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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

ORIGINAL APPLICATION NO.304 OF 2009

Cuttack this the 20th day of December, 2011

Paramananda ...Applicant
-VERSUS-
Union of India & Ors....Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not ? ✓
2. Whether it be referred to PB, CAT, New Delhi or not ? ✓


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


(A.K.PATNAIK)
Member (Judicial)

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CORAM:

HON'BLE SHRI C.R.MOHAPATRA, ADMINISTRATIVE MEMBER
AND
HON'BLE SHRI A.K.PATNAIK, JUDICIAL MEMBER

...
**Paramananda Sethy, aged about 45 years/DOB 10.03.1964, Son of late
G.C.Sethy, working as Sr.Technician under Sr.Divisional Engineer (Co-
ordination), E.Co.Railway, Khurda Road, permanent resident at Aravinda
Nagar, PO-Madhupatna, Dist-Cuttack**

...Applicant

By the Advocates:M/s.A.Das & D.K.Mohanty

-VERSUS-

1. **Union of India service through General Manager, E.Co.Railway,
ECoR Sadan, Samant Vihar, PO-Mancheswar, Dist-Khurda, PIN-
751017**
2. **Chief Personnel Officer, E.Co.Railway, ECoR Sadan, Samant
Vihar, PO-Mancheswar, Dist-Khurda, PIN-751017**
3. **Divisional Railway Manager, E.Co.Railway, Khurda Road, PO-
Jatni, Dist-Khurda, PIN-752 050**
4. **Sr. Divisional Engineer (Co-Ordination), E.Co.Railway, Khurda
Road, PO-Jatni, Dist-Khurda, PIN-752 050**
5. **Sr.Divisional Personnel Officer, E.Co.Railway, Khurda Road, PO-
Jatni, Dist-Khurda, PIN-752050**
6. **Section Engineer (P.Way), E.Co.Railway, Sompeta, Dist-
Srikakulam PIN-532284**

...Respondents

By the Advocates:Ms.S.L.Patnaik

O R D E R

A.K.PATNAIK, JUDICIAL MEMBER:

The Applicant, Paramananda Sethy, at present working as Senior Technician (Painter) has filed this Original Application seeking the following reliefs:-

- "i) To quash the order dated 26th March, 2008 under Annexure-A/7 and the order dated 24th July, 2008 under Annexure-A/9.
- ii) To direct the Respondents to allow the applicant to continue in the promotional post in question with all

service and financial benefits retrospectively with effect from 01.12.2005 as per Office Order No.12/2005 dated 14.3.2005(Annexure-A/3).

iii) To pass any other order/orders for the ends of justice and removal of gross injustice caused to the applicant in the decision making process of the matter."

2. Respondents filed their counter objecting to the prayer of the Applicant and praying dismissal of this OA to which the Applicant has filed rejoinder trying to justify his claim.

3. We have heard the rival submissions of the parties and perused the materials placed on record. The contention of Mr. Das, Learned Counsel for the Applicant is that the Applicant initially joined the service as a Painter, Gr.III in the scale of Rs.3050 - 4590/- with effect from 21.7.1996 under S.E.(P.Way), Sompeta. While working as such he was promoted to the grade of Painter, Gr.II in scale of Rs.4000-6000/- being posted against an existing vacancy under SE(Br.)/S/KUR. According to him, since he was not spared to join the promotional post, he preferred representation. However, as per office order dated 06.11.2001 he was allowed to be retained under SE (P.Way), Somepeta as Painter, Gr.II.vide order No. 97/2003 dated 27.10.2003 (Annexure-A/1), the Applicant was appointed to the post of Technical (Painter) Gr. I in the scale of pay of Rs. 4500-7000/-and was posted under SE (PW)/BAM against an existing vacancy. Accordingly, by submitting representation to his immediate authority i.e. SE (PW)/SPT (Respondent No.6), under Anneure-A/2 dated 29.10.2003, he requested to spare him to join in his promotional post so as to get all consequential benefits in the promotional post. Sri Das further submitted that had the Applicant been spared on time, he would have joined his promotional post of Technician (Painter) Gr. I on 28.10.2003 itself & maintained his seniority in that grade. But the Applicant was not spared despite representation and ultimately, on being relieved he joined in his promotional post only on 01-12-2003 without

