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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

OA No. 552 of 2005
Cuttack, this the 19th day of December, 2008

Amar Patnaik Applicant
Versus
Union of India & Ors. Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not?
2. Whether it be circulated to all the Benches of the CAT or not?


(JUSTICE K. THANKAPPAN)
MEMBER (JUDICIAL)


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

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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)

Amar Patnaik, aged about 38 years, S/o.Karunakar Patnaik, working as Senior Deputy Accountant General in the office of the Accountant General (Civil Audit), Orissa, at Sachivalaya Marg, PO. Bhubaneswar, Dist. Khurda.

.....Applicant
Legal practitioner M/s.Bigyan Kumar Sharma, G.K.Das
Counsel and Mr. Aswini Kumar Mishra,
Senior Counsel.

- Versus -

1. Union of India represented through the Secretary, Department of Personnel and Training, At-North Block, New Delhi.
2. Secretary, Ministry of Finance, Government of India, North Block , New Delhi.
3. Union Public Service Commission represented by the Secretary, At-

....Respondents

Legal Practitioner :Mr. U.B.Mohapatra, SSC.

O R D E R

MR. C.R.MOHAPATRA, MEMBER (A):-

Applicant working as Senior Deputy Accountant General in the Office of the Accountant General (Civil Audit), Orissa, Bhubaneswar is aggrieved having been superseded by the officers who were placed below him in the merit list of 1989 batch of Indian Audit and Accounts Service in the matter of promotion. By filing this Original Application U/s.19 of the Administrative Tribunals Act, 1985 he has prayed for the following relief:-

"(a) To declare the applicant as belonging to 1989 batch of IA & AS;

- (b) to allot correct position to the applicant in the 1989 batch as per his position secured in the Civil Services Examination, 1988;
- (c) to restore the seniority of the applicant in the 1989 batch;
- (d) to direct the respondents to place the applicant in his correct position in the Classified Civil List for Group A Officers of IA and as in 1991 and 1992;
- (e) To quash the order dated 27th April, 1993 under Annexure-2;
- (f) To quash the officers dated 15.12.2004 under Annexure-5 series;
- (g) To direct the respondents to give promotion to the applicant to super time scale in the rank of officers on Special Duty/Accountant General from 3.1.2005;
- (h) To direct the respondents to extend all consequential service benefits to which the applicant is entitled under law as per the 1989 batch;
- (i) To pass such other order/orders as this Hon'ble Tribunal may fit and proper."

2. Respondents by filing counter have opposed the prayers of the Applicant which has also been contested by the Applicant through rejoinder filed by him after serving copy thereof on the other side.

3. Heard Learned Counsel for both sides and perused the materials placed on record.

4. According to Applicant, he appeared at the Civil Service Examination of 1988. On being qualified, he was placed at Sl.No.3 of the 1989 batch of Indian Audit and Accounts Service published under Annexure-

1. All on a sudden, his name appeared along with the recruits of 1990 who were selected on the basis of 1989 Civil Service Examination. As per second proviso to Rule 4 of the Civil Service Examination Rules, 1989 existing as on that date, persons already allotted to a particular service on the basis of a Civil Service Examination were not to be allowed to join the probationary/foundational training along with his batch mates, if he/she intended to appear at the subsequent civil service examination and

accordingly, he/she would be placed below the candidates who would join without postponement of probationary training but in the same batch. The applicant sought for exemption from probationary training during 1989. Similarly situated successful candidates of 1989 batch also sought exemption for writing the subsequent civil service examination in the year 1990. Aforesaid proviso to Rule 4 of Civil Service Examination Rules, 1989 was challenged by some of the candidates in the CAT, Principal Bench, New Delhi. The matter was ultimately carried to Hon'ble Apex Court and the Hon'ble Apex Court in its order dated 13.09.1991 held as under:

“.....The seniority of those successful candidates in Civil Service Examination 1990 would depend on the service to which they have qualified. The seniority of the left out candidates would be maintained in case they have joined the service to which they have been allocated on the results and such candidates will not be subject to suffer loss of seniority as held by the Central Administrative Tribunal, Principal Bench, New Delhi.”

Further case of the Applicant is that in accordance with the aforesaid direction of the Hon'ble Apex Court, inter-se-seniority of all the candidates who qualified in the Civil Service Examination, 1987 was restored by assigning their names at the correct place and position in the classified civil list of Indian Audit and Accounts Service Group A Officers. As also the inter se seniority of candidates who had qualified along with applicant in the year 1989 and who were exempted from the foundational course during the year 1989 for a period of one year in order to re appear in the subsequent civil service examination 1989 and ultimately joined the foundational course in the year 1990 in the same service as that of the applicant, their place and position in the seniority list were rightly reflected in the civil list of Group 'A' Officers. Though Applicant's case stands in similar footing, the benefit of the judgment

