

35

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No.691 of 2011

Cuttack this the 6th day of August, 2014

Abhay Sankar Mishra & Ors. Applicants

-VERSUS-

Union of India & Ors.....Respondents

(FOR INSTRUCTIONS)

1. Whether it be referred to reporters or not ? X
2. Whether it be referred to CAT, PB, New Delhi for being circulated to various Benches of the Tribunal or not ? X


(R.C.MISRA)
MEMBER(A)


(A.K.PATTNAIK)
MEMBER(J)

BKS

36

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No.691 of 2011

Cuttack this the 6th day of August, 2014

CORAM

HON'BLE SHRI A.K.PATNAIK, MEMBER(A)

HON'BLE SHRI R.C.MISRA, MEMBER(A)

1. Abhaya Sankar Mishra
Aged about 47 years,
S/o-Sasibhusan Mishra,
at present working as Superintendent,
Bhubaneswar-II Commissionerate
Headquarters of Central Excise, Customs & Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
2. Pradipta Kumar Subudhiray,
aged about 45 years,
S/o-Late Pramod Ch. Subudhiray
at present working as Superintendent,
Bhubaneswar -I Commissionerate
Headquarters of Central Excise Customs and Service Tax,
At/Po-Bhubaneswar,
Dist-Khurda.
3. Dillip Kumar Swain,
aged about 45 years,
S/o-Gouranga Charan Swair.
at present working as Bhubaneswar-II
Commissionerate Headquarter of Central Excise Customs and
ServiceTax,
At/PO-Bhubaneswar,
Dist-Khurda.
4. Suvakanta Pradhan,
aged about 42 years,
S/o-Late Kailash Chandra Pradhan,
at present Superintendent Balasore-I Range,
Central Excise, Customs and Service Tax,
At/PO/Dist-Balasore.



37

5. Manoj Kumar Pattnayak,
aged about 41 years,
S/o-Premananda Pattnayak
at present Superintendent,
Jeypore Range Central Excise, Customs & Service Tax,
At/PO-Jeypore,
Dist-Koraput.
6. Ranjit Kumar Mohanty
aged about 45 years,
S/o-Anik Kumar Mohanty
at present working as Superintendent
Bhubaneswar-II Commissionerate Headquarters,
Central Excise, Customs and Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
7. Sarbeswar Nayak,
aged about 42 years,
S/O-Late Dhaneswar Nayak
at present working as Superintendent,
Bhubaneswar-I Commissionerate Headquarter
Central Excise Customs and Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
8. Susil Kumar Samataray
aged about 42 years,
S/o-Late Kailash Ch. Samal
at present working as Superintendent,
Bhubaneswar-II Commissionerate,
Headquarter of Central Excise, Customs and Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
9. Ashwini Kumar Sahoo,
aged about 42 years,
S/o-Gauranga Chandra Sahoo
at present working as Superintendent,
Bhubaneswar-I Commissionerate
Headquarters of Central Excise, Customs and Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
10. Sanjay Kumar Chatter,
aged about 44 years,
S/o-Chandra Mohan Chatter,



at present working as Superintendent Bhubaneswar-II
Commissionerate,
Headquarter of Central Excise Customs and Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.

11. Dillip Kumar Bera
aged about 38 years,
S/o-Dinabandhu Bera,
at present working as Inspector Bhubaneswar-II
Commissionerate Headquarters of Central Excise Customs and
Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
12. Sudhir Kanta Sahoo,
aged about 46 years,
S/o-Late Sesha Dev Sahoo,
at present working as Inspector, Bhubaneswar-II
Commissionerate Headquarters of Central Excise, Customs and
Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
13. Himanshu Sekhar Sha,
aged about 42 years,
S/o-Late Prana Ballav Sha,
at present working as Superintendent Bhubaneswar-II
Commissionerate
Headquarters of Central Excise, Customs and Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.
14. Mirza Sahid Baig,
aged about 41 years,
S/o-Mirza Sohaib Baig
at present working as Superintendent,
Cuttack-1 Range,
Central Excise, Customs & Service Tax,
At/PO/Dist-Cuttack.
15. Basant Kumar Naik,
aged about 43 years,
S/o-Golak Chandra Naik,
at present working as Superintendent Bhubaneswar-II
Commissionerate



Headquarters of Central Excise, Customs & Service Tax,
At/PO-Bhubaneswar,
Dist-Khurda.

