16

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

OA No.206 of 2011
Cuttack this the 29th day of February, 2012

Sri Khagendra Nath Jena .... Applicant
Versus
Union of India & Others .... Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not? Yes.

2. Whether it be circulated to Principal Bench, Central Administrative Tribunal or not? Yes.

(A.K.PATNAIK)
Member(Judl)

(C. R. MOHAPATRA)
Member (Admn.)

17

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CORAM
THE HON'BLE MR.C.R.MOHAPATRA, MEMBER (A)
And
THE HON'BLE MR.A.K.PATNAIK, MEMBER (J)

Sri Khagendra Nath Jena, aged about 55 years, Son of Late Sambhunath Jena at present working as Additional Secretary, Fisheries and Animal Resources Development Department, Secretariat Building, Bhubaneswar, Dist. Khurda.

.....Applicant

By legal practitioner -M/s. Prafulla Kumar Rath.
R.C.Jena, P.K.Satpathy,
R.N.Parija, A.K.Rout,
S.K.Pattnaik, Counsel.

-Versus-

1. Union of India represented through its Secretary, Ministry of Personnel, Public Grievances and Pension Department of Personnel & Training, 112, North Block, Government of India, New Delhi-110 001.
2. Chairman, Union Public Service Commission, Dholpur House, Shahjahan Road, New Delhi-110 069.
3. Under Secretary to Government of India, Ministry of Personnel, Public Grievances and Pension, Department of Personnel & Training, 112, North Block, Government of India, New Delhi- 110 001.
4. Chief Secretary to Govt. of Orissa, General Administrative Department, Secretariat Building, Orissa, Bhubaneswar, Dist.Khurda.
5. Ramnarayan Dash, aged about 54 years, Joint Secretary to Chief Minister of Orissa, Bhubaneswar, Dist. Khurda.

....Respondents

By legal practitioner -Mr.U.B.Mohapatra, SSC
Mr.G.C.Nayak, GA (State)

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ORDER

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

The grievance of the Applicant agitated in the present OA is that after protracted litigations in the State Administrative Tribunal, he achieved proper seniority in the Orissa Administrative Service vis-à-vis his cadre mates. But for the purpose of his promotion/induction to the All India Service (IAS), he has been illegally superseded. His contention is that for the purpose of selection of State Civil Service Officers to the Indian Administrative Service, in terms of Indian Administrative Service (Appointment by Promotion) Regulations, 1955 the Government of Odisha prepared an eligibility list. According to him, in terms of the Regulations, it is obligatory on the part of the Government to prepare an eligibility list of officers taking into account the date of their continuous officiation in the post of Deputy Collector or equivalent. The post of OAS Class II is equivalent to the post of Deputy Collector. If the date of continuous officiation in the cadre of Class II which is equivalent to the post of Deputy Collector is taken into consideration the applicant would be treated as Senior not only to Respondent No.5 but also other officers named above. Therefore, in all fairness, the Government of Odisha should have prepared the eligibility list placing the applicant above S/Shri **Yudhistir Sethi, Durga Prasad Behera, Ashok Kumar Tarenia,**

Dukhishyam Satpathy and **Ramanarayan Dash** but it is the case of the Applicant that without adhering to the norm of the Regulations in a most illegal and unfair manner, he was placed at Sl.No.17 i.e. below his juniors. Hence it is the stand of the Applicant that appointment to IAS based on such eligibility list was illegal, arbitrary and is not sustainable in the eyes of law and that though stating so he preferred representation to the Government of Orissa, Government of India and UPSC on 11.2.2011 but nothing has been communicated to him. Hence, by filing the present Original Application Under Section 19 of the Administrative Tribunals Act, 1985, the applicant has sought the following reliefs:

> "(a) Quash and set aside the selection list so far as the private Respondent No.5 and **other Junior Officers** are concerned and quash the notification under Annexure-12 and further be pleased to direct the Respondents to re notify the eligibility list by placing the applicant in its appropriate position or in alternate give promotion to the applicant to the cadre of IAS from the date his **juniors** are promoted within a stipulated period." [Emphasis supplied]

2. The State of Odisha/Respondent No.4 filed its counter contesting the case of the Applicant in which it has been stated that in compliance of the order of the Orissa Administrative Tribunal dated 09-09-2009 in OA No. 1159 of 2008 the applicant was promoted to the cadre of JS vide notification dated 10-11-2009

and accordingly, his inter se seniority was fixed below Shri **Banshidhar Mohapatra** and above **Shri Gopinath Setihi** which was after preparation of the eligibility list of State Civil Service Officers for consideration for appointment /promotion to IAS for the year 2010 (subsequently renamed as 2009) based on the disposition list (gradation list) as of 01-01-2009. At that relevant time/01-01-2009 the applicant was junior to Shri Yudhistir Sethi, Shri Durga Prasad Behera, Shri Ashok Kumar Tarenia, Shri Dukhishyam Satpathy and Shri Ram Narayan Das.

