts of the applicant's case are that he joined as Youth Assistant, Grade II, at National Service Scheme, Regional Centre, Bhubaneswar, on 20.10.1982. He was promoted to the post of Youth Assistant, Grade I, w.e.f. 25.9.1989 whereas under the rules he should have been promoted to the said grade on 21.10.1987 after completion of 5 years of service. He approached Central Administrative Tribunal, Hyderabad Bench, in OA No. 1041 of 1993 challenging his non-promotion from the due date of 21.10.1987. During pendency of the said O.A., the Respondents reconsidered his case and issued order dated 14.6.1994

promoting him to the post of Youth Assistant Grade I w.e.f. 21.10.1987, instead of 25.9.1989, after which the applicant withdrew OA No.1041 of 1993. He was thereafter promoted to the post of Youth Officer w.e.f. 19.1.1995. The applicant made representation – dated 27.3.1995 to Respondent No.1 to revise the seniority list on the basis of his promotion to the grade of Youth Assistant, Grade I, w.e.f. 21.10.1987. The Respondent-Department, without taking note of his date of promotion to the grade of Youth Assistant, Grade I, i.e., 21.10.1987, published the draft/modified seniority list placing the applicant much below his due position. The applicant made a representation dated 22.9.1998 to Respondent No.1 for correction of his seniority position. But the Respondent-Department, in clear disregard to the provisions of law and without giving an opportunity of hearing to the applicant, issued order dated 13.11.2001 reverting the applicant from the post of Youth Officer to the rank of Youth Assistant, Grade I with effect from 26.10.2001 and altering the date of his promotion from Youth Assistant, Grade II to Youth Assistant, Grade I, from 21.10.1987 to 25.9.1989. The said order of reversion dated 13.11.2001 was challenged by the applicant before this Bench of the Tribunal in OA No. 464 of 2003. After hearing the parties, the Tribunal reserved the order, and before the order could be pronounced, the Respondent-Department, without issuing a show-cause notice and without affording an opportunity to the applicant of being heard, passed the order of recovery dated 9.3.2005 which has been assailed by the applicant in the present O.A.

5. The Respondents have filed a detailed counter. They have not disputed the factual aspects of the applicant's case. In order to justify the impugned order of recovery, the Respondents have taken the stands that the applicant was wrongly given promotion to the post of Youth Assistant, Grade I, with effect from 21.10.1987, instead of 25.9.1989, on the basis of five years regular service in the feeder grade, i.e., Youth Assistant Grade II, which was one of the eligibility conditions prescribed under the Recruitment Rules. The promotion from Youth Assistant, Grade II to the post of Youth Assistant, Grade I is not automatic like Flexible Complementing Scheme and is subject to the availability of post in the higher grade. As the promotion of the applicant to the grade of Youth Assistant, Grade I, was given effect to from 21.10.1987 without holding Review D.P.C., the same was found irregular as per the advice of the DoP&T and by order dated 13.11.2001 (Annexure R/II) the applicant was reverted from the post of Youth Officer to the post of Youth Assistant, Grade I w.e.f. 26.10.2001 and was deemed to be promoted as Youth Assistant, Grade I from the post of Youth Assistant, grade II, w.e.f 25.9.1989, instead of 21.10.1987. The Respondent-Department have every right to rectify the mistake at any point of time and therefore, there is no illegality in issuing the reversion order dated 13.11.2001 by the Respondent-Department to rectify their own mistake. The applicant being not entitled to the pay and allowances attached to the post of Youth Assistant, Grade I, during the period from 21.10.1987 to 24.9.1989 and the same having been paid by mistake, the Respondent-Department are well within their domain to recover the same and no

order.

fault can be found with them. As regards OA No. 464 of 2003 filed by the applicant challenging the order of reversion, the Respondents have stated that the Tribunal allowed the said O.A. by order dated 1.4.2005 and that W.P. (C) No.3464 of 2006 has been filed by them before the Hon'ble High Court of Orissa challenging the Tribunal's order. They have, therefore, submitted that effect of the order of reversion of the applicant has not been fully wiped out.

6. The applicant has filed a rejoinder. In paragraph 8 of the rejoinder, the applicant has mentioned the names of several persons who have been granted promotion from the post of Youth Assistant, Grade II to the post of Youth Assistant, Grade I. The applicant has also alleged in paragraph 9 of the rejoinder that the Respondent-Department have acted arbitrarily and illegally in filling up some of the vacant posts of Youth Assistant, Grade I, by bringing persons from the Surplus Cell during 1988 though under the Rules such persons could not have been deployed against promotional post of Youth Assistant, Grade I.

7. The Respondents have filed a reply to the applicant's rejoinder and have not specifically denied the averments contained in paragraphs 8 and 9 of the applicant's rejoinder.

8. It has been contended by the applicant that the reversion order dated 13.11.2001 (Annexure 1), which formed the very basis of the impugned order of recovery dated 9.3.2005 (Annexure 2), being unsustainable in the eyes of law, the said impugned order is bad and illegal. Admittedly, the applicant had challenged the reversion order dated 13.11.2001 before this Tribunal by filing OA No. 464 of

2003 which has been allowed by the Tribunal in order dated 1.4.2005, and the Respondent-Department have filed W.P. (C) No. 3464 of 2006 before the Hon'ble High Court of Orissa challenging the Tribunal's order dated 1.4.2005 (Annexure R/VIII to the reply filed by the Respondents to the applicant's rejoinder). Though the Tribunal's order upholding the applicant's claim is sub judice in a writ petition before the Hon'ble High Court, there appears to be some force in the contention of the applicant in as much as the Tribunal, which is the court of first instance in respect of the subject-matter, on an analysis of the pleadings of the parties and the relevant materials placed by them, has returned a verdict in favour of the applicant allowing his prayer to quash the reversion order.