...Applicants

By the Advocate(s)-M/s.A.K.Bose
P.Ku.Das

-VERSUS-

Union of India represented by

1. The Secretary,
Ministry of Finance,
Deptt. Of Revenue,
North Block,
New Delhi-110001.
2. Commissioner,
Central Excise, Customs & Service Tax,
Bhubaneswar-I Commissionerate,
Rajaswa Vihar,
Bhubaneswar-751007,
Dist—Khurda.
3. Commissioner,
Central Excise, Customs & Service Tax,
Bhubaneswar-II Commissionerate,
Rajaswa Vihar,
Bhubaneswar-751007, Dist-Khurda.
4. Saroj Kanta Sarangi,
S/o-Kalandi Charan Sarangi,
at present posted as Superintendent Grade "B",
under the Commissioner,
Central Excise, Customs & Service Tax,
Bhubaneswar-II Commissionerate
Rajaswa Vihar,
Bhubaneswar-751007,
Dist-Khurda.

...Respondents

By the Advocate(s)-Mr.L.Jena(Res.1 to 3)
M/s.P.K.Rath

P.K.Satpathy
R.N.Parija
A.K.Rout
S.K.Pattnaik
D.P.Pattnaik
(Res.No.4)



ORDER

R.C.MISRA, MEMBER(A):

In this Original Application under Section 19 of the Administrative Tribunals Act, 1985, applicant, Abhaya Sankar Mishra, presently working as Superintendent, Bhubaneswar - II Commissionerate Headquarters of Central Excise & Customs & Service Tax, Bhubaneswar along with 14 others having a common cause of action, have approached this Tribunal praying for the following relief.

- i) Applicants may be declared senior to the Respondent No.4 in the cadre of Inspector in the Department of Central Excise, Customs & Service Tax.
- ii) Judgment passed by this Hon'ble Tribunal in O.A.No.497/98 under Annexure-A/13 be reviewed referring the matter for proper adjudication to a larger bench.
- iii) Directions be issued to Respondents No.1 to 3 to consider the promotion of the applicants to the post of Superintendent Grade B w.e.f. the date when the Respondent no.4 was given promotion.
- iv) Any other appropriate order(s)/direction(s) be issued which deem just and proper.

2. Factual matrix of the case, as revealed from the record runs thus: Private Respondent No.4 (Sri Sarojkanta Sarangi) had earlier moved this Tribunal in O.A.No.497 of 1998 claiming regularization of his service in the grade of Inspector, Central Excise & Customs on the ground that he being senior had been ignored whereas his juniors were so regularized. This Tribunal, vide order dated 30.3.2004 disposed of the said O.A. The operating portion of the order is as under.



41

"We, therefore, order that the Respondents should take action for issue of proforma promotion order under the Next Below Rule in respect of the applicant and that is how they should rectify the error and not by recovering any amount from the applicant.

With the above observation and direction, we dispose of this Original Application. No costs".

3. The aforesaid decision of the Tribunal being not palatable, the said Sarojkanta Sarangi, moved the Hon'ble High Court of Orissa, which formed the subject matter of W.P. (C) No.11529 of 2005. Similarly, the Respondent-Department also challenged the aforesaid decision before the Hon'ble High Court in W.P. (C) No.10571 of 2004. The Hon'ble High Court of Orissa, vide common judgment dated 18.02.2010, disposed of the above Writ Petition as under.

