

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A. No. 599 of 2016
Cuttack this the 15th day of January, 2018

Sri Manoj Kumar Acharya...Applicant

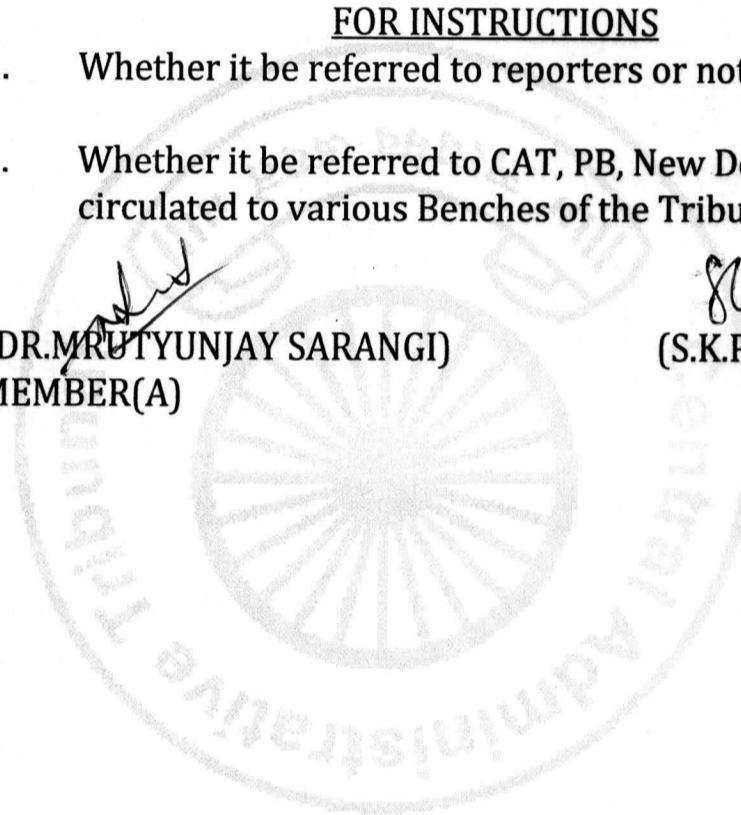
-VERSUS-
Union of India & Ors....Respondents

FOR INSTRUCTIONS

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

(DR.MRUTYUNJAY SARANGI)
MEMBER(A)

(S.K.PATTNAIK)
MEMBER(J)



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CORAM:

THE HON'BLE SHRI S.K.PATTNAIK, MEMBER(J)
THE HON'BLE DR.MRUTYUNJAY SARANGI, MEMBER(A)

Sri Manoj Kumar Acharya, aged about 42 years, S/o. Sri Golak Mohan Acharya, resident of Qr.No.A/04, Old Factory School Campus, presently working as DBW/HS, Ordnance Factory, Badmal, Dist-Bolangir

...Applicant

By the Advocate(s)-M/s.S.K.Ojha
S.K.Nayak

-VERSUS-

Union of India represented through:

1. The Secretary to Government of India, Ministry of Defence, Defence Head Quarters, New Delhi-110 011.
2. The Director General, Ordnance Factory Board, 10-A, Saheed Khudiram Bose Road, Kolkata-1.
3. The General manager, Ordnance Factory, At/PO-Badmal, Dist-Bolangir-767 770.
4. The Joint General Manager (Admn.), Ordnance Factory, At/PO-Badmal, Dist-Bolangir-767 770.

...Respondents

By the Advocate(s)-Mr.C.M.Singh

ORDER

DR.MRUTYUNJAY SARANGI, MEMBER(A):

The applicant was working as Danger Building Worker

(DBW) (Highly Skilled) at Ordnance factory, Badmal at the time of filing the Original Application. He has prayed for the following reliefs:

- i) To quash the letter/speaking order dtd. 20.07.2016 (Annex.A/15) holding the same is arbitrary, illegal & outcome of non-application of mind;
- ii) To direct the Respondents to promote the applicant to the post of Chargeman(Chem) from the panel published on 12.10.2010(Annex.A/2);

- iii) To extend all consequential benefit with effect from the date when other employees promoted;
- iv) To pass any other order/orders as deemed fit and proper in the circumstances of the case and for ends of justice.

