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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK
O.A.No.175 of 2013
Cuttack this the 6th day of July, 2015

CORAM
HON'BLE SHRI A.K.PATNAIK, MEMBER(J)
HON'BLE SHRI R.C.MISRA, MEMBER(A)

Kshetrabasi Mohanta
Aged about 55 years
S/o. late Mukunda Mohanta
Residing at Qrs.No.II/32,
Census Colony
Baramunda
Director of census Operation
Odisha
Janpath
Unit-IX
Bhubaneswar-751 022
Dist-Khurda
Odisha

...Applicant

By the Advocate(s)-M/s.K.C.Kanungo
Ms.C.Padhi

-VERSUS-

Union of India represented through

1. The Secretary,
Ministry of Home Affairs
Govt. of India
New Delhi-110 001
2. Registrar General of India
2A Mansingh Marg
New Delhi-110 001
3. Director of Census Operation
Janagana Bhawan
Janapath, Unit-IX
Bhubaneswar-751 022
Odisha
4. Joint Director of Census Operation
Office of Director of Census Operation
Janagana Bhawan
Janapath, Unit-IX



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Bhubaneswar-751 022
Odisha

...Respondents

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

ORDER

A.K.PATNAIK, MEMBER(J):

This is the third round litigation by the applicant before this Tribunal.

2. Brief history of the matter runs thus: Initially, applicant had been appointed as Peon(Group-D) in the year 1980 under the Respondent-Department. In the year, 1998, he was promoted to the Post of Assistant Compiler against 10% quota earmarked for Group-D employees. In the year 2006, he was further promoted to the post of Compiler. While working as such, vide order dated 27.9.2006, he was called upon to exercise his option for qualifying the test of type writing or proficiency in operating calculating machine. Aggrieved with this, applicant approached this Tribunal in O.A.No.207 of 2007. This Tribunal disposed of the said O.A. vide order dated 15.7.2009 in the following terms.

“However, it is submitted by the learned counsel that the applicant wants to make representations to Respondent No.1 & 2 seeking exemption from appearing the typing test. If such representations are filed by the applicant within 30 days hence, it is only proper for the Respondent No. 1 & 2 to consider the matter keeping in mind that the applicant has in the meantime been continuing in promoted post of Asst.Compiler and Compiler since 09 years, and pass appropriate



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orders within a period of three months from the date of receipt of order”.

3. Accordingly, applicant submitted a representation exercising his option/willingness on 7.8.2009 to Respondent No.2. Thereafter, vide communication dated 6.11.2009, applicant was intimated the status of his representation. Subsequently, vide order dated 4.12.2009, applicant was reverted to the post of Peon with effect from 3.12.2009. This gave rise to filing O.A.No.578 of 2009 by the applicant before this Tribunal. While the matter stood thus, vide order dated 6.8.2010, applicant was intimated regarding the result of his representation dated 7.8.2009 that he had made under the orders of this Tribunal in O.A.No.207 of 2007. This necessitated the applicant to seek amendment to the O.A.No.578 of 2009 and the Tribunal having allowed the amendment, the applicant brought the order dated 6.8.2010 within the purview of the said O.A. as a measure of amendment. O.A.No.578 of 2009 was disposed of by this Tribunal vide order dated 19.06.2012 with the following directions.

- i) The representation dated 07.08.2009 shall be considered only by the Respondent No.1 having regard to observation made in Paragraph-13 above and the observation made by this Tribunal in O.A.No.207/2007.
- ii) The applicant is at liberty to exercise his choice for the qualifying test other than the typing test(English) as provided in the Recruitment Rules.



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iii) Since the Respondents have made out a case that the applicant's promotion to Asst.Compiler in the year 1998 had been made against a vacancy which was not in existence, they are free to take such action as deemed fit and proper in accordance with rule of law, after complying with the principles of natural justice and if necessary, after giving an opportunity to the applicant of being heard in person.

4. In compliance of the above order of the Tribunal, Respondent No.1 passed order dated 8.11.2012(A/8) as communicated by Respondent No.4 vide A/9 dated 1.4.2013, which are impugned and called in question herein. Hence, this Original Application, seeking the following relief.

- i) To admit the Original Application, call for the records and upon hearing the parties be pleased to quash Annexure-A/9 for the ends of justice;
- ii) To hold that the applicant's promotion to the post of Asst. Compiler and Compiler were legal and need not be disturbed at belated stage for the ends of justice.
- iii) To pass any order/orders, direction/directions and relief/relief(s) as the Tribunal deems fit and proper.

5. Respondent-Department have filed their counter repudiating the claim of the applicants. The points urged by the Respondents in support of their contentions are two-fold.



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Firstly, applicant did not possess the essential qualification for promotion to Assistant Compiler as per the Recruitment Rules and secondly, when the applicant was promoted to the grade of Assistant Compiler in the year 1998, no vacancy in the grade of Assistant Compiler existed in 10% promotion quota earmarked for Group-D employee.

6. We have heard the learned counsel for both the sides and perused the pleadings of the parties. We have also gone through the written notes of submission filed by the parties concerned.

7. Before considering the matter, we would, at first, like to examine as to whether the Respondents have complied with the order dated 19.6.2012 passed by this Tribunal in O.A.No.578/2009, while considering and disposing of the representation dated 7.8.2009. For the sake of clarity, the points raised by the applicant in his representation dated 7.8.2009 vis-à-vis, the consideration made, as outlined in order dated 8.11.2012 issued by the Respondents, are quoted hereunder.

POINