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**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

OA No. 188 of 2010
Cuttack, this the 24th day of April, 2014

Pramod Kumar RayApplicant
Versus
Union of India & Ors. Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not?
2. Whether it be circulated to PB, CAT, New Delhi for onward circulation?


(R.C.MISRA)
Member(Admn.)


(A.K.PATNAIK)
Member (Judicial)

**CENTRAL ADMINISTRATIVE TRIBUNAL
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O. A. No. 188 of 2010
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CORAM
HON'BLE SHRI A.K.PATNAIK, MEMBER (JUDL)
HON'BLE SHRI R.C.MISRA, MEMBER (ADMN)

.....

Shri Pramod Kumar Ray, aged about 56 years, Son of Late Ghaniram Ray presently working as Draftsman, O/o the Director Census Operation Orissa, Unit-IX, Janpath, Bhubaneswar-22, Dist. Khurda, Orissa.

.....Applicant

(By the Advocate(s)-Mr.K.C.Kanungo)

-VERSUS-

Union of India represented through

1. The Registrar General of India, Census Operation, 2/A, Mansingh Road, New Delhi-11.
2. Director Census Operation Orissa, Unit-IX, Janpath, Bhubaneswar-22, Dist. Khurda.
3. Deputy Director Census Operation Orissa, Unit-IX, Janpath, Bhubaneswar-22, Dist. Khurda.

.....Respondents

(By the Advocate(s)-Mr.U.B.Mohapatra)

O R D E R

A.K.PATNAIK, MEMBER (JUDL):

The case of the applicant, in gist, is that on 11.09.1979, he was appointed as a Draftsman in the office of the Respondent No.2 i.e. Director Census Operation Orissa, Unit-IX, Janpath,

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Bhubaneswar-22, Dist. Khurda. In order to mitigate financial hardship caused to employees in cases of acute stagnation either in a cadre or in an isolated post, Government of India, on the recommendation of the fifth Central Pay Commission issued an exhaustive instruction on 09.08.1999 for grant of two financial up gradation on completion of 12 and 24 years of regular service respectively. On 24.04.2000, applicant was communicated adverse entries made in his ACR for the year 1998-99 against which applicant submitted representation on 11.05.2000. On 16.06.2000 representation was rejected and the same was communicated to the Applicant. In the meantime, the Selection Committee for grant of financial up gradation under ACP to all the eligible employees including the applicant was held on 09.05.2000 and based on its recommendation, while others were allowed the said benefit, applicant was deprived of the same. On 15.03.2001 Recruitment Rule for Senior Draftsman was notified. On the recommendation of the Screening Committee, 2nd financial up gradation under ACP was granted to the applicant on 10.11.2004 w.e.f. 11.09.2003. But subsequently, the said order dated 10.11.2004 was modified stating therein that the order dated 10.11.2004 may be read as first

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financial up gradation instead of 2nd Financial up gradation. The applicant's representation dated 02.12.2005 was rejected on 06.01.2006. Being aggrieved, the applicant filed OA No. 278 of 2006 challenging the order of rejection of his representation for grant of first financial up gradation w.e.f. 09.08.1999 on the ground of adverse entry in his ACR for the period 1998-99. On 27.11.2008 for the reasons discussed in the order, the case of the Applicant was remitted back to the Respondents for reconsideration I order to grant 1st and 2nd Financial up gradation w.e.f. 09.08.1999 and 11.09.2003 respectively. In compliance of the order of this Tribunal, Review Screening Committee was held and reconsidered the case of the applicant but denied the benefit of first financial up gradation on the ground of not meeting the bench mark. Thereafter, another order dated 08.12.2010 was issued intimating the applicant that as the first ACP was deferred due to non-fulfillment of the criteria of minimum bench mark, 2nd ACP will be allowed to him only after completion of 12 years of regular service from the date of first financial up gradation i.e. on 11.09.2015 subject to fulfillment of the prescribed condition in terms of DoP&T OM No. 35034/1/97-Estt.(D) Volume (IV) dated



10th February, 2000 (clarification No.57). Being aggrieved by the aforesaid orders, the instant OA has been filed praying as under:

“...to quash Annexure-A/5 for the ends of justice;

...to quash Annexure-A/7 for the ends of justice;

...to hold that the applicant is entitled to the first financial up gradation as the scale of Rs.5, 500-9000/- (pre revised) w.e.f. 09.08.99 and the second financial up gradation in the scale of Rs.6, 500-10,500/- (pre revised) w.e.f. 11.09.2003.