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any of his fault. While the matter stood thus, restructuring of cadre took place w.e.f. 01-11-2003. Accordingly, the DRM(P)/KUR issued Office Order No. 12/2005 dated 14.03.2005 in which the applicant was promoted to the post of Sr. Technician (Painter) in the scale of pay of Rs.5000-8000/- with effect from 01-12-2005 against existing vacancy. But the said promotion order could not be given effect to and the Sr.DPO/KUR (Resp No. 5) referred the matter to the CPO,BBSR (Resp No.2) seeking clarification whether the promotion order of the applicant can be given effect to as the applicant was not holding the promotional post as on 31.10.2003 and joined the promotional post only w.e.f. 01-12-2003. It has been strongly contended by Mr. Das, the learned Counsel appearing for the Applicant that based on the letter of the CPO, BBSR dated 03.12.2007 (Annexure A/5), the Senior DPO,ECoRly,KUR issued Office Order dated 11.3.2008 (Annexure-A/6) in which the Applicant was given promotion to the post of Sr. Technician (Painter) & posted under the SE (W)/HQ/SERly/KUR. However vide letter dt. 26.03.2008 under Annexure-A/7 the applicant was intimated by the Resp No. 5 i.e. Sr.DPO/KUR that he is not eligible for promotion to the post of Sr. Technician (Painter) w.e.f. 01.11.2003 as well as to the post of Technician (Painter) Gr.I from 1.12.2003. The applicant on receipt of the aforesaid letter under Annexure A/7 submitted representation under Annexure-A/8. But without giving due consideration to the representation submitted by the applicant, the Resp No.5 i.e. the Sr. DPO/ECoRly,KUR cancelled the office order dated 14.3.2005 vide order under Annexure-A/9 dated 24.7.2008. According to the Learned Counsel for the Applicant the impugned order under Annexure-9 is not sustainable as the impugned order is bereft of any reason that too without considering the points raised by the Applicant in his representation dt. 7.5.2008 and that's too without considering the facts that the joining of the applicant in the

promotional post and place was not within his domain and after he joined the promotional post only after being relieved by his immediate authority under whom he was working. Therefore Mr. Das the learned counsel for the Applicant pleaded for cancellation of the aforesaid letter under Annexure A/9. By placing reliance on the decision of the Mumbai Bench of this Tribunal in the case of **Vijaya Kumar J and Others -Vs- Union of India and others**, 9/24, **Swamysnews 87 (Mumbai)** in OA Nos.I 423 & 424 of 2003 decided on 30.12.2004 and on the decision of the Hon'ble Apex Court in the case of **State of Maharashtra -Vs- Public Concern for Governance Trust**, (2007) 3 SCC 587 it has been contended by Mr.Das that as the cancellation of the promotion without putting any notice to the Applicant was in gross violation of the principles natural justice and therefore the impugned order is liable to be set aside. He further contended that the Sr.DPO,ECoRly,KUR became functus officio to alter the order passed by him to the detriment of the applicant without putting any prior notice to him. His last submission is that as the applicant was promoted on the recommendation of the Committee & therefore the order of promotion could only have been cancelled on the recommendation of the Review Committee. But without following due procedure of Rules and without complying with the principles of natural notice, the cancellation order of the promotion of the applicant being bad in law is liable to be set aside.

On the other hand, Ms.S.L.Pattnaik the learned counsel appearing on behalf of the Respondents Railways contended that one cannot retain the benefit which was wrongly allowed to him although he/she is not entitled to the same as per the Rule and Law. Her contention is that the authority has every right to rectify its mistake or withdraw the benefit if wrongly allowed to an employee at any point of time. As regards the merit of this



matter is concerned, it has been contended by Ms. Patnaik the learned counsel appearing on behalf of the Railways that the Applicant was initially appointed as Technician Gr.III only on 20-0-7-1996 and thereafter he was promoted to the post of Technician II. The Applicant while working as Technician II (Painter) in the scale of Rs.4000-06000/-(RSRP) under the Section Engineer (P.Way), Somepta was promoted to the post of Technician I (Painter) in the scale of Rs.4500-7000/-(RSRP) vide order dated 27.10.2003. As such the applicant completed combined ten years of service as Technician Gr. I, II & III as on 20.07.2006 and completed three years of service as Technician Gr.I only on 29.11.2006 during which time he was empanelled for promotion to the post of Senior Technician (Painter) w.e.f. 01-11-2003 vide order under Annexure-A/3 under restructuring of cadre in certain Categories in Civil Engineering Department. But the Department rightly did not allow him the benefit of promotion to the post of Sr. Technician (Painter) as the applicant did not complete the residency period in the feeder category as prescribed under Rules [Estt.Srl.Nos.177/03 & 5/04] enclosed at Annexure-R/1&R/2 to the counter. By drawing our attention to the aforesaid two annexure, Ms.Patnaik emphatically drew our attention to the provision regarding the cut-off date i.e. 01-11-2003 and more particularly the prohibition under clause 6 of the said instruction not to relax the residency period for promotion to various categories of posts in the Railway. In view of the above, it was contended by Ms.Patnaik, Learned Counsel for the Respondents that as the applicant was inadvertently empanelled for promotion to Senior Technician (Painter) w.e.f. 1.12.2005 in complete deviation, derogation and infraction of the Railway Board's instruction/circular, the authority after examining the matter decided to cancel the erroneous empanelment of the applicant for promotion to the post of Senior Technician (Painter) w.e.f.

