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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK


Original Application No. 186 of 2012
Cuttack, this the 02nd day of February, 2016

Manoj Kumar Acharya	Applicant
	Versus	
Union of India & Ors.	Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not? ✓
2. Whether it be referred to PB for circulation? ✓


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


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

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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No.186 of 2012

Cuttack this the 2nd day of February, 2016

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

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

Sri Manoj Kumar Acharya
Aged about 38 years
S/o-Sri Golak Mohan Acharya
Resident of Qr. No.20, IDCO Colony,
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 General Manager
Ordnance Factory
At/PO-Badmal
Dist-Bolangir-767770
3. The Joint General Manager (Admn.)
Ordnance Factory
At/PO-Badmal
Dist-Bolangir-767770
4. The Director General
Ordnance Factory Board 10-A
Saheed Khudiram Bose Road
Kolkata-700001

...Respondents

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

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ORDER

A.K.PATNAIK, MEMBER(I)

Upon perusal of records, we have heard the learned counsel for the parties. Undraped facts as revealed from the O.A. are as under.

2. Shri Manoj Kumar Acharya, applicant herein, had, along with five others, earlier moved this Tribunal in O.A.No.302 of 2011, challenging the decision of the respondent-authorities dated 29.4.2011 (A/9), which for all intends and purposes, had declined their promotion to the grade of CM/T based upon the Limited Departmental Competitive Examination, 2010. In the circumstances, while praying for quashing the impugned decision (A/9), the selection notification dated 23.8.2011(A/17) which is A/12 in the instant O.A., had also been sought to be quashed, with a prayer for direction to respondent-authorities to promote the applicants to the post of Charge Man(Chem) in respect of the panel published on 12.10.2010.

3. The aforesaid Original Application was grounded upon the following.

- i) Ordnance Factory Board (OFB) issued instructions on 31.3.2010 to the authorities of the Factories/Units within its control for filling up the vacancy of Charge Man/Tech & Non-Tech.(Stores & OTS) through Limited Departmental Competitive Examination (LDCE) for 2010-11, taking into account the vacancies in the LDCE quota only occurring and available upto **31.03.2010**.

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- ii) Soon thereafter, on 7.4.2011, OFB issued Corrigendum to the effect that instead of taking into account the vacancies under LDCE quota upto 31.03.2010, the Factories/Units shall take into account the vacancies of Charge Man(Tech & Non-Tech) in the LDCE quota only occurring and available upto **31.03.2011**.
- iii) **Factory Administration, without taking into account the anticipated vacancies likely to occur as on 31.3.2011, vide A/1 dated 21.4.2010, notified for filling up 02 vacancies of Charge Man(Chem).**
- iv) **04 vacancies in CM/Chem. arose** when 04 CM/Chem. stood promoted to AF/Chem. **with effect from 31.5.2010** and again **02 vacancies in CM/Chem. arose** when 02 CM/Chem. were promoted **with effect from 28.7.2010**. Subsequently, due to promotion of 18 CM/Chem. To the grade of JWM/Chem., total no. of **(4 + 2 + 18) 24 posts of CM/Chem. fell vacant, which were the vacancies occurring and available upto 31.3.2011.**
- iv) **Out of total 24 nos. of vacancies, the prescribed quota being 25%, instead of 02, 06 vacancies of CM/Chem. occurring and available upto 31.3.2011 under LDCE quota should have been notified.**
- vi) Applicants being the successful candidates, they should have been appointed on promotion against those 06 vacancies of CM/Chem. under the LDCE quota.
- v) Precedent was cited by the applicants therein that in Ishapore Unit under the administrative control of OFB, Kolkata, selection notification had been issued on 10.4.2010 pursuant to the **same letters dated 31.3.2010 and 07.04.2010 for filling up 7 posts of CM/Mech. However, after selection 13 persons were promoted as against 7 notified vacancies.** Therefore, a sheer discrimination had been meted out to the applicants.

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4. This Tribunal having considered the totality of facts and circumstances, disposed of O.A.No.302 of 2011 vide order dated 17.10.2011 with the observation and direction as under.