Further it has been stated that in terms of Regulation 5(1) of the IAS (Appointment by Promotion) Regulations, 1955 each Committee shall ordinarily meet every year and prepare a list of such members of the State Civil Service as are held by them to be suitable for appointment/promotion to IAS. The number of Members of the State Civil Service to be included in the list shall be determined by the Central Government in consultation with the State Government concerned and shall not exceed the number of substantive vacancies as on the first day of January of the year for which the meeting is held for the post available for them under Rule 9 of the Recruitment Rules. As per provision 5(2) of the IAS (Appointment by Promotion) Regulation, 1955 names of eligible SCS Officers three times the number of vacancies were forwarded

to the UPSC for consideration in which the name of the applicant find place at Sl.No.17 against the eligibility list for the years 2010 (subsequently renamed as 2009) as per his seniority as on 01-01-2009. The meeting of the Selection Committee to consider the case of SCS Officers of Odisha for appointment/promotion to IAS for preparation of Select List for the years 2006-A, 2007, 2008 and 2009 was held on 01-11-2010. The case of the Applicant was duly considered along with others but the name of the applicant could not find place in the Select List as he was assessed '**Unfit**' by the Selection Committee held on 01-11-2010. In view of the above, the Respondent No.3 has prayed for dismissal of this OA.

3. Though Mr. U.B.Mohapatra, Learned SSC for the Union of India appeared for the Respondent No.1 and despite due opportunity no counter was filed for and on behalf of Respondent No.1. Similarly, despite due opportunity none has appeared or filed counter on behalf of Respondent Nos. 2&3. Similar was the position/situation in so far as Respondent No.5 is concerned. Though this OA is of the year 2011 we are not inclined to grant any time in view of the specific order of the Hon'ble High Court of Orissa dated 20.09.2011 in WP(C) No. 21986 of 2011 directing disposal of this OA within a period of four months.

4. Applicant has filed rejoinder more or less reiterating the stand taken in the OA.

5. Mr. Rath, Learned Counsel for the Applicant submitted that after the notification under Annexure-A/8 dated 10.11.2009 promoting the applicant to the cadre of Joint Secretary, OAS (S) retrospectively from the date his juniors were promoted and fixation/re-fixation of his inter se seniority vide Annexure-A/9 showing him below Shri B.Mohapatra and above Shri Gopinath Sethi the Resopndent No.4 should have sent the revised eligibility list for consideration for promotion/appointment to IAS as per provision 5 of Regulations, 1955 and by not doing so supersession was allowed to happen which is not sustainable in the eyes of law. Further contention of the Applicant's counsel is that the case of the applicant was not at all considered by the Selection Committee and if at all considered, his name being placed much below i.e. at Sl.No. 17 (as stated by the Respondent No.4) he could not be included in the list recommended for promotion/appointment to IAS. This was vehemently opposed by Mr. G.C.Nayak, Learned GA appearing for the Respondent No.4. It was contended by him that the case of the Applicant was duly considered along with others but the Committee found him unfit for promotion/appointment to IAS. He has contended that at best

one can claim consideration as a matter of right but certainly promotion cannot be claimed as a matter of right. Since the case of the applicant was duly considered by the Selection Committee but he was adjudged 'unfit' and, therefore, he cannot claim to be promoted/appointed to IAS merely because his juniors were included in the list of appointment/promotion to IAS. Non-joinder of necessary party was taken as one of the grounds during hearing by Mr. Nayak, Learned GA who prayed for dismissal of this OA.

6. We have considered the rival submissions of the parties and perused the materials placed on record. It reveals from the record that Selection Committee Meeting was convened for filling up of NINE vacancies for the assessment years 2009 and against the NINE vacancies TWENTY SEVEN eligible SCS Officers including the name of the applicant were recommended for consideration. The name of the Applicant appeared at Sl.No.15 of the said eligibility list. While the Committee graded the SCS Officers in the Select List of NINE Officers in whose favour assessment was 'Very Good', the name of the applicant could not be included in the said list of NINE SCS Officer as he was assessed by the Committee as '**unfit**'. Similarly, S/Shri Pradip Kuamr Hota S.C.Suar whose names appeared above the name of the Applicant