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1.11.2003. By drawing out attention to the provision made in Estt. Srl. No. 48/86 dated 12.3.1986 wherein in clause 2 it has been mentioned that post of master craftsman which has been re-designated as Technician as per Railway Board's instruction bearing RBE No. 74/1997 will be available for promotion to the employees working in skilled Gr.I with 10 years of continuous service in the same or allied grade in the skilled grades I,II and III including at least three years service in Skilled Grade I. Hence, it is the contention of Ms.Patnaik that as the applicant has neither completed ten years of combined service as Technician III to I nor has he completed three years of residency period in the post of Technician I, after giving due opportunity to the applicant and with the approval of the competent authority order empanelling him for promotion to Senior Technician (Painter) was cancelled. In the above circumstances by placing reliance on the decision of the Hon'ble Apex Court in the case of **Balkishan -Vs- Delhi Administration and another** reported in AIR 1990 SC 100 it was contended by Ms.Patnaik, the Learned Counsel appearing for the Respondents that as the authority has the power to rectify its mistake at any point of time and this being a case of rectification of the mistake, no interference is warranted. Further By placing reliance on the decision of the Hon'ble Apex Court in the case of **Union of India and another -Vs- Narendra Singh** reported in 2008 (I) SCC (L&S) 547 she contended that "no notice" cannot be a ground to annul the order of cancellation. And accordingly she prayed for dismissal of the O.A being devoid of any merit.

4. The whole controversy boils down to the eligibility of the applicant for promotion to the post of Technician Gr. I. Respondents' stand is that as per the instruction of Railway Board [RBE No. 177/2003] under Annexure-R/1, the Applicant was not eligible for such empanelment for

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promotion. Hence, it is worthwhile to quote the relevant portion of the instruction made in RBE No. 177/2003 which reads as under:

"The Ministry of Railways have had under review cadres of certain Group C & D staff in consultation with the staff side with a view to strengthening and rationalizing the staffing pattern on Railways. As a result of the review undertaken on the basis of functional operational and administrative requirements, it has been decided with the approval of the President that the Group C & D categories of staff as indicated in the Annexure to the letter should be restructured in accordance with the revised percentages indicated therein. While implementing these orders the following detailed instructions should be strictly and carefully adhered to.

1. This restructuring of cadres will be with reference to the sanctioned cadre strength as on the date following the date on which the cadres in the headquarter offices of new Zonal Railway/new Divisions are closed. The benefit of restructuring will be restricted to the persons who are working in a particular cadre on the cut off date.

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6. While implementing the orders, instructions regarding minimum period of service for promotion issued from time to time should be followed. In other words, residency period prescribed for promotions to various categories should not be relaxed."

5. The instruction under Annexure-R/2 is nothing but RBE No. 05/2004 dated 23.1.2004 deals in regard to restructuring of Gr. C D cadres in which it has been provided as under:

"Date of effect: This restructuring of cadres will be with reference to the sanctioned cadre strength as on 01.11.2003. The staff who will be placed in higher grades as a result of implementation of those orders will draw pay in higher grades w.e.f. 01.11.2003."

6. It is not in dispute that the Applicant has completed ten years of service as Technician I,II and II as on 20.07.2006 and three years of service exclusively in the grade of Technician I as on 29.11.2006. The cut off date provided in the Railway Board's instructions quoted above is 01-11-2003. As such by no stretch of imagination it can be said that the applicant has completed the residency period in the feeder grade.

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7. It is well propounded law that no indefeasible right vested on account of mistaken/erroneous promotion/ appointment. It is well settled law that no **person can claim any right to retain benefits erroneously/ illegally given against Rules/public policy** [Ref:, as held by the Hon'ble Supreme Court in **M.I.Bulders Pvt. Ltd v Radhey Shyam Sahu**, reported in AIR 1999 SC 2468, **Delhi Development Authority v Skipper Construction Private Limited and Another**, 1995 (8) SLR 221 (SC)].