"From the aforesaid submissions and pleadings it is undisputed that though the Board has directed the factory Administration to notify the vacancies including the anticipated vacancy up to 31.03.2011, certainly they have failed to carry out the order of the Board. Secondly, the applicants were/are empanelled on the basis of a positive act of selection and Factory Administration has made it clear in their letter dtd.01.04.2011 that the vacancies are available and the currency of panel is still prevailing and requirement of the factory also existing for filling of the posts immediately. Moreover, it is also undisputed that the Factory Administration, Badmal has extended benefit of promotion over and above the post advertised from time to time and for this year also same procedure has been followed by another Unit under the Administrative control of the Ordnance Factory Board, Kolkata. Even though, Ordnance Factory Board is a party to the case in hand, stands so taken by the applicant have not been replied by the Ordnance Factory Board nor in anywhere the respondents have taken any such stand that what type of corrective measure has been taken by the Board to rectify the mistake if any committed during 2007, 2008 and 2010 itself.

Further, the decisions so relied on by the Respondents were also existed while giving promotions in the year 2007, 2008 and 2010-11. In the present case, applying the ratio of that Hon'ble Apex Court decision, Board can not refuse to extend the benefit of promotions to the applicants whereas other unit working under the Board are giving promotions over and above the notified vacancies. Respondents cannot resort to such type of practice adopting pick and choose method.

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In this view of the matter, we leave this matter to the discretion of Respondent No.2, viz., General Manager, Ordnance Factory to reconsider the matter afresh having regard to long standing precedent and practice as aforementioned and pass a reasoned and speaking order within a period of sixty days from the date of receipt of this order. In effect, we quash the impugned orders at Annexure-A/9 dated 29.4.2011.

Ordered accordingly."

5. In compliance with the above direction of the Tribunal, respondent-authorities issued Memorandum dated 18.01.2012(A/11), the relevant part of which reads as under.

Sub: O.A. No.302/2011-Shri V.C. Maharaj & Others Vrs. UOI & Others.

Ref: Hon'ble CAT Cuttack Order dated 17.10.2011 in O.A. No.302/2011

In compliance to the above referred direction of Hon'ble CAT, Cuttack the matter has been reconsidered afresh in the context of extant Rules. Instructions and Court decisions on the subject and having duly considered the same, it is regretted that, on the following grounds, your request for appointment to the post of CM/T through LDCE-2010 cannot be acceded to on merit.

- a) Ordnance Factory Board, Kolkata vide its letter No.2982/LDCE/CM(T & NT)/A/NG dated 31.03.2010 had issued direction to fill up the post of CM/T through Limited Departmental Competitive Examination for 2010-11. Further, OFB vide its letter No.2982/LDCE/CM(T&NT) A/NG dated 07.04.2010 has categorically indicated therein that the factories shall take into account the vacancies of CM/T&NT in the LDCE quota only occurring and available upto 31.03.2011. In compliance to above, the vacancies in the trade of CM Chemical, among other

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trades, were calculated wherein 02 (two) vacancies (01 UR & 01 SC) were worked out to be filled up through LDCE taking the vacancy position up to 31.03.2011 and accordingly circular dated 21.04.2010 was published inviting applications for appearing the said examination. Pursuant to above, the written examination was conducted from 28.08.2010 to 30.08.2010 and result sheet was published vide circular dated 12.10.2010. Accordingly, the candidates as per their merit position were appointed to fill up the already notified 01 vacancy each in UR category and in SC category and order published vide P.O.Pt.II No.1706 dt.12.10.10. Since the vacancies under LDCE quota as above were filled up vide P.O. dt.12.10.10 by following the rules and instructions on the subject and since you had not represented against the same despite knowing that some additional vacancies in the CM grade has already occurred due to promotion taking place in Astd. Foreman post from CM on 08.06.2010 and 30.07.2010, your contention therefore lacks merit for consideration.