....to grant the benefit under ACP i.e. first financial up gradation and second financial up gradation in the scale of Rs.5,500-9,000/- (pre revised) and Rs.6,500-10,500/- (pre revised) respectively w.e.f. 09.08.99 and dated 11.09.2003 respectively with all arrears and interest in such time as your Lordships deem it fit and proper.”

2. Respondents have filed their counter and additional counter objecting to the prayer of the applicant. Applicant has also filed rejoinder.

3. The contention of the Learned Counsel for the Applicant (Mr.K.C.Kanungo) is that while the applicant was continuing as Draftsman w.e.f. 11.09.1979, ACP scheme came into effect from 09.08.1999 in which it has been provided for grant of two financial up gradation after completion of 12 and 24 years of regular service without having any promotion. The Applicant was communicated about the adverse entries in his ACR on 24.04.2000

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for the year 1998-99 only on 24.04.2000 and the applicant submitted his representation against such adverse entries on 11.05.2000. In the meantime, the Screening Committee met on 09.05.2000 to consider the cases of all eligible officers including that of the applicant for grant of the benefit of first financial up gradation under ACP. It has been stated that had the applicant been found suitable, he would have been entitled to the first financial up gradation in the year 1991 but for the cutoff date, the same could be allowed to him w.e.f. 09.08.1999. As per the rules, five years ACR is required for consideration and, as such, taking into consideration the adverse entries for the year 1998-99, the applicant should not have been debarred from getting the ACP benefits. Second contention of Mr.Kanungo is that the review committee did not recommend the case of the applicant on the ground that he does not meet the bench mark 'Good'. The principle is well settled that in accordance with the rules of natural justice, an adverse entry in a confidential character roll cannot be acted upon to deny the benefit unless it is communicated to the person concerned. In the present case the Bench mark (i.e. the essential requirement) laid down by the authorities for promotion and grant

of the benefits under ACP scheme was that the candidate should have 'good' entry for the last five years. Thus, in this situation the adverse entry in fact eliminates the applicant from getting the benefit of ACP. Hence, the entry below the bench mark 'good' should have been communicated to the applicant so as to enable him to make a representation praying for up gradation of the entry from below the bench mark good. Of course, after considering such a representation, it was open to the authority to reject the representation and confirm the entry but at least an opportunity of making such a representation should have been provided to the applicant and that would only have been possible had the applicant been communicated regarding the entry which was not done in the instant case. Therefore, denial of the benefit of the ACP taking into consideration below bench mark 'good' without giving the applicant any opportunity is not sustainable in the eyes of law. In this connection, Mr.Kanungo placed reliance on the decision of the Hon'ble Apex Court in the case of **Dev Dutt v Union of India and others**, AIR 2008 SC 2513=(2008) 2 SCC (L&S) 771 and the instruction issued by the Government of India to the above effect. The third limb of submission of Mr.Kanungo is that with a view to

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overreach the decision of this Tribunal dated 27th November, 2008 rendered in earlier OA No. 278 of 2006 the respondents rejected the prayer of the applicant which is not sustainable in the eyes of law.

4. On the other hand, Mr.U.B.Mohapatra, Learned Senior CGSC appearing for the Respondents by placing the scheme and the clarification issued thereafter contended that there was no illegality in rejecting the claim of the applicant. The rejection of the claim of the applicant is just and proper as the same is in accordance with the instructions of the DoP&T. Further it was contended by him that the case of Dev Dutt having no retrospective effect is not applicable and that the same is still under consideration by the larger Bench of the Hon'ble Apex Court and as such the applicant is not entitled to the relief claimed in this OA especially when the applicant did not achieve the bench mark **good** in his ACRs. Hence, he has prayed for dismissal of this OA.

5. As regards applicability of the law laid down by the Hon'ble Apex Court, Mr.Kanungo submitted that the law enunciated by the Hon'ble Apex Court is in fact the law from inception and, therefore, it is wrong to state that the decision in the

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case of Dev Dutt (supra) is applicable prospectively and therefore has no application to the case of the applicant. In this context Mr.Kanungo placed reliance on the decision of the Hon'ble Apex Court in the case of **M.A.Murthy Vrs State of Karnataka and others**, Appeal (Civil) No. 6913-6914 of 2003 (arising LSP (C) Nos. 8113-8114/2002 decided on 02.09.2003. Further pendency of consideration by the Larger Bench on an issue decided by the Division Bench does not mean that the issue already decided by the Divison Bench should not be followed, Mr. Kanungo placed reliance on the decision of the Hon'ble Apex Court in the case of **Manager, National Insurance Company Limited Vrs Sju P. Paul and another**, (2013) 1 SCC (L&S) 399.