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of the Hon'ble Apex Court has not been extended to him. Rather in letter dated 27th April, 1993, the Ministry of Finance intimated the applicant to the effect that the applicant shall be accorded depressed seniority of 1990 and his future promotions shall be regulated in accordance with the seniority so fixed. As against the above letter he submitted representations. In consideration of his **representation he was informed in letter dated 26.02.1997 that the seniority of applicant is to be fixed in accordance with the seniority rules applicable to the members of Indian Audit and Accounts Service (in short "IA&AS") prevailing at the time of appointment.** According to him although the Department of Personnel and Training has specifically directed for fixing of the seniority of applicant as per rules applicable to the members of IA and AS, the Comptroller and Auditor General without due application of mind erroneously fixed the seniority of the Applicant that too without any reference under which rule the seniority was fixed. In support of his plea of discrimination he has pointed out that out of eleven selected persons of 1989 batch eight officers including him did not undergo the foundational course in the year 1989 and joined their service in the year 1990. Except the Applicant the remaining other officers who joined along with applicant in the year 1990 they were assigned their correct place and position in the seniority list of 1989 whereas for no fault of his he was discriminated thereby allowing him to be superseded by the persons who had ranked below him in the select list of Civil Service Examination, 1988. According to him though he represented against such supersession in the matter of promotion, there being no answer, he has approached this Tribunal in the present Original Application with the

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aforesaid prayers. By filing MA No. 403 of 2005, Applicant has also prayed for condonation of delay, if any, caused in filing the present Original Application.

5. On the other hand, it is the stand of the Respondents that the Applicant after being successful in the Civil Service Examination, 1988 was required to undergo training during the period of probation for a period of one year. By filing representation dated 17.08.1989 he requested to abstain from probationary training for one year to complete M. Sc Degree. He also gave an undertaking to forgo one year seniority in the service. On the basis of the undertaking, Department of Personnel and Training/Respondent No.1 agreed to the request of applicant and allowed him to join the foundation course in 1990 with depressed seniority which was duly communicated to him under Annexure-R/2 dated 02.01.1990. Their case is that second proviso to rule 4 of Civil Services Examination Rules provides *inter alia* that a candidate allotted to Group A service can obtain permission to abstain from joining training along with his batch mates if he wants to appear again at the next Civil services examination but a candidate who has accepted allocation to service and joined that service would not be eligible to appear again in the Civil Service Examination unless he first resigns from that service. Aforesaid rules were under challenge in various Benches of the Tribunal and finally the matter was set at rest by the decision of the Hon'ble Apex Court in the case of **Mohan Kumar Singhania v Union of India** (1992) Supplementary 1 SCC 594; after which the DOP&T issued instructions dated 07.01.1993 stating *inter alia* that seniority of candidates who obtain permission to abstain from training to appear at the next civil service examination would be protected. It has further been clarified that seniority of probationer who joined service late on

any ground other than appearing at the next civil service examination would be fixed along with probationer with whom they undergo probationary training. Applicant who had appeared in the civil service examination, 1988 neither was a candidate in the civil service examination, 1989 nor was he permitted to abstain from training on that ground. On the contrary the Applicant was allowed to abstain from training for reasons of completion of higher studies and ultimately the applicant joined service in 1990 and accordingly his seniority was kept on the top of the list of 1990 batch. The applicant became unsuccessful in the civil service examination 1990. As the applicant did not join the service (IAAS) on the basis of civil services examination, 1988 and he joined the service in August, 1990 there was no wrong in the fixation of his seniority with 1990 batch which was also in accordance with then existing Rules. The sub rule 2(a) of Rule 8 of Indian Audit and Accounts Service (Recruitment Rules) 1983 ^{provides} ~~periods~~ that the seniority of offices who are appointed to the service after the commencement of these rules shall be regulated in accordance with the principles that (a) persons recruited on the results of a competitive examination conducted by the commission in any year to posts in Junior Group A scale of the Service shall be ranked inter se in the order of merit in which they are placed at the examination on the results of which they are recruited; those recruited on the basis of an earlier examination being ranked senior to those recruited on the basis of a later examination (ii) in whose case offers of appointment are revived after being cancelled; or (iii) who are not initially appointed for valid reasons but are appointed after the appointment of candidates recruited on the basis of results of subsequent examination or examination. They have also stated that the

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issue of seniority has been settled way back in 1993 when the representation of applicant was rejected. As such the applicant has no right to agitate his seniority after a delay of 12 years and, accordingly, they have prayed that besides lacking merit this OA is liable to be dismissed on the ground of limitation.

6. Before coming to the merit of the matter we would first like to take a view on the point of limitation raised by the Respondents and by filing MA applicant prays for condonation of the same. From the averments and materials placed on record it is seen that the matter is in correspondence stage between the applicant and Respondents which gave bona fide belief to the applicant that his case would receive due consideration by the authority. But such genuine belief of the applicant proved to be a dream when his juniors were promoted to next rank from 03.01.2005 and he became unsuccessful through representation, has rightly approached this Tribunal in the present Original Application. Also it is trite law that hypertechnicality of law of limitation should not stand on the way of dispensation of justice and when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of *mala fides*. That apart in case the delay is condoned all that will happen is that the matter would be decided on merit. In view of the above, in our opinion there is no delay and even if, according to Applicant, there is any delay the same is hereby condoned.

