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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A. Nos.75/08, 331/08,364/08, 457/08, 458/08, 517/08,518/08,42/09&365/09
Cuttack, this the 19th day of October, , 2010

C O R A M
THE HON'BLE MR.M.R.MOHANTY, VICE-CHAIRMAN (J)
AND
THE HON'BLE MR.C.R.MOHAPATRA, MEMBER (A)

1. **O.A.No.75/2008**
Shri Narasingo Behera, aged about 55 yers, son of Late Jayadev Behera, Dera Street, At/Po.Gunupur, Dist. Rayagara at present Inspector of Income Tax in the Office of the Additional Commissioner of Income tax, Aayakar Bhawan, Ambapua, Berhampur-10.
....Applicant

By legal practitioner: M/s. J.M.Pattanaik, C.Panigrahi, P.C.Sethi, A.K.Moharana, Counsel.

-Versus-

Union of India & Others .... Respondents

By legal practitioner: Mr.S.Barik, ASC.

2. **OA No. 331 of 2008**
Sri Binod Xess, aged about 45 years, Son of Piyus Xess, resident of Village-Jhagarpur, PO-Kesrarmal, Dist. Sundargarh 770 017, Orissa at present working as Office Superintendent office of Additional Commissioner, Income Tax, Range-2, Sambalpur Town, Dist. Sambalpur, Orissa. ....Applicant

By legal practitioner: M/s.K.C.Kanungo, S.K.Patnaik, Counsel.

-Versus-

Union of India & Others .... Respondents

By legal practitioner: Mr.S.Barik, ASC
M/s.H.M.Dhal, B.B.Swain, A.S.Das, N.Mishra (for intervener)

3. **OA No.364 of 2008**
Panchanan Laxman Murmu, aged about 38 years, son fo Sana Dandu Majhee, Village-Teliarsala, PO-Arsala, Via-Jhumpura, Dist. Keonjhar, at present working as Office Superintendent in the office of the Commissioner of Income Tax (Appeals)-I, Aayakar Bhawan, Rajaswa Vihar, Bhubaneswar-751 007, Dist. Khurda.

By legal practitioner: M/s. M.K.Khuntia, A.K.Apat, G.R.Sethi, J.K.Biswal,B.K.Patnaik, P.K.Mishra, Counsel.

-Versus-

Union of India and others .... Respondents

By legal practitioner: Mr.U.B.Mohapatra, SSC,
Mr.R.N.Mishra,
M/s.H.M.Dhal, B.B.Swain, A.S.Das
(for intervener)

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4. **OA No. 457 of 2008**
Shri Sachipati Behera aged about 48 years, son of late Dambarudhar Behera, At-Maharda Palsa, PO/PS-Jashipur, Dist. Mayurbhanj, at present working a Income Tax Officer (TDS), Balasore, under the jurisdiction of Commissioner of Income Tax, Cuttack.

....Applicant

By legal practitioner: M/s. J.M.Pattanaik, S.Mishra, P.K.Nayak, D.P.Mohanty, P.K.Rout, Counsel.

-Versus-

Union of India & Others .... Respondents

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

5. **OA No. 458 of 2008**
Basant Kumar Naik, aged about 49 years, son of Late Ritbhanjan Naik, At-Kubahurang, PO-Lowaram, PS-Bisra, Dist. Sundargarh at present working as Income Tax Officer, Ward-5, Rourkela under the jurisdiction of Commissioner of Income Tax, Sambalpur.

.....Applicant

By legal practitioner: M/s.J.M.Pattanaik, S.Mishra, Counsel.

-Versus-

Union of India and others ... Respondents

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

6. **OA No. 517 of 2008**
Shri Hemanta Kumar Sethy, aged about 45 years, son of Late Chandramani Sethy, At-Badapatna, PO-Manijanga, PS Tirtol, Dist. Jagatsinghpur at present working as Income Tax Inspector in the office of the Additional Commissioner of Income Tax, Range-I Bhubaneswar.