could not be included as one was assessed as '**Unfit**' and the other one was assed as '**Good**'. Law is well settled that the final grading assigned to an officer by the Selection Committee may not necessarily be the same as the overall ACR grading of the officer. Inclusion/non-inclusion of the name of an officer in a select list would depend on the grading assigned by the Selection Committee which may be different from the ACR grading assigned to him by the reporting/reviewing officer. As per the provisions of the Promotion Regulations, the Selection is based on merit. Where Selection is made on merit alone, a senior officer has no legal right to promotion but only a right to consideration and if any officer junior to him is selected for promotion on merit, the senior officer is not legally superseded. In other words, the selection/induction to the All India Service is primarily made on the basis of merit and seniority plays a secondary role. An element of supersession is also inherent in the selection process. Since the applicant being eligible has been considered but being assessed as 'unfit' by the Selection Committee, the Tribunal lacks jurisdiction/competence; especially in absence of any proven mala fide exercise of power, to interfere in the matter. Similar matter had come up for consideration before this Tribunal in OA No. 24 of 2010 filed by Shri P.C.Patnaik Vs Union of India and others and this Tribunal after taking into

consideration various judge made laws on the subject was not inclined to interfere in the decision taken by the Selection Committee for promotion/appointment to IAS as per the Regulations 1955. Relevant portion of the order is quoted herein below:

> "8. We note that the main grievance of the applicant is that the consideration given by the Review Selection Committee to his case vis-à-vis the case of the others was no consideration being contrary to the observations of this Tribunal, Hon'ble High Court of Orissa which was confirmed by the Hon'ble Apex Court. In other words it is the case of the applicant that the Review Selection Committee also committed the same mistake as was committed by the Original Selection Committee viz; consideration was given without evaluating the entire service records of the officers. In this connection we have perused the minutes dated 08-09-2006 of the Review Selection Committee placed at Annexure-A/8. Relevant portion the minutes of the Review Selection Committee is extracted herein below:
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> > "11. The Review Committee examined the records of the officers whose names are included in the Annexure, who fulfilled the conditions of eligibility upto the year 2000-01 as the crucial date for reckoning the eligibility is 01.01.2002. Since there was no material change in the service records of the officers other than officers at Sl.No. 4,5, 6 & 7 of the eligibility lists, the Review Selection Committee decided to retain the assessment of the previous Committee in their respect. The Review Committee also noted that a formal warning was issued to the officer at S.No.1 vide State Government's order dated 31.10.1995 which is not a penalty as per the State Government Rules. The Committee also noted that the change in the status of disciplinary proceedings in respect of officers at Sl.No.05 and 21 of the eligibility list since the

original Selection Committee met on 13.08.2003 would only have an effect on the provisional inclusion of officers in the list as per proviso to Regulation 5(5). As such, the Committee retained the assessment of previous Committee in respect of them. On an overall relative assessment of their service records, the Committee assessed them as indicated against their names in Annexure. **While assessing their suitability, the Committee took into consideration the penalties imposed on the officers against them as intimated vide State Government's letters dated 18.08.2006 and 05.09.2006**. However, the Committee did not take into consideration any adverse remarks in the Annual Confidential Reports of the officers which were not communicated to them while assessing their suitability."

9. In view of the above we do not find any justification to hold that the Review Selection Committee had erred in making its recommendations and that too by ignoring the penalties/punishments while making its own assessment. The Commission has its own guidelines and procedure about scrutinizing the records. Scrutinization of records on the basis of the said internal guidelines and procedure by the Commission has been upheld by the Hon'ble Apex Court in the case **of Anil Katiyar V Union of India and others**, 1997 (1) SLR 153. This apart, classification given by the State Government authorities in the ACRs of an officer is not binding on the Selection Committee which can evolve its own methods for classification and this can be at variance with gradations given in the ACRs. The power to classify as Outstanding,Very Good, Good and Unfit being vested with the Selection Committee is no more *res integra* in view of the decision of the Hon'ble Apex Court in the case of **UPSC V K.Rajaiah**, 2005 AIR SCW 3275. In view of the above, none of the grounds canvassed by the Applicant's counsel in support of the reliefs claimed in this OA warrants interference by us. Hence this OA is held to be without any merit and is accordingly dismissed. No costs."

7. For the discussions made above, as the case of the applicant was duly considered by the Selection Committee but his name could not be included in the Select List for the vacancies pertaining to the assessment year 2009 being 'Unfit'. We do not find any wrong has been meted out to the Applicant. The contention of the Applicant that **had a revised eligibility list been sent, he would not have been superseded holds no water as position would have ~~been~~ remained unaltered due to his assessment as 'Unfit'.**

8. Further we find that the prayer of the applicant is to quash and set aside the selection list so far as the private Respondent No.5 and **other Junior Officers** are concerned and quash the notification under Annexure-12 and to direct the Respondents to re notify the eligibility list by placing the applicant in its appropriate position or in alternate give promotion to the applicant to the cadre of IAS from the date his **juniors** are promoted within a stipulated period. But he has failed to make the other juniors as party to this OA. As such, this OA is also liable to be dismissed for non-joinder of necessary and proper party.

9. Accordingly this OA stands dismissed by leaving the parties to bear their own costs.

(A.K.PATNAIK)
Member (Judl.)

(C.R.MOHAPATRA)
Member (Admn.)