"Relying on the Constitution Bench decision of the Hon'ble Supreme Court in Direct Recruit Class-II Engineering Officers' Association and others vs. State of Maharashtra and others : AIR 1990 SC 1607, it has been reiterated by this court in Pradipta Kumar Mohapatra vs. State of Orissa and others (supra) that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. Decision in the above said cases were rendered while adjudicating rival claims of seniority of direct recruits and promotes^{ed} to a cadre. In the present case also, after being promoted^{ed} on ad hoc basis to the grade of Inspector after being subjected to scrutiny and tests, the applicant has continued in the promotional post without break in the department. Therefore, we find no justification to deny the applicant's regularization in the post of Inspector with effect from the date of initial ad hoc promotion. We, accordingly, direct regularization of the applicant's promotion the post of Inspector from 30.10.1991.



42

Both the writ applications are, accordingly, disposed of".

4. Aggrieved with the above judgment of the Hon'ble High Court, the Union of India filed SLP CC No.16099 of 2010, which was dismissed by the Hon'ble Supreme Court, vide judgment dated 29.10.2010, leaving the question of law open. This being the backdrop of issue, the judgment of the Hon'ble High Court dated 18.2.2010 was implemented by the Respondents by holding review DPC. As per the recommendations of the Review DPC, order dated 10.02.2011(Annexure-A/17) was issued notionally promoting Respondent No.4 to the grade of Inspector on regular basis with effect from 30.10.1991 and thus, placing him senior to Sri Abhay Shankar Mishra (DR) applicant No.1 of this O.A. While the matter stood thus, vide order dated 20.04.2011, Respondent No.4 has been issued order of promotion on ad hoc basis to the grade of Superintendent(Group-B), Central Excise & Service Tax. This is the background which has led to filing this Original Application by the applicants with the prayer as quoted above.

5. This Original Application came up for admission on 18.10.2011, when this Tribunal ordered as under.

"Heard Sri A.K.Bose, Ld. Sr.Counsel for the applicant and Sri L.Jena, Ld.ASC for the Respondents. Issue notice to the Respondents both on the O.A. as well as on the M.A. 611/11 for Jt.Petition, returnable within 04 weeks. Counter, if any, shall be filed 04 weeks thereafter. List this matter after six weeks for consideration of admission.



43
Call on 05.12.2011".

6. Again the matter came on 05.12.2011 and, this Tribunal issued the following orders.

"Since notices in this case have already been issued, no further notice need be issued and the case is admitted. At the request of Mr.L.Jena, Ldd.ASC for the official-Respondents, 04 weeks' time is allowed to file counter. Call on 05.01.2012".

7. It reveals from the record that in response to notice, Respondent-Department have filed their counter opposing the prayer made in the O.A., to which applicants have also filed their rejoinder and again the Respondent-Department have also filed a reply to rejoinder filed by the applicants. While this was the ongoing state of affairs, Private Respondent No.4 filed a Misc. Application No.30/2013 questioning the very maintainability of this Original Application. However, in the process, the matter was put up for hearing, without any decision being taken on M.A.30/2013 filed by the Respondent No.4 and this is the reason why the Private Respondent No.4 approached the Hon'ble High Court of Orissa in W.P. (C) No.5167/2013 seeking a direction upon the Opposite Parties, particularly, Central Administrative Tribunal, Cuttack Bench, to decide the maintainability of Original Application first. The Hon'ble High Court of Orissa, vide order dated 23.04.2013 disposed of the said Writ Petition in the following terms.



44
"Heard.

Considering the innocuous nature of prayer made by the writ petitioner, we propose to dispose of the writ application before issuance of notice.

It appears that O.A.No.691 of 2011 is pending before the learned Central Administrative Tribunal, Cuttack Bench, Cuttack, which has been filed by the opposite parties 4 to 18. In the said Original Application, the petitioner, who is the opposite party, has filed M.A.No.30/2013 questioning the maintainability of the said Original Application.

The grievance of the petitioner is that before taking up the Original Application for hearing, the learned Central Administrative Tribunal should first decide the question of maintainability of the Original Application as prayed in M.A.No.30 of 2013.

According to the petitioner, the Original Application is not maintainable, in view of the previous judgment passed by this Court, which has been affirmed by the Hon'ble Supreme Court and after that the applicants have prayed in the Original Application for review of the judgment of this Court.