- b) Ordnance Factory Board in the meantime effected promotions to 24 employees in the grade of CM/Chem to the next higher grade which were notified vide factory order dated 08.06.2010, dated 30.07.2010 and dated 24.02.2011 consequent to which you had made representation vide application dated 29.10.2010 to the GM/OFBL that the vacancies were to be reworked taking into account of the above resultant vacancies also in terms of OFB letter No.2982 LDCE/CM/T&NT/A/NG dated 07.04.2010 and 25% of such vacancies earlier notified vide circular dated 21.04.2010. In this connection, it is indicated that the vacancies for LDCE 2010-11 were calculated as per the vacancies available as well as

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anticipated vacancies likely to occur by 31.03.2011 on account of retirement and promotion in normal course and accordingly notified vide circular dated 21.04.2010. In the instant case, vacancies have occurred subsequently i.e. after issue of promotion orders by OFB and as notified vide factory orders dated 08.06.2010, dated 30.07.2010 and dtd.24.02.2011 which could not be anticipated from factory's point of view. However, on receipt of above representation from you the matter was thoroughly examined by Ordnance Factory Board and who following the Hon'ble Supreme Court orders in Madan Lal & Ors-Vrs. The State of Jammu & Kashmir & ors[1995] RD-SC 115 and Union of India & Ors Vrs. V.B. Valluvan & Ors [2006] RD-SC 689 have held that appointment can be made from the panel drawn up for the purpose to the extent the vacancies were advertised and no new names can be included in the panel because of occurrence of vacancies subsequently. In this connection it may be indicated that vacancy created due to promotion order issued by OFB subsequently is not in the hands of OFBOL and as such the factory cannot foresee such vacancies at the time of advertisement of LDCE vacancies. As appointment of CM through LDCE in this factory was to the extent the vacancies were advertised. Your contention for giving employment based on subsequent arising of vacancies is without basis as it lacks merit.

- c) Further, with regard to the direction of Hon'ble CAT Cuttack in their order dated 17.10.2011 that GM/OFBL to reconsider the matter afresh having regard to long standing precedent and practice it is indicated that if at all in incorrect practice, contrary to the Rules and Instructions laid down by Govt. of India, was being followed in the past that may not be construed an authority

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and may not be allowed merely on the grounds of precedent.

7. Decision taken vide A/11 dated 18.01.2012 in compliance of the direction of the Tribunal, not being palatable, applicant, who was one of the applicants in O.A.No.302 of 2011, challenging its legality and validity, has moved this Tribunal, in the instant O.A. seeking the following relief.

- i) To quash the letter/Speaking order dated 18.01.2012 (Annex.A/11).
- 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) quashing the selection notification dtd.23.08.2011 (Annex.A/12).
- iii) To pass any other order/orders as deemed fit and proper in the circumstances of the case and for ends of justice.

8. In the counter-reply, respondent-authorities have stiffly opposed the prayer of the applicant. According to them, vacancies already advertised for LDCE, 2010-11 cannot be changed at a later date even if unanticipated and/or additional vacancies occurred in view of the fact that Limited Departmental Competitive Examination had taken place only in respect of the vacancies notified and/or advertised. Additional vacancies arose subsequent to a decision of Govt. of India to merge the post of Asst. Foreman with that of Jr. Works Manager, in consequence of which promotions were effected from Chargeman to Junior Works Manager and the vacancies

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occurred in that behalf having been calculated, notification for the subsequent year 2011-2012 for filling up the vacancy has been issued on 23.8.2011(A/12) upon receipt of further direction from OFB vide letter dated 05.08.2011. According to them, contention of the applicant that the Factory Administration has illegally issued further Selection Notification dated 23.08.2011 is baseless. It has been stated that as per the settled position of law filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution and that selectees could not claim appointments as a matter of right. In this connection, respondents have cited a decision of the Hon'ble Supreme Court in Arup Das & Ors. Vs. State of Assam & Ors. [SLP (Civil) (No.CC .22/2012)] decided on 27.01.2012 as an authority to stultify the claim of the applicant. They have also relied on the decisions in Madan Lal & Ors. Vs. The State of Jammu & Kashmir & Ors. [1995] RD-SC 115 and Union of India & Ors. Vs. V.B.Valluvan & Ors. [2006] RD-SC 689 of the Hon'ble Supreme Court which lay down that appointment can be made from the panel drawn up for the purpose to the extent the vacancies advertised and no new names can be included in the panel because of occurrence of vacancies subsequently. Based on the aforesaid decisions, it has been submitted that vacancy created due to promotion order issued by OFB subsequently is not in the hands of OFBL