8. Further it is well propounded law that in cases where the appointments/promotions were void ab initio, having been made in utter disregard of the existing Rules and/or constitutional scheme adumbrated under article 14 and 16 of the constitution of India would be wholly illegal [Ref: **Punjab water supply and sewerage Board v. Ranjodh Singh** [2007] 1 SCC (L&S) 713; **Punjab State Warehousing Corporation v. Manmohan Singh** [2007] 9 SCC 337] and that in the case of **Punjab Natoinal Bank v. Manjeet Singh** [2007] 1 SCC (L&S) 16 it has been held by the Hon'ble Apex Court that the principles of natural justice were also not required to be complied with as the same would have been an empty formality. The court will not insist on compliance with the principles of natural justice in view of the binding nature of the award. Their application would be limited to a situation where the factual position or legal implication arising there under is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principles of natural justice.

9. Also it is trite law that mistake cannot be allowed to perpetuate. The Apex Court in the case of **Maharashtra State Seeds Corp. Ltd v Hariprasad Drupadrao Jadhao** (2006) 3 SCC 690 held that "an admisnitrative order can be recalled. A mistake can be rectified". Further in

the case of **Major General R.S.Balyan v Secretasry, Ministry of Defence, Govt. of India**, (2007) 1 SCC 513 held that "the Union of India is competent to correct the mistake of ranking the appellant senior to Respondent No.5 in the substantive rank of Brgadier when such mistake or irregularity has come to its knowledge through representation having been made by the affected army officers in 2004. Besides the above, in the case of **M.K.Venkatachalam v Bombay Dyeing & Mfg. Co.Ltd.**,AIR 1958 SC 875 laid down the principle of law that if a mistake of fact apparent from the record of assessment order can be rectified under section 35 we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified.

10. On examination of the factual scenario with reference to the Rules and various judge made laws, we find no substance in any of the grounds set forth by the Applicant in support of his prayer made in this OA. Hence this OA being devoid of any merit deserves to be dismissed.

11. This apart, admittedly, the applicant was promoted to the grade of Tech (Painter) Gr.I vide order at Annexure-A/1 dated 17.10.2003 on which post the applicant joined way back on 1.12.2003 without any protest. According to applicant, had he been relieved earlier he could have joined the post of Tech(Painter) Gr.I prior to cut off date, i.e., 1.11.2003 so that nothing would have stood in his way for being promoted to the grade of Senior Technician(Painter) with effect from 1.12.2005 vide Annexure-A/3 dated 14.3.2005 having completed two years residency period in the grade of Tech(Painter) Gr.I. So the plea of the applicant is that he should not be made to suffer for no fault of his. In this connection, it is worthwhile to mention that the cause of action for the applicant in this O.A. arose when exactly he was not spared to join the post of Tech.(Painter) Gr.I by the S.E, P.Way, Sompeta in pursuance of Annexure-A/1 dated 27.10.2003.Although he submitted a

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representation for sparing him to join the promoted post but he joined said promoted post only on 1.12.2003, without any protest, which in effect would construe to mean that he had acquiesced his joining date as such without any demur. Therefore, the question arises as to whether the Tribunal can unsettle a settled position at this stage where cause of action for the applicant had arisen way back in the year 2003. The validity and legality of the impugned orders which the applicant has called in question in the present O.A. are basically grounded upon due to his non-promotion to the grade of Tech.(Painter) Gr.I prior to 1.11.2003 in consequence of which he could not be promoted to the grade of Senior Technician(Painter) by virtue of Annexure-A/3 dated 14.3.2005. Even he did not challenge the said action of the Respondent-Railways when he was not promoted to Senior Technician in pursuance of Annexure-A/3 dated 14.3.2005 and chose to join the said promotional post vide order dated 11.3.2008(Annexure-A/6) without any hesitation and thus, forfeiting his rights and claim for promotion as per Annexure-A/3 dated 14.3.2005. It is only after the issuance of order dt. 26.3.2008 under Annexure-A/7, the applicant rose from the slumber. Be that as it may, unless and until his promotion to Tech.(Painter) Gr.I is ante-dated prior to 1.11.2003 the efforts made by the applicant are in vain. In this view of the matter, we cannot but hold that the applicant having acquiesced his promotion as Tech.(Painter) Gr.I with effect from 1.12.2003 is estopped under the law of acquiescence to now agitate his grievance that had arisen in the year 2003. Similarly, the applicant having acquiesced his promotion to the grade of Senior Technician (Painter) in pursuance of Annexure-A/6 dated 11.3.2008, by its very effect, order promoting him to that grade vide Annexure-A/3 dated 14.3.2005 is superseded. Hence interfering in the matter

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at this stage would tantamount to unsettling a settled thing after lapse of considerable period which is not permissible in the eyes of law.

12. For the discussions made above, we find no merit in this OA. Hence this OA stands dismissed by leaving the parties to bear their own costs.


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


(A.K.PATNAIK)
Member (Judicial)

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