Mr.Rath, learned counsel for the petitioner submits that the judgment of this Court cannot be reviewed by the learned Tribunal.

Be that as it may, without expressing any opinion on the merits of the case, we direct the learned Central Administrative Tribunal to dispose of M.A.No.30 of 2013 filed by the petitioner questioning the maintainability of the Original Application first before taking up the Original Application for hearing. The learned Tribunal shall do well to expedite hearing of M.A.No.30 of 2013.



45

The writ application is accordingly disposed of".

8. This Tribunal, in compliance of the orders of the Hon'ble High Court of Orissa (supra) heard the learned counsel for the parties on the question of maintainability of this O.A. and after giving them opportunities to file respective written note of submissions, reserved the matter for orders.

9. We have heard the learned counsel for the parties and perused the pleadings. We have also gone through the written note of submissions filed by the applicants and the Private Respondent No.4 in order to decide the O.A. on the question of maintainability. We have also gone through the counter-reply filed by the official Respondents.

10. The grounds urged by the applicants in support of their case, inter alia, are as under.

- i) Private Respondent No.4 had moved this Tribunal in O.A.No.497 of 1998 praying for regularization of his service in the grade of Inspector with effect from 31.10.1991, without making the applicants as necessary parties to the O.A., who have now been affected by the orders of the Tribunal in the above said O.A.
- ii) In the above O.A. applicant/Res.No.4 had misled the Tribunal by suppressing two important facts, i.e., (i) his promotion and joining in the post of Stenographer – II on 01.04.1993 and 06.04.1993, respectively, and (ii) his regular promotion to the post of Inspector from the post of Stenographer against a regular vacancy in the year 2002.
- iii) Applicants being senior to Private Res.No.4 in the grade of Inspector ought to have been arraigned as necessary parties to O.A.No.497 of



1998, in view of settled position of law that a person whose right is likely to be affected in any proceeding before the Court of Law is necessary party and in the absence of such person being impleaded as party to the lis, judgment affecting his right cannot bind him.

- iv) Reliance has been placed on the decision in K.Ajit Babu and Ors. Vs. Union of India and Ors. (1997) 7 Supreme - Pg. 76, wherein it has been held by the Hon'ble Supreme Court that application challenging the seniority list changed by the authority in terms of the decision made by the Central Administrative Tribunal, can be challenged by the person affected by filing application U/s. 19 of the Administrative Tribunals Act. It has been further held that the matter can be referred to a larger Bench if the Tribunal did not agree with the view taken in the earlier judgment.
- iv) Applicants have also relied on the decision in Gobapabandhu Biwal vs. Krushna Chandra Mohanty in AIR 1998 SC 1872, which lays down that "person aggrieved by the judgment who is not a party to the main application and SLP cannot challenge the judgment by filing Review Application, but only remedy available to such person who wants to challenge the judgment is to file separate application praying to refer the matter to a larger bench". It has been observed by the Hon'ble Supreme Court in Para-15 of the judgment "separate original application filed by the persons not parties to the judgment in question is required to be disposed of on merit".

11. On the other hand, Private Respondent No.4, while elaborating the factual background of the matter, as already mentioned above, has stated that decision in K.Ajit Babu (supra) is not applicable to his case. According to him, in K.Ajit Bahu case the entire dispute was within the



47

Tribunal and the Tribunal dismissed the parallel application seeking setting aside the another judgment of the Tribunal. Secondly, the ratio decided by this Tribunal in O.A.No.497/98 does no longer exist in view of the principle of merger. According to Private Res.No.4, the order dated 30.03.2004 of this Tribunal in O.A.No.497/98 having been modified by the Hon'ble High Court in common judgment dated 18.02.2012 in W.P. (C) Nos.11529 of 2005 and 10571 of 2004, has thus merged with the judgment of the Hon'ble High Court. This apart, SLP filed by the Union of India against the above said judgment of the Hon'ble High Court before the Hon'ble Supreme Court having been dismissed, seniority that has been assigned to Private Res.No.4 in the grade of Inspector, Central Excise & Customs is unalterable and therefore, the Tribunal is divested with powers, authority and jurisdiction to entertain the present O.A. filed by the applicants.