2. The brief facts of the case as appeared from the O.A. are as follows:

The applicant had applied for the post of Chargeman(Chem.) against 25% LDCE quota in response to the notification dated 21.4.2010. On 12.12.2010, the result of the written examination for the said selection was published in which the applicant's name appeared at Sl.No.3. It is his contention that the Ordnance Factory, Badmal notified only two posts of Chargeman(Chem.) without adding the anticipated vacancies which are likely to occur by 31.3.2011 as per the Corrigendum issued on 7.4.2010. The applicant was not selected for the post of Chargeman(Chem) since he was No.3 in the merit list. He submitted a representation on 2.8.2010 and again on 29.10.2010 praying that he should be given the benefit of promotion since the currency of the selection panel was still valid and posts were available when the vacancy upto 31.3.2011 is taken into account. The Ordnance Factory, Badmal had sent a letter dated 1.4.2011 to the Ordnance Factory Board stating that six more vacancies were available in the financial year 2010-11 and therefore, the applicant should be appointed from the existing panel. However, the Ordnance factory Board did not accept the request of the Ordnance Factory, Badmal. On

29.4.2011, the applicant was informed by a letter that his request for promotion as Chargeman based on the LDCE 2010 cannot be agreed to. The applicant had earlier approached this Tribunal by filing O.A.No.302 of 2011 which was disposed off on 17.10.2011 directing the General Manager to consider the matter in all respects. In compliance of the orders of the Tribunal, the Joint General Manager (Admn.) of the Ordnance Factory, Badmal passed the speaking order on 18.1.2012 rejecting the claim the applicant's claim. On 27.3.2014, the Ordnance Factory, Korwa called for the names of the selected persons from other Factories for filling up of the unfilled vacancies of Chargeman (T&NT). The applicant was not selected for the same. The applicant filed O.A.No.186 of 2012. The said O.A. was disposed of on 2.2.2016 by this Tribunal with the following orders.

“20. For the discussions held above, impugned order at A/11 is quashed and the matter is remitted back for consideration on the following points.

- i) What was the total no. of vacancies in the grade of CM/Chem. Occurring and available under LDCE quota upto 31.3.2011, specifying the category to which they belong ?
- ii) What necessitated the respondents to fill up the promotional posts under LDCE quota over and above the vacancies notified/advertised when the law laid down by the Hon'ble Supreme Court to the contrary was well within their knowledge ?
- iii) What remedial measures have been taken to right the wrong ?

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iv) What stood in their way to consider the case of the applicant ?

21. Since the General Manager (res.no.2) has failed to comply with the orders of this Tribunal in O.A.No.302 of 2011 in letter and spirit and that A/1 in so far vacancy notification is concerned has been issued by the Office of Director General, Ordnance Factory Board, Kolkata, in the aptness of things, the matter has to be considered by the Director General, ordnance Factory Board (res.no.4) and accordingly, Director General, Ordnance factory Board (res.no.4) is directed to consider the matter above and pass a reasoned and speaking order by discussing each and every point mentioned above. Respondent No.4 is also directed to conduct an inquiry regarding filling up un-notified vacancies at Korwa Factory for the year 2013-14 and the vacancy of Chargeman/NT filled up by one Fakir Charan Naik for the year 2013-14 and as alleged by the applicant in the additional affidavits and disclose the outcome of such inquiry in the speaking order.

22. The above exercise shall be completed within a period of 120 (one hundred and twenty) days from the date of receipt of this order. Until then no action in pursuance of A/12 shall be taken".

In compliance with the above direction, the Director General, Ordnance Factory Board, Kolkata (Res.No.2) passed the impugned order dated 20.7.2016(A/15), the relevant paragraph of which reads as follows:

"04.6. OFB Letter
No.2982/LDCE/CM(T&NT)/CLARIFICATION/A/NG
dated 19.04.2011 addressed to OF Bolangir
clarified the existing rule position that

"...appointment can be made from the panel drawn up for the purpose. The panel can be prepared to the extent of the vacancies advertised. No new

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names can be included in the panel because of occurrence of vacancies subsequently..."

