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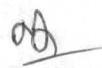
IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.


Original Application No.09 of 2007
Cuttack, this the 11th day of August, 2009

Yudhistir Mohanty 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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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A.No.09 of 2007

Cuttack, this the //th day of August, 2009

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)

.....

Sri Yudhisthir Mohanty, aged about 42 years,
S/o.Sanatan Mohanty, working as Clerk in the Office
of the Accountant General (A&E), Orissa,
Bhubaneswar, Dist. Khurda.

.....Applicant

Advocate for Applicant: M/s.Chitra Padhi, S.Behera,
Monalisa Devi.

-Versus-

1. Union of India represented through Comptroller and Auditor General,10, Bahadur Shah Zafar Marg, New Delhi-110 002.
2. Union of India represented through Accountant General (A&e), Orissa, Bhubaneswar, Dist. Khurda.
3. Senior Accountant General (Administration), Office of the Accountant General, Orissa, Bhubaneswar, Dist. Khurda.
4. Anil Kumar Pati
5. Jharna Mallick
6. Sauna Charan Hansdah
7. Joachim Baa
8. Tej Kumar Trikey
9. Prafulla Chandra Jena

(Respondents No.4 to 9 are working as Accountant in
Office of the AG (A&E), Orissa, Bhubaneswar)

....Respondents

Advocate for Respondents: Mr.P.R.J.Dash.

O R D E R

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

Applicant is working as Clerk in the office
of the Accountant General (A&E), Orissa,
Bhubaneswar. Non-consideration of his case in the
DPC held on 26.09.2005 and subsequently

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14 thereafter, and promotion of his juniors (Respondent Nos.4 to 9) to the post of Accountant has been challenged by the Applicant with prayer to direct the Respondents 1 to 3 to promote him to the grade of Accountant w.e.f. 30.09.2005 i.e. the date of promotion of Respondent Nos. 4 to 9 with all consequential service and financial benefits retrospectively.

2. The reason for non-promotion of the Applicant as revealed from counter filed by the Respondents is that the DPC held on 26.09.2005 deferred the case of the Applicant due to pendency of the representation of applicant dated 23.09.2005 against the adverse remarks communicated to him in letter dated 20.09.2005. In regard to non-consideration of his case by the DPC/Review DPC subsequently, convened on 14.08.2006, 22.12.2006 and 08.09.2006 it has been stated in the counter that as disciplinary proceedings under Rule 14 of CCS (CC&A) Rules was pending consequent to the issue of charge sheet to the Applicant on 29.12.2005, there was no scope to release the name

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of applicant for promotion other than following 'sealed cover' procedure as provided in the Rules. Accordingly Respondents opposed the prayer of the Applicant and have prayed for dismissal of this OA. By filing rejoinder, Applicant more or less reiterated the stand taken in his Original Application and has stated that as the procedure adopted by the Respondents was unfair, the Applicant is entitled to the relief claimed in this OA.

3. Heard the rival submission of the parties and perused the materials placed on record. It has been contended by Learned Counsel for the Applicant that Governmental action must not be arbitrary or capricious but must be based on some principle which meets the test of reason or reasonableness and relevance. It should be free from bias and *mala fide* because bias vitiates all action. The applicant has a right to be considered and that right ought not to have been curtailed in the manner it has been done in the case of the Applicant by DPC. Further it was argued by Learned Counsel for the Applicant that the entire

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exercise of recovering the money, recording adverse remarks in the ACR its communication and consideration of the representation were done with *mala fide* intention to deny the applicant his legitimate right of consideration for promotion along with others. In course of hearing Learned Counsel for the Applicant by drawing our attention to the order of this Tribunal dated 13.02.2008 in OA NO. 03/2007 holding recovery of the amount was bad in law and thereby directing release of the said amount has submitted that the very foundation of recording of the adverse CCR was wiped out by the order of this Tribunal in the aforesaid case. As such, the Respondents ought to have reconsidered the case of the Applicant by holding review DPC as provided in the rules. Having not done so, the Applicant is entitled to the relief claimed in this OA.

4. We have given in-depth consideration to the arguments advanced by the respective parties and perused the records including the records of OA No. 03/2007 disposed of on 13th February, 2008. On perusal of the records, it is noticed that

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the adverse remark was based on certain wrong transactions in the GPF A/C which led to the recovery of the amount ordered by the Accountant General. It pertains to the period from 01.10.2004 to 21.01.2005. This adverse remark was communicated to the applicant in letter dated 20.09.2005 which was five days prior to the convening of the DPC which met on 26.09.2005. Applicant submitted his representation against the adverse remark on 23.09.2005. Order of promotion of the Respondents 4 to 9 who were admittedly juniors to the Applicant was issued on 30.09.2005. According to the Respondents though the case of the applicant was placed before the DPC held on 26.09.2005 in the aforesaid circumstances, DPC deferred the case of the Applicant. The representation for expunction of adverse remark was rejected and communicated to the Applicant in letter dated 13.04.2006. Subsequently, DPCs/Review DPC were held on 14.08.2006, 22.12.2006 and 08.09.2006. Though the case of the Applicant was considered by the subsequent DPCs by that time a



charge sheet under Rule 14 having been issued to the Applicant his case was considered by the DPCs but kept in the sealed cover. By filing OA No.03 of 2007 Applicant had challenged the recovery. This Tribunal vide order dated 13th February, 2008 by holding recovery of the amount was bad directed for refund of the amount. Admittedly, Respondent Nos. 4 to 9 are juniors to the Applicant. From the above, one thing is clear that the case of the Applicant had not at all received due consideration though he has a right for the same. We may usefully record that the role and functions of the DPC, as has been defined in the Rules is to assess the suitability of the employees and make the recommendation as to whether an employee on the basis of the service record is fit for promotion. On receipt of such recommendation of the DPC, the competent authority will proceed in the matter as per rules. According to us, there is no power or jurisdiction available with the DPC to defer the case of an employee due to adverse remark against which representation is pending. We are aware of the

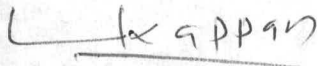
8/ instructions supported by various judge made laws that un-communicated adverse remarks cannot be acted upon nor adverse remarks against which representation is pending can have any effect. In this connection, it is profitable to rely on the decisions of the Hon'ble Apex Court in the cases of **Brij Mohan Singh Chopra v State of Punjab**, AIR 1987 SC 948 & **State of MP v Bani Singh**, AIR 1990 SC 1308. As such non-consideration of the case of the Applicant by the DPC held on 26.09.2005 is not in accordance with rules or law as the DPC held on 26.09.2005 erred in law in not making any assessment of the performance of the Applicant for making suitable recommendations.

5. In view of the discussions made above, we find considerable force in the argument that non-consideration of the case of the Applicant in the DPC held on 26.09.2005 is neither supported by any rule nor law. Hence, the Respondents 1 to 3 are hereby directed to consider the case of the Applicant by convening Review DPC to review the recommendations of the DPC held on 26.09.2005

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and in case the Applicant is found fit for promotion (after due assessment taking into consideration the ACRs for the relevant periods and treating the ACR for the period from 01.10.2004 to 21.01.2005 as non-est), he should be promoted retrospectively with effect from the date Respondents 4 to 9 (the juniors) were promoted to the grade of Accountant with all consequential benefits except the payment of arrears of pay and allowances. The entire exercise shall be completed within a period of 30 (thirty) days from the date of receipt of this order.

6. In the result, this OA stands allowed to the extent indicated above. No costs.


(JUSTICE K. THANKAPPAN)
MEMBER (JUDICIAL)


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