..... Applicant

By legal practitioner: M/s. J.M.Patnaik, S.Mishra, D.P.Mohanty, P.K.Rout, M.K.Samal, C.Panigrahi, Counsel.

-Versus-

Union of India and others .... Respondents

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

7. **OA No.518 of 2008**
Shri Mohan Sundar Murmu, aged about 38 years, Son of late Lundra Murmu, resident of Khadikudar, PO. Saralapada, PS-Karanjia, Dist. Mayurbhanja, Orissa, at present working as Office Superintendent in the office of Income Tax Officer, Baripada.

.....Applicant

By legal practitioner: M/s. J.M.Patnaik, S.Mishra, D.P.Mohanty, P.K.Rout, M.K.Samal, C.Panigrahi, Counsel.

-Versus-

Union of India and others .... Respondents

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

8. **OA No. 42 of 2009**
Sri Hemanta Kumar Pradhan, aged about 38 years, Son of Sri Sashinath Pradhan,, resident of At/Po.Kurumingia, Via-G.Udayagiri, Dist. Kandhamal, Orissa at present working as. Office Superintendent of Ministerial Staff Training Unit, At/Po/Dist. Puri.
....Applicant

By legal practitioner: M/s. J.M.Patnaik, S.Mishra, D.P.Mohanty, P.K.Rout, M.K.Samal, C.Panigrahi, Counsel.

-Versus-

Union of India and others .... Respondents

By legal practitioner: Mr. P.R.J.Dash, ASC.

9. **OA No. 365 of 2009**
Shri Bharat Sethi aged about 50 years, son of Amar Sethi, At-Bakharabad, PO-Chandinichowk, Dist. Cuttack at present working as Income Tax Inspector in the office of Director of Income Tax (Investigation), Bhubaneswar. .....Applicant

By legal practitioner: Mr. Sunil Mishra, Counsel.

-Versus-

Union of India and others .... Respondents

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

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CENTRAL ADMINISTRATIVE TRIBUNAL ★ CUTTACK BENCH ★

ORDER

MR. C.R.MOHAPATRA, MEMBER (ADMN.):

Since the issues involved in these Original Applications are one and the same, though these matters have been heard one after the other, this common order will govern all these cases.

2. Heard the rival contentions of the respective parties and perused the materials placed on record. The applicants are working in different grades under the Respondents viz; some of them are working as Office Superintendents who seek promotion to Income Tax Inspector and others working as Income Tax Inspectors seeking promotion to the post of Income Tax Officer.

3. It is not in dispute that as per the Recruitment Rules, be it for promotion to IIT or ITO, besides fulfilling other conditions, passing of the Departmental Examination for becoming eligible for consideration for promotion to the aforesaid grades is a crucial precondition. As per the extant Rules/instructions, while minimum 60% of marks is fixed for declaring general

candidates as qualified, minimum 55% of marks is fixed for SC/ST candidates in the respective departmental examinations. In view of the above, the broader issue for consideration in all these cases as to whether, in view of various instructions of the Government, "**the SC/ST candidates falling in the consideration zone can be denied promotion on the plea that no reserved post is available for them. When no reserved post is available, whether SC/ST candidates falling in the consideration zone should be considered for promotion along with other candidates treating them as if they belong to general category. If any of them is selected whether he should be appointed against the UR post and should be adjusted against unreserved point and whether candidates so promoted can be treated as promoted on their 'own merit'. To determine whether an SC/ST candidate in the consideration zone can be promoted or not when no reserved posts are available, it has to be seen whether the candidate could have been promoted if he/she did not belong to SC or ST category. If yes, whether he should get promotion or not.**"

4. In support of the stand respective parties have relied on decisions of various Benches viz; Bangalore, Jabalpur, Hyderabad and Mumbai Benches of the Tribunal. We have gone through the said decisions vis-à-vis the issues involved in the present cases. The Bangalore Bench, in the case of Shri Dharmaraj B. Khode Vs. the Commissioner of Income Tax and Others (OA No. 510/2004 decided on 17.8.2005) (page 78) had observed as follows:-

> a) The promotions of SC/ST candidate who were declared successful and qualified in the ITO departmental examination on relaxed standard could not be allowed to compete with general candidates as they could not have been promoted based on their own merits and not owing to reservation or relaxed qualification.The private respondents having not secured 390 marks out of 650 remain to be considered only as SC/ST

candidates and could not be treated as general candidates for any purpose particularly for the purpose of consideration for promotion to the next higher post. They could be allowed to compete only for the vacancies meant for SC/ST candidate.