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and as such the factory could not foresee such vacancies at the time of advertisement of LDCE vacancies. As appointment of CM through LDCE in the factory was to the extent the vacancies advertised, appointment based on vacancies arising subsequently is without any basis and thus lacks merit.

9. Applicant has assailed the impugned Memorandum (A/11) on the ground that whereas this Tribunal vide order dated 17.10.2011 in O.A.No.302 of 2011 directed the General manager to take a decision, the authority subordinate to him has taken the decision rejecting his claim, which amounts to violation of the orders of the Tribunal.

10. By refuting this, respondents have submitted that that memorandum has been issued by a competent officer with the approval of the General Manager.

11. From the narration of above facts in issue, it is apparent that the relief that had been sought in the O.A.No.302 of 2011 is quite akin to the relief sought in the present O.A. *However, the Tribunal in this O.A. is only to decide whether the order at A/11 is in keeping with the direction of this Tribunal in O.A.No.302 of 2011 and if so whether the same warrants interference by the Tribunal.*

12. In this connection, it is prudent to mention that initially, circular dated 31.03.2010(A/3) was issued by the OFB, Kolkata for filling up of vacancies in the post of Chargeman(Tech. & Non-Tech.)(Stores & OTS) through LDCE for 2010-11, taking

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together the vacancies of 2009-10 and 2010-11 with a stipulation that the factories/units shall take into account the vacancies of Chargeman(Tech. & Non-Tech.) in the LDCE quota only occurring and available upto **31.03.2010**. Subsequently, by corrigendum dated 7.4.2010, it was directed that the Factories/Units shall take into account the vacancies of Chargeman(Tech. & Non-Tech.) in LDCE quota occurring and **available up to 31.03.2011 instead of 30.3.2010** as circulated vide A/3 dated 31.3.2010. Thereafter, vide A/1 dated 21.4.2010 vacancy notification, the number of vacancy of CM/Chem. sought to be filled through LDECE was 2 (1 UR + 1 SC). This vacancy notification appears to have been issued by the OFB and not by the Ordnance Factory, Badmal. Applicant did appear in the examination and came out successful, his name being placed at Sl. No.3 vide circular dated 12.10.2010 (A/2). The uncontroverted - rather admitted facts are that owing to promotion, 24 nos. of vacancies in the post of CM/Chem. fell vacant by 31.3.2011. This, in other words, construes to mean the vacancies occurring and available upto 31.3.2011 within the extent of corrigendum dated 7.4.2010(A/4). Therefore, there was no justifiable reason to earmark 2 nos. of vacancies of CM/Chem. under LDCE quota in the selection notification dated 21.04.2010. From this, it is quite clear that the selection notification dated 21.04.2010 had been issued without having regard to the vacancies occurred for the year 2010-2011.

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Therefore, vacancy of CM/Chem. as sought be filled through LDCE vide A/1 was pertaining to the vacancies for the year 2009-10 only. This is because had the vacancies of CM/Chem. occurring and available upto 31.3.2011 been taken into account, by any stretch of imagination, vacancies under LDCE quota could not have been two. Therefore, vacancy notification at A/1 had been issued by the OFB in abnegation of its own corrigendum dated 7.4.2010, which no doubt gives vent to deliberate and intentional administrative lapse. Applicant has nowhere called in question the legality in calculating and assigning 2 nos. of vacancies of CM/Chem. occurring and available upto 31.03.2011 to be filled through LDCE as notified vide A/1. On the contrary, he plunged in a crusade by citing long standing practices and precedents whereby OFB had approved appointment on promotion over and above the vacancies notified to be filled through LDCE quota and therefore, he has been discriminated against.