6. We have considered the rival contentions of the parties and perused the records. The direction of this Tribunal in the earlier OA No. 278 of 2006 disposed of on dated 27th November, 2008 was as under:

“6. After giving our in-depth consideration to various submissions advanced in relation to their pleadings by the respective parties, we have perused the materials placed on record. Instruction dated 30th January, 1978 clearly provides that adverse remarks should not be deemed to be operative if any representation filed within the



prescribed time limit is pending which has also the sanction of law that neither uncommunicated adverse remarks nor adverse remarks against which representation is pending can be acted upon against an employee. Also it is trite law that preceding five years ACR is normally to be taken into consideration for assessing promotion and if bench mark for promotion is achieved, there is no reason to hold an employee ineligible to be promoted. In the absence of any contrary statement, **it is proved that except for the year 1998-99 there is no other adverse entry in the ACR of the Applicant for the relevant period.** It is not in dispute that adverse ACR for the year 1998-99 was communicated to the applicant on 24.4.2000 against which he made representation on 11.05.2000. The representation of applicant against adverse entry was rejected and communicated to applicant under Annexure-A/13 dated 16.6.2000. Meanwhile, on 19.5.2000 Screening Committee Meeting was convened for grant of ACP to the Applicant and others and the recommendation of Selection Committee was implemented on 13.06.2000. In other words, on the basis of the adverse remark against which representation of applicant was pending the Selection Committee did not recommend the case of the applicant for grant of ACP which is against the instructions of the Government dated 30th January, 1978 as also law of the land.

7. For the reasons stated above, we find substantial force in the submission of the applicant that there has been miscarriage of justice in the decision making process for grant of ACP benefit to the applicant with effect from his entitled date. In view of the above, we remit the matter back to the Respondents for consideration of the case of the applicant for grant of 1st and 2nd up gradation of pay under ACP w.e.f. 09.08.1999

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and 11.09.2003 respectively within a period of 90 days from the date of receipt of copy of this order. This OA is accordingly allowed to the extent stated above. No costs.”

7. The Respondents rejected the case of the applicant on the ground as revealed from the order dated 13.3.2009 is as under:

“2. As directed by the Hon’ble Tribunal, the case for grant of 1st and 2nd ACP w.e.f. 09.08.1999 and 11.09.2003 to the applicant was reconsidered by the review Screening Committee constituted as per the composition laid down in the Recruitment Rules for the post of Sr. Draftsman. On the scrutiny of his ACRs it was observed that he does not meet the bench mark “Good” prescribed for grant of ACP to the next higher pay scale of Rs.5500-9000/- (Pre –revised). As such, the applicant was assessed “unfit” for grant of 1st ACP w.e.f. 09.08.1999. Therefore, he cannot be granted 1st and 2nd ACP w.e.f. 09.08.1999 and 11.09.2003.

8. The order of rejection does not show in which year the ACR of the applicant graded below the bench mark i.e. “Good”. This Tribunal has specifically observed in the earlier order that “in the absence of any contrary statement, it is proved that except for the year 1998-99 there is no other adverse entry in the ACR of the Applicant for the relevant period” and after giving full justification as to why based on the below bench grading of the year 1998-99 ought not to have been taken into consideration to deny the

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applicant the benefit of ACP, remitted the matter back to the Respondents to consider the case of the applicant for grant of 1st and 2nd up gradation of pay under ACP w.e.f. 09.08.1999 and 11.09.2003 respectively within a period of 90 days from the date of receipt of copy of this order. When there is no ambiguity or any scope for confusion in the order of this Tribunal, then obviously, the Respondents should not have rejected the case of the applicant by taking into consideration the entry in his ACR for the year 1998-99 once again. Therefore, without going into the other controversy, we hold that the consideration and rejection of the case of the applicant is a proof of non-application of mind being contrary to the earlier order/direction of this Tribunal the same needs to be quashed and should be remitted back for reconsideration by the Respondents. Hence, the order/corrigendum dated 13.03.2009 and 08.12.2010 in so far as denying the applicant 1st ACP w.e.f. 09.08.1999 is hereby quashed and the matter is remitted back once again to the Respondents to reconsider the case of the applicant for grant of the same strictly as per the discussions made above and communicate the outcome of such reconsideration



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to the applicant within a period of 90(ninety) days from the date of receipt of copy of this order.

9. In the result, this OA stands allowed to the extent stated above. There shall be no order as to costs.


(R.C.MISRA)
Member (Admn.)


(A.K.PATNAIK)
Member (Judicial)