Accordingly, respondents are directed to review the promotions made to the cadre of ITO in Karnataka Circle in terms of the directions issued by this Tribunal on 17.1.2003 as well as the observations made above. However, this judgment has been stayed by the Honble High Court of Karnataka at Bangalore on 16.3.2006 (page 103).

5. In Jabalpur Bench, OA was filed by the ST candidates challenging the order dated 16.8.2007 whereby they were reverted to the post of Income-tax Inspector. They had appeared in the departmental examination of ITO Group B of 2003 and qualified the same, yet they were not promoted even though they were within the zone of consideration. Being aggrieved, they had given a representation that persons who belonged to the general category and were junior to them had been promoted, therefore, they may also be considered. In response to the representation, review DPC was held by the department for the year 2006-07 and the applicants were promoted against unreserved vacancies. However, based on the advice given by the DOP&T on 24.7.2007, another review DPC was held in 2007 and they were reverted to the substantive post of Inspector. This order was challenged by the applicants before the Jabalpur Bench and the question framed by the Jabalpur Bench in its order dated 28.5.2009 in OA No. 778 of 2008 was as under:

"Whether applicants who had secured less than 60% marks could be termed to have passed written examination on their own merit. Whether said term own merit is relatable to written examination alone or it includes the marks awarded by the DPC to the ACR which are also basic inputs for making assessment". After considering the rival contentions, it was held as under:-

13. Admittedly, the applicants have qualified the written examination with relaxed standard and as per settled instructions on the subject they could compete only against reserved vacancies. SC/ST candidate who pass the

written examination based on general standard can certainly compete against the unreserved posts as he does not require the clutches of reservation for promotion. The converse is not justified. We may also observe that it is not their plea that any junior to them has been promoted. Further more, no challenge has been made to OMs issued and applied on the subject. Thus we are of the opinion that applicants have failed to make out any case for judicial interference.

14. In our considered view, we do not find any illegality committed by the respondents in re-reviewing the entire exercise and passing impugned order. The reasons assigned by the respondents that applicants were found ineligible for promotion, can not be doubted & no exception could be taken to such justification. We do not find any justification and substance in any of the contentions raised by the applicants. The OA is dismissed."

6. Subsequently the same issue came up before the Hyderabad Bench of the Tribunal, where OAs were filed by the SC/ST candidates who had qualified the departmental examination and had put in 3 years of regular service as per the RRs. Grievance of the applicants was that though DPC was convened for the post of Income Tax Officer, but vigilance clearance for the applicants were not called for even though they were within the zone of consideration but the same was called for their juniors. In these circumstances they had filed OA No. 607/2008 seeking a direction to consider and promote them to the post of ITO by treating them as eligible candidates on their own merit and based on the seniority, eligibility etc. Their grievance was that subsequent to their passing in the qualifying examination with more than 55% marks, the standard of pass marks has been reduced from 60% to 50% in respect of unreserved category and from 55% to 45% in respect of reserved category candidates. This reduced standard was made applicable to the departmental examination from 2007 onwards. Those who appeared in the departmental examination 2007 were declared passed even if they had secured 50% in the case of unreserved candidates and 45% in case of

reserved category candidates. The applicants were ignored on the ground that they had got less than 50% marks in one subject and had availed relaxation to pass in the qualifying test. The Hyderabad Bench in its order dated 18.9.2009 observed as under:-