12. We have given our anxious thoughts to the arguments advocated by the learned counsel for the parties.

13. As indicated above, since Hon'ble High Court of Orissa vide order dated 23.04.2014 in W.P. (C) No.5167 of 2013, has directed to decide the point of maintainability of this O.A. first before taking up the O.A. for hearing, on the M.A.No.30/13 filed by Respondent No.4 before this Tribunal, in effect, earlier order dated 05.12.2011 of this Tribunal admitting the O.A. has to be reopened and reconsidered.



48

14. In this connection, we have to at first take into account the relief sought by the applicants in this O.A. in the face of the points urged by them regarding maintainability of this O.A.

15. The first relief sought by the applicants is to declare them senior to the Respondent No.4 in the cadre of Inspector in the Department of Central Excise, Customs & Service Tax.

16. Apparently, applicants in respect of this particular relief have not at all exhausted the departmental remedies available to them under the relevant service rules. Therefore, applicants are estopped to approach the Tribunal directly and unhesitatingly, without exhausting the departmental remedies before the authorities competent to consider and decide the matter in that behalf.

17. Secondly, the Tribunal cannot pass a declaratory order declaring the applicants senior to Respondent No.4 in the grade of Inspector, without the seniority list published in this respect being challenged and its sustainability being quashed.

18. Thirdly, orders passed by this Tribunal in O.A.No.497/98 having been modified by the Hon'ble High Court of Orissa on being appealed of, and that the SLP filed by the Union of India against the Judgment of the Hon'ble High Court of Orissa having been dismissed by the Hon'ble Supreme Court, relief sought by the applicants to review the order of this Tribunal in O.A.497/98 for referring the matter for proper adjudication to a Larger Bench is not only contrary to the provisions of



49

Section 19 of the A.T.Act, 1985, but, exercising such a jurisdiction at this juncture by the Tribunal would tantamount to arrogating the powers of the Hon'ble High Court or for that matter the Hon'ble Supreme Court. In this regard, relying on the decision of the Hon'ble Supreme Court in K. Ajit Babu case(supra), we are of the considered view that in the present O.A. applicants have not challenged the seniority list changed by the authorities pursuant to the decision of this Tribunal on the ground that they were not parties to the said decision before the Tribunal, but it is an action in pursuance of the judgment of the Hon'ble High Court which having been appealed of has been dismissed by the Hon'ble Supreme Court. Therefore, reliance placed by the applicants on K.Ajit Bahu case will be of no help to the applicants.

19. As regards the observation of the Hon'ble Supreme Court in *Gopabandhu Biswal vs. Krushna Chandra Mohanty* (supra) that "separate original application filed by the persons not parties to the judgment in question is required to be disposed of on merit" which has been relied on by the applicants, as noted above, whatever benefit of seniority has been granted to the applicant in O.A.No.497/98/Respondent No.4 herein, is based on the judgment of the Hon'ble High Court as upheld by the Hon'ble Supreme Court. Judged from this angle, the question of either reviewing or referring the matter for being heard by a Larger Bench on merit does not arise.

20. Before coming to the conclusion, we cannot but observe that the applicants have also not brought to the notice of the Tribunal what was

50

the embargo before them to intervene in O.A.No.497/98 notwithstanding the fact that they were not arraigned as parties to the said O.A., to defend their interests. This is axiomatic that the applicants, by doing so have acted as fence sitter.

21. For the aforesaid reasons, the grounds based on which applicants have sought for relief are not grounds based on the sound principles of law and therefore, the O.A. is not worth admitting. In view of this, order dated 18.10.2011 issuing notice to the Respondents as well as order dated 05.12.2011 admitting the O.A. are hereby recalled. In effect, the O.A. is held to be not maintainable and accordingly, the same is dismissed.

Ordered accordingly.


(R.C.MISRA)
MEMBER(A)


(A.K.PATNAIK)
MEMBER(J)

BKS