13. To this, respondents have stated that practices and precedents may be considered appropriate or inappropriate. But the basic purposes enshrined in the process at the outset should not be overlooked at a later date. According to them, the rules prevailing in the field need to be upheld and if any incorrect practice, contrary to the rules and instructions laid down by the Government of India was being followed in the

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past that may not be construed an authority and may not be allowed merely on the grounds of precedence.

14. This Tribunal, vide order dated 17.10.2011 had disposed of O.A.No.302 of 2011 with direction to the General Manager, Ordnance Factory, (res.no.2) to reconsider the matter having regard to long standing precedent and practices as mentioned therein and pass a reasoned and speaking order. But to our utter dismay, we find that Joint General Manager(Admn.) has issued order dated 18.01.2011(A/11) styling it to be Memorandum for the General Manager. This, in our considered view, is contumacious. Authorities whom the direction had been issued should have reconsidered the matter but not the Joint General Manager(Admn.) for and on behalf of the General Manager. Reconsideration means, due application of mind, which is personal to the specific authority. It cannot be assumed that the General Manager will apply his mind in the same manner as the Joint General Manager(Admn.). In other words, Joint General Manager(Admn.) should not have applied his mind for General Manager. The speaking order constitutes contempt of Court on two counts. Firstly, the Joint General Manager(Admn.) ignoring the specific order of the Tribunal has disposed of the matter for General Manager. Secondly, he has mocked the observation of the Tribunal, but has not denied that wrong practice and precedents do exist. If he admits that wrong practice has been followed, then he has to clarify what

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corrective measure that has been taken to curb the same.

Drawing a red herring across the trail, Joint General Manager(Admn.) has taken the observations of this Tribunal as a matter of course. Therefore, order issued by the Joint General Manager vide A/11 is held to be not in consonance with the orders of this Tribunal in O.A.No.302 of 2011 and therefore, the same is liable to be quashed.

15. At this stage, it would be profitable to quote the relevant part of written notes of submission filed by the applicant which reads as under.

“From the documents appended to the additional affidavit filed on 22.09.2014 it clearly proves that for the year 2013-14 to fill up the un-notified vacancies of Korwa Factory, the Board has issued letter to all other factories to sponsor the names of the selected candidates available in the panel for their appointment. Similarly, from the additional affidavit filed on 13.01.2015 it proves that the Factory Administration, Badmal themselves going beyond the advertisement have appointed one Sri Fakir Charan Naik against the post of Chargeman/NT. To be more specific, for the year 2013-14 selection notification was issued for filling up 2 posts (Annex.A/16 to Addl.Affidavit) and two persons were given appointment against the notified vacancies(Annex.A/17) to Addl.Affidavit). However, further promotion was given from the panel to Sri Fakir Charan Naik(Annex.A/20) to Addl.Affidavit) against the post of Chargeman/Non-Tech. which was occurred subsequent to the advertisement.”

16. The above points do not form part of the pleadings of the O.A. Therefore, there was no opportunity for the respondents to

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submit their counter reply to this. Even though the above submissions do not form part of the O.A., but, by filing additional affidavits, applicant has brought to the notice of the Tribunal as to how the authorities have made an attempt to confound the Tribunal.

19. If at all the respondents have appointed any incumbents over and above the vacancies as advertised for the year 2013-14, as quoted above, it is a matter of serious concern. The Tribunal could have taken cognizance of suo motu contempt, but for the prolongation of litigation.

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 ?
- 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,

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Ordinance Factory Board, Kolkata, in the aptness of things, the matter has to be considered by the Director General, Ordinance Factory Board (res.no.4) and accordingly, Director General, Ordinance 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 Chran Naiak 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.

23. With the above observations and directions, the O.A. is disposed of, leaving the parties to bear their respective costs.


(R.C.MISRA)
MEMBER(A)


(A.K.PATNAIK)
MEMBER(J)