> "There is also no such provision in the examination Rules to permit the already passed candidates to appear again to improve their performance in the examination. In fact when Ankarama Rao, applicant No.3 in OA No. 628/2008 submitted a representation seeking permission to appear for 2008 examination, he was not permitted. The respondents contended that the said representation was made after the filing of this OA by way of an after thought. It is immaterial whether such representation was made after filing of this OA or earlier. The fact remains that he made such representation seeking permission to appear in the departmental examination of 2008 again and the same was not acceded to. Further, no material is placed before this Tribunal to show that any of the SC/ST candidates who passed the examination with less than 60% aggregate in the examination held prior to 2007 were permitted to appear again. On the other hand, as seen from the letters dated 11.9.2006 and 7.12.2006 to the Chief Commissioner of Income Tax, Bhopal and also the letter dated 3.3.2006 addressed to the Chief Commissioner of Income Tax, Lucknow, which are filed by the official respondents along with their additional reply statement dated 17.3.2009 at pages 33, 34 and 35, it is clear that the CBDT itself issued instructions in consultation with the DOP&T to the Chief Commissioners of Income Tax Bhopal, Lucknow and Delhi to the effect that departmental examinations for ITO are only qualifying and pre-condition for promotion and are not competitive examinations".

It was further observed as follows:-

> It is an admitted fact that not only the applicants who belonged to reserved category but also all others who are declared passed in the departmental examination are given the benefit of two advance increments. No discrimination was shown while granting two advance increments between those who passed with 60% and those passed with 55% aggregate. When no such discrimination was shown while granting two advance increments on the ground that they are declared completely passed the examination, there is no reason for showing discrimination while considering for promotion to the cadre of ITO, especially when the recruitment rules for ITO do not contain any provision for showing such discrimination. As per the recruitment rules, it is clear that all those who are declared pass in the departmental examination and completed three years regular service are entitled to be considered as per their seniority depending upon the vacancies available. At

no point of time since 2002, the applicants were informed that they will not be considered for promotion against UR vacancies even if they reach the zone of consideration as per the seniority list maintained in the ITI cadre. Their seniority list in the cadre of ITI is not altered placing all those who secured 60% aggregate above those who secured less than 60% aggregate. No separate seniority lists are maintained, one for those who passed with 60% aggregate and the other for those who passed with less than 60% aggregate. It is also not the case of the official respondents that the applicants opted or requested the department to grant concession of 5% marks in the departmental examination. The Government of India, on its own, suo moto as a matter of policy prescribed pass marks as 55% aggregate and minimum of 45% marks in each subject for general candidates. Having given such benefit suo moto and having declared them completely passed along other passed candidates and having considered them as such all through, it is not open for the department to exclude them all of a sudden in the year 2008 from the zone of consideration for promotion when they reached the normal zone of consideration by virtue of their seniority in the feeder cadre."

Ultimately, Hyderabad Bench allowed the OAs and directed the respondents to constitute review DPCs for consideration for promotion to the post of ITO and in the event they are found fit by the DPC, they shall be promoted from the dates their juniors were promoted with all consequential benefits. So far so good. However, it is relevant to note that while deciding this OA, Hyderabad Bench referred to the judgment of Jabalpur Bench in the case of Siya Ram Meena and Others (Supra) and noted that the facts of the cited cases are to a major extent similar to the facts of the case being heard by them yet ultimately the Hyderabad Bench observed as follows:-

"The said recruitment rules passed under Rule 309 were not considered by the Division Bench. Further, on the crucial point, whether the departmental examination conducted in different years be treated as competitive written examination held for determining the suitability or otherwise for promotion to the cadre of ITO in spite of raising such contention by the applicants therein, there was no discussion at all on such crucial point to be determined. No reasons are also given in the orders to reject such contention. Therefore, in our considered view such a decision will not have precedential value. With due respect we are unable to concur with

the view taken by the Division Bench of Jabalpur Bench in the cited case."