7. Now coming to the merit of the matter, we may observe that the general law in the matter of determination of seniority is well settled by a plethora of judicial pronouncements of the Hon'ble Apex Court and one of such principles, as held by the Hon'ble Apex Court in the case of **Surendra Narain Singh v State of Bihar**, 1998 SCC (L&S) 1317=(1998) 5 SCC 246 is that persons who were selected against earlier vacancies but who could not be appointed along with others of the same batch due to certain technical difficulties when appointed subsequently will have to be placed above those who were appointed against subsequent vacancies. Further in the case of **Puri Gramya Bank v Ananda Chandra Das**, 1994 SCC (L&S) 1384, **Bimlesh Tanwar v State of Harayana**, 2003 SCC (L&S) 737, **P.Srinivas v M. Radhakrishna Murty**, 2004 SCC (L&S) 424 it has been held by the Hon'ble Apex Court that when candidates are selected in the same process of selection and a merit list is prepared, the date on which the candidate actually joined the post is not determinative of his seniority. It is his position in the merit list which determined his seniority.

8. In the present case, that the Applicant was at Sl.No.3 of the select list of 1989 batch is not in dispute. The only thing is that he took exemption from probationary training during 1989 for writing the M.Sc (Final) Examination and joined at a later date and, therefore, it is to be decided as to whether, in the circumstances, he is to be shown along with the candidates who were selected in 1990 batch or to be shown, (according to his place and position of the merit list of 1989 batch) in the seniority list of his batch mates. The applicant has specifically pleaded in paragraph 4.16 & 4.18 of his OA that eight officers including present applicant did not undergo the probationary

training/foundational course in the year 1989 and joined their service in August, 1990. Except the applicant, the remaining other officers who joined along with him in the year 1990 their seniority has correctly been fixed. In Annexure-A/4 dated 26th February, 1997 the Applicant was intimated that the Ministry has opined that the seniority of the applicant is to be fixed in accordance with the seniority rules applicable to the members of the service prevailing at the time of his appointment to the service. The main objection of the Respondents to grant the relief claimed by the applicant is as under:

- (a) The applicant did not join the foundational training course in 1989 as he had to complete his M.Sc. final examination whereas the other seven officers of his batch did not join the foundational training course in 1989 as they were to appear at the next Civil Service Examination of 1989. Hence the applicant and the other seven officers do not stand on the same footing.
- (b) The decision of the Apex Court dated 13.09.1991 does not cover the applicant.
- (c) That the applicant had given undertaking before being allowed to postpone his foundational training.

9. Notwithstanding the above objection, the Respondents in para-11 of their counter have stated that the seniority of persons appointed to IAAS is regulated by Rule 8 of the Indian Audit and Accounts Services (Recruitment Rules) 1983. Rule 8(2)(a) makes it clear that the inter se seniority will be based on the order of merit of the result of the examination. These rules do not contain any provision regarding depression of seniority. Even Annexure-R/7, which is a letter from the Ministry of Finance (Department of Expenditure), has conveyed the opinion of the DoPT that the seniority of the Applicant has to be fixed in accordance with the seniority rules applicable to

the members of the service prevailing at the time of appointment to the service. It is, therefore, presumed that the Department would have taken into consideration the above provisions of the Rules while fixing the inter se seniority of all the direct recruits including the seven Private Respondents belonging to the 1989 batch of Indian Audit and Accounts Service. The applicant cannot be an exception to this statutory provision. In the face of such rules on seniority, the applicant cannot be subjected to a different yardstick vis-a-vis his batch-mates, who were recruited on the basis of the same examination i.e., Civil Service Examination, 1988 and allocated to IAAS.

10. As regard the undertaking of the applicant, at the time of seeking permission for joining the foundational course at a later date because of his M.Sc. final examination, such an undertaking has no legal sanctity on the face of explicit provisions under the Recruitment Rules. It is trite law that undertaking taken or given dehors the Rules is not binding upon the parties. It appears that the applicant has written such a letter in a panic situation. This being the position of facts and law, we find no justification in the denial of restoration of his position as in the merit list of 1989 batch vis-a-vis his batch-mates. We are, therefore, of the considered view that the applicant is entitled to maintain his position as in the Select List of 1989 batch of IAAS and would thus be entitled to further consequential benefits, which have accrued in favour of his juniors in the meanwhile. Ordered accordingly.

11. Respondents are hereby directed to complete the entire exercise relating to the restoration of seniority and grant of consequential

benefit within a period of three months from the date of receipt of a copy of this order.

12. In the result, in the afore-stated terms, this O.A. is allowed.

There shall be no order as to costs.

Kappan
(JUSTICE K. THANKAPPAN)

MEMBER (JUDICIAL)

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

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