04.7.OFB Letter No.987/OA
232/2011/GBM/OFBOL/A/NG DATED 06.03.2012
ADDRESSED TO ALL Factories/Units also categorically instructed that

"...appointments can only be made from the panel drawn up for the purpose and the panel can be prepared only to the extent of the vacancies advertised.... No new names can be included in the panel because of occurrence of vacancies subsequently....

....4. In view of the above, it is once again directed that at the time of filling up of vacancies, the select list should not contain more no. of names than the advertised vacancies".

05.(ii).It is open to the authorities to reduce the vacancies even during a recruitment process and even after the declaration of results of written test for main examination upon a re-assessment of the requirement. This follows from the principle that Government is not bound to fill up the vacancies even if selection has been made. (Union Public Service Commission vs. Gourav Dwivedi (1999) 5 SCC 180: air 1998 SC 2012)

(iii)The Supreme Court has pointed out that the existence of vacancies does not give a legal right to a candidate to be selected for appointment. (State of Haryana vs. Subash Chander Marwaha (1974) 3 SCC 220: AIR 1973 SC 2216: (199\73) II ILJ 266).

(iv)The practice of making appointments in excess of notified vacancies could result in violation of Articles 14 and 16 (Ashok Kumar vs. Chairman, Banking Service Recruitment Board, JT 1995 (8) SC 276: (1996) 1 SCC 283: AIR 1996 SC 976).

08.1. OFB vide letter dated 31.03.2010 had issued instruction for filling up of vacancies in the post of Chargeman through LDCE for the year 2009-10 and 2010-11.The cut-off date for calculation of vacancies was erroneously mentioned as 31.03.2010 (in place of 31.03.2011) in the said Circular dated 31.03.2010. Accordingly, to correct the date a corrigendum dated 07.04.2010 was issued stating that "...The factories/Units shall take into account the vacancies of Chargeman (Tech. &

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Non-Tech.) in the LDCE quota only occurring and available upto 31.03.2011..." In compliance, OF Bolangir had published notification dated 21.04.2010, in which two posts were advertised for CM/Chemical (1 UR + 1 SC). The circumstances behind availability of details/information with the factory relevant to working/out/calculating LDCE vacancies for publication of notification upto 07.05.2010(i.e., the last possible date for making notification/advertisement of vacancies) have already been brought out in para 04.4 hereinabove. In the absence of knowledge about promotions that were to happen in future dates (upto 31.03.2011) ultimately resulting in creating vacancies in the grade of CM/Chem, the calculation of vacancies by the factory based on existing/available information was absolutely in order. Therefore, there is no infirmity found in the notification/advertisement made by the factory for filling up posts in Chargeman/Chem.

11.1. In the matter, it is to be conceded that earlier in some cases promotions have been erroneously granted over and above the notified vacancies, as have been quoted by the applicant. It was brought to the notice that such a practice was being followed in certain specific Factories, which was without the knowledge of OFB. However, as soon as this was brought to notice, a policy decision had been taken at OFB that such a wrong practice was required to be stopped immediately the relevant rules/instructions/law is required to be essentially adhered to at least in all future cases. Accordingly the required instructions were issued to all Factories/Units for implementation.

11.2. It has been repeatedly stressed by Hon'ble Supreme Court in its various judgments, some of which are quoted in the preceding paragraphs, that the law does not confer any right to the applicant as because Article 14 of the Constitution does not envisage negative equality and if the state has committed a mistake it cannot be forced to perpetuate the said mistake. If at all an incorrect practice, contrary to rules and instructions laid down by Govt. was being followed in the past that may not construe an authority and may not be allowed merely on grounds of precedence".

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By the said impugned order the request of the applicant for promotion to the post of Chargeman(T&NT) has been rejected. Aggrieved by this, the applicant has filed the present O.A. praying for the reliefs as mentioned in para-1 Above.

3. The applicant has based his prayer on the ground that the impugned order has been passed without due application of mind and cannot stand judicial scrutiny. He has alleged discrimination vis-à-vis the employees of the MSF, Ishapur who have got relief similar to the applicant.