7. The same issue came up for consideration before the Mumbai Bench of the Tribunal. The Mumbai Bench referred to the judgment of Hyderabad Bench and observed in its order dated 07.10.2009 as follows:-

"Finally, there is an order rendered by CAT Hyderabad Bench as early as on 18th September, 2009. We have gone through this judgment very carefully and we cannot persuade ourselves to hold otherwise than what is held by Bangalore Bench of the CAT."

In other words the Mumbai Bench did not agree with the view taken by the Hyderabad Bench. After going through various decisions vis-à-vis the Rules/instructions relied upon by the parties, we are, however, inclined to take a prima facie view on the lines of the view expressed by the Hyderabad Bench. But while preparing the final order, we have come across the decision of the Hon'ble Apex Court in the case of K.Manorama v Union of India and others dated 29th September, 2010 in Civil Appeal No.2379 of 2005 in which it has been held by the Hon'ble Apex Court as under:

"14. As can be seen from this chart it was Respondent No. 4 who had obtained the highest marks i.e. 128. Mr. V. Subramanian and Mr. T.P. Bhaskar are next to him with 127 and 125 marks respectively. Thereafter, there are other candidates i.e. Mr. Siddaiah, Mr. Abdul Khader and Mr. Muthusamy who all get 124 marks. Mr. Siddaiah has been selected out of them, essentially because it was a Scheduled Caste vacancy which came to be allotted to him keeping aside other candidates. Not only that, but he was placed at number one and respondent No. 4 (having higher marks) was placed at number two. The Tribunal held that if Respondent No. 3 got marks lesser than that of Respondent No. 4, only then he can be said to be selected against Scheduled Caste point. The Tribunal did not realize that the third Respondent had in fact got marks lesser than the fourth Respondent, and his selection was basically because he was a Scheduled Caste candidate. In view of this position, there is no occasion to apply the instruction contained in Railway Board's letter dated 29.7.1993 nor the propositions in R.K. Sabharwal's judgment (supra) to the present case. Even otherwise, the principle that when a member belonging to a Scheduled Caste gets selected in the open competition field on the basis of his own merit, he will not be counted against the quota

reserved for Scheduled Castes, but will be treated as open candidate, will apply only in regard to recruitment by open competition and not to the promotions effected on the basis of seniority-cum- suitability.

(Emphasis supplied)

Be that as it may, Mr. P.Sethi, Learned Counsel relying on an order of the Principal Bench dated 15th April, 2010 in OA Nos. 1830/2009 (M.A. No.1229/2009), with O.A. No.1836/2009 (M.A. No.1230/2009) dated 15th day of April, 2010 in the case of Ram Narain Varma and others v Union of India and others) submitted that in view of divergent views of different Benches of the Tribunal on this particular aspect/issue, it was decided to place the matter before the Full Bench and, therefore, these matters need either to be placed before the Full Bench or to be kept pending till the matter is decided by the Full Bench. Perused the orders of the PB in the case of Ram Narain Varma (supra). There is no dispute or quarrel that the matter, referred to the full Bench not only relates to the employees of the Income Tax Department working in various grades like the present cases but also issues in both the matters are one and the same. It is the case of the Learned Counsel for the Applicants that the decision of the Full Bench is still awaited. The Hon'ble Apex Court of India in the case of SI Rooplal and others v Lt. Governor through Chief Secretary Delhi and others - reported in (2000) 1 SCC 644) have laid down that decision of the co-ordinate Bench is binding on another Bench; unless, on disagreement, matter is referred to a Larger Bench for proper adjudication. In view of the divergent opinion of different Benches on the same subject of the same Department that too same grade of employees, we refrain from adjudicating the dispute raised in the present OAs and dispose of these Original Applications with direction that decision of the Full Bench in the aforesaid cases shall govern the issues raised in these Original

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Applications. Further, the Chairman, CBDT, New Delhi is hereby directed to issue appropriate order pursuant to the orders of the Full Bench so far as the Applicants are concerned. There shall be no order as to costs.

Sd/-
vice-chairman.

Sd/-
Member (A)

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TRUE COPY

Section Officer (J)
Central Administrative Tribunal
Cuttack Bench, Cuttack