9. It has been next contended by the applicant that there being no fault on the part of the applicant, and by virtue of the lawful order passed by the competent authority giving him retrospective promotion to the post of Youth Assistant Grade I, the applicant having been paid his rightful and legitimate dues, the impugned order of recovery issued long 10 years after, amounts to arbitrary exercise of power and hence is bad. It is the admitted case of the parties that OA No. 1041 of 1993 was filed by the applicant before the Hyderabad Bench of the Tribunal claiming promotion to the post of Youth Assistant, Grade I, with effect from 21.10.1987. During pendency of the said O.A., the Respondent-Department issued the — office order dated 14.6.1994 (Annexure R/V to the counter) granting him promotion to the post of Youth Assistant, Grade I, with effect from 21.10.1987. The said order dated 14.6.1994 reads as follows:

"OFFICE ORDER

In supersession of this Department's Office Order No.A.32016/1/88-YS.III dated 4.10.1989, the promotion of Shri P.K.Patnaik, Youth Asstt. Gd.II to the post of Youth Asstt. Gd.I in the pay scale of Rs.1600-50-2300-EB-60-2660 will be from 21st October, 1987.

2. He is also entitled to claim arrears of pay and allowances, if any."

(Emphasis supplied)

In view of the above order of the Respondent-Department, the applicant withdrew OA No.1041 of 1993 pending on the file of the Hyderabad Bench of the Tribunal. On the basis of the said order dated 14.6.1994 the arrears of pay and allowances might have been paid to the applicant by the Respondent-Department sometimes during 1994 or 1995. It is not the case of the Respondents that the applicant, at any point of time, misrepresented the facts which occasioned the issuance of the order dated 14.6.1994 and the payment of the arrears of salary and allowances attached to the post of Youth Assistant, Grade I. By a lawful order issued by the competent authority, the arrears of pay and allowances were paid to him in 1994 or 1995. More than seven years after the order dated 14.6.1994 was passed, Respondent No.1 issued the order dated 13.11.2001 (Annexure 1 to the O.A. and Annexure R/II to the counter) reverting the applicant from the post of Youth Officer to the post of Youth Assistant, Grade I w.e.f. 26.10.2001 and deeming the promotion of the applicant to the grade of Youth Assistant, Grade I w.e.f 25.9.1989. On the basis of the said reversion order dated 13.11.2001, the order of recovery was issued on 9.3.2005 (Annexure 2). Thus in the process the order of recovery came to be issued after more than ten years of the payment of the salary

and allowances made to the applicant in 1994/1995. The Respondent-Department have submitted that the Government or, for that matter, every authority making the order has an inherent power to rectify its mistake crept in the order. I have carefully considered this reply of the Respondents. There must be some reasonable period of limitation within which, such power should be exercised by the Government or any authority. In the instant case, by order issued by the competent authority, the promotion of the applicant was given effect to from 21.10.1987 and the arrears of pay and allowances, as were admissible and due to him under the Rules, were paid to the applicant, and the same have been directed to be recovered from the applicant after more than 10 years, as a consequence of the purported order of his reversion dated 13.11.2001 which has been quashed by the Tribunal. He having never made any misrepresentation of facts at any relevant period, as already found above, and being in no way responsible for disbursement of the arrears of salary and allowances and in view of the fact that the reversion order which formed the basis of the order of recovery has already been quashed by the Tribunal, I have no hesitation to hold that the impugned order of recovery is not sustainable in the eye of law. This view is supported by the decision of the Hon'ble Apex Court in the case of *Sahib Ram v. State of Haryana,* 1995 SCC (L&S) 248, wherein recovery of payment made to the appellant in that case, due to wrong construction of the relevant order by the concerned authority without any misrepresentation by the appellant, was restrained by Their Lordships. In the instant case the applicant is rather placed on a better footing in as much as the order dated 14.6.1994

(Annexure R/V) in clear and unequivocal terms mentioned that the applicant was entitled to claim arrears of pay and allowances because of his promotion to the grade of Youth Assistant, Grade I, being made effective thereunder from 21.10.1987.

10. The next vital contention of the applicant is that no opportunity of showing cause or of being heard having been granted to the applicant in the matter of recovery of arrears of pay and allowance, the impugned order is violative of the principles of natural justice. The Respondents have nowhere stated in their counter or reply to the rejoinder that before issuance of the order of recovery, any show-cause notice or opportunity of being heard was given to the applicant. From the impugned order of recovery (Annexure 2) it also does not appear that any show-cause notice or opportunity of being heard has been given to the applicant. In this view of the matter, I am of the considered view that the impugned order of recovery suffers from violation of the principles of natural justice and is thus unsustainable and liable to be quashed.

11. Having regard to the facts and circumstances of the case and in view of my conclusions in the foregoing paragraphs, I quash the impugned order of recovery (Annexure 2).

12. In the result, the Original Application is allowed. No costs.

(N.D.RAGHAVAN)
VICE-CHAIRMAN

PPS

fix for pronouncement on 03.10.07 at PM.