The notification dated 21.4.2010 had advertised vacancies for the year 2010-11 and therefore, the anticipated vacancies likely to occur by 31.3.2011 should have been taken into account. Therefore, the action of the respondents is a violation of the law laid down by the Hon'ble Supreme Court and there has been a deviation of the notification issued for filling up of vacancies through LDCE.

4. The Respondents in their counter reply filed on 18.4.2017 have denied the contentions of the applicant that there has been violation of rules. It is their contention that Respondent No.2 has complied with the direction of this Tribunal in his speaking order dated 20.7.2016 (A/15). The notification of Ordnance Factory, Badmal issued on 31.3.2010 had clearly stated that the Factories/Units shall take into account the vacancies of Chargeman(N&NT) in the LDCE quota only occurring and available upto 31.3.2010. Subsequently, this was

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amended as 31.3.2011 by issuing a corrigendum dated 7.4.2010. As on 31.3.2011 only two vacancies were calculated in LDCE quota in the trade of Chargeman/T/Chem. The applicant in his representation dated 2.8.2010 had requested for amending the vacancy notification much later than the vacancy calculated in the Ordnance Factory, Badmal and much after sending the vacancy position to the Ordnance Factory Board for necessary action. The notification cannot be amended at a later stage. The panel prepared on the basis of the LDCE ceased to operate after the expiry of the panel period and since no further vacancy was available, the applicant's request for promotion to the post of CM/T.Chem. based on LDCE 2010 could not be agreed to. The respondents have denied that promotions were extended by the Ishapur Factory Administration on approval of the Ordnance Factory Board for the financial year 2010-11. They have emphatically submitted that no such cases were approved. The promotion of Shri Fakir Nayak which has been pointed out by the applicant in his O.A. has been cancelled and he has been reverted to the post of UDC vide letter dated 8.9.2016. The vacancies at Ordnance Factory, Korwa for the year 2013-14 were circulated in the other Ordnance Factories in response to which 40 applications were received and all of them were for the Mechanical Discipline. Therefore, the case of the applicant was not considered. The

process was closed after the publication of the result of the LDCE, 2014.

5. Applicant filed a rejoinder on 3.10.2017 enclosing the copy of the selection notification for the LDCE - 2007-08 and the order of promotions. It is his contention that the Ordnance Factory Board vide its letters dated 31.3.2010 and 7.4.2010 had directed all the Factories to issue selection notification in respect of present vacancies and the vacancies likely to occur till 31.3.2011. Six number of vacancies arose before 31.3.2011 and since the selection panel was still current, the applicant should have been given promotion against these vacancies in the LDCE quota. As per the prevailing practice, the employees had been earlier given promotion against the vacancies which were created after the notification was issued. Vide Office Order dated 22.11.2017, two persons were given promotion and one more person was further given promotion vide office order dated 1.11.2008 as against the LDCE, 2007. Therefore, as against one advertised vacancy three promotions were given to the post of Chargeman (Mech.). Similarly, as against 2008-LDCE three persons were promoted although the advertised vacancy of Chargeman(Elect.) was only for two posts. The applicant therefore, claims that taking into account the anticipated vacancy upto 31.3.2011 he should be given a promotion. He has also cited the judgment of the Hon'ble Apex Court in Virendra Singh Hooda vs. State of Haryana & Ors (1999) SCSLJ 249 in

which the Hon'ble Apex Court confirmed the action of the Government in offering appointment as against the future vacancies which was in conformity with the selection notification issued by the Department.

6. We have heard the learned counsels from both the sides and perused the documents submitted by them. The issue to be decided in the present O.A. is whether the applicant is eligible for promotion against the LDCE quota of anticipated vacancies upto 31.3.2011 as claimed by him. We find from the impugned order dated 20.7.2016 that four points raised in the order of this Tribunal dated 2.2.2016 have been addressed in the reasoned and speaking order by the Ordnance Factory Board on 20.7.2016. A Board of Inquiry was also constituted and its report was considered by the Ordnance Factory Board. Although in the speaking order dated 20.7.2016, the Respondent No.2 has taken great pains to cite a number of judgments/orders from various judicial fora to assert that the Government is not bound to fill up the vacancies as advertised even after the selection has been made [UPSC vs. Gourav Dwivedi (1999) 5 SCC 180] and existence of vacancies does not give a legal right to the candidate to be selected for appointment [State of Haryana vs. Subash Chander Marwaha (1974) 3 SCC 220], they have also averred that the practice of making appointments in excess of notified vacancies could result in violation of Articles 14 & 16 of the Constitution [Ashok

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Kumar vs. Chairman, Banking Service Recruitment Board (JT 1995 (8) SC 276]. In this O.A., the basic question is what were the number of posts advertised in the notification dated 21.4.2010. The respondents had originally fixed the cut-off date as 31.3.2010 for calculation of vacancies. Subsequently, through corrigendum dated 7.4.2010, it was clearly stated that the Factories/Units shall take into account the vacancies of Chargeman(Tech & Non-Tech) in the LDCE quota only occurring and available upto 31.03.2011. Respondent No.2 has admitted in the impugned order dated 20.7.2016 that there were eight number of LDCE quota vacancies in Chargeman/Chem as on 31.3.2011 and taking into account the 24 vacancies that had arisen due to promotion orders published upto 31.3.2011. In the said order it is mentioned that break up of 8 vacancies has been shown as (02 already filled up + 06 resultant vacancies). In effect, this means that the actual vacancies to be filled upto 31.3.2011 were 8. As against this, 2 vacancies were already filled up. Filling up six anticipated/resultant vacancies can be construed as within the number of vacancies advertised in the notification dated 21.4.2010. Respondent No.2 has issued two subsequent notifications dated 19.04.2011 and 06.03.2012. For the sake of clarity the relevant parts are extracted hereunder:

“...appointment can be made from the panel drawn up for the purpose. The panel can be prepared to the extent of the vacancies advertised. No new names can be included in

the panel because of occurrence of vacancies subsequently”

“...appointments can be made from the panel drawn up for the purpose and the panel can be prepared only to the extent of the vacancies advertised....No new names can be included in the panel because of occurrence of vacancies subsequently....”

7. A perusal of the above two notifications which were issued after the cut off date i.e., 31.3.2011 shows that they do not appear to have any restrictions on the respondents to fill up the six anticipated/resultant vacancies occurring on 31.3.2011. In the impugned order dated 20.7.2016, the respondents have made an attempt to justify the non-appointment of the applicant on the ground that there is nothing wrong in correcting an error. The relevant part reads as under:

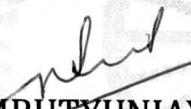
“11.2. It has been repeatedly stressed by Hon’ble Supreme Court in its various judgments, some of which are quoted in the preceding paragraphs that the law does not confer any right to the applicant as because Article 14 of the Constitution does not envisage negative equality and if the State has committed a mistake it cannot be forced to perpetuate the said mistake. If at all an incorrect practice, contrary to rules and instructions laid down by Govt. was being followed in the past that may not construe an authority and may not be allowed merely on grounds of precedence”.

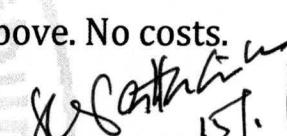
8. However, in the present O.A., the applicant’s case does not stand on negative equality, but on the fact that the anticipated/resultant vacancies upto 31.3.2011 as per the stipulation of the notification have not been taken into account.

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The subsequent clarification issued by the Ordnance Factory Board dated 19.4.2011 and 6.3.2012 which are basically on the validity of the selection panel will not be applicable in the case of the applicant. Going by the anticipated/resultant vacancies upto 31.3.2011 the applicant was entitled to promotion under the LDCE quota. Accordingly, order dated 20.7.2016(A/15) is quashed and set aside. The Respondent No.2 is directed to issue necessary orders giving promotion to the applicant under the LDCE quota from the year 2010-11 within a period of eight weeks from the date of receipt of this order.

9. In the result, the O.A. is allowed as above. No costs.


(DR.MRUTYUNJAY SARANGI)
MEMBER(A)


15.1.18
(S.K.PATTNAIK)
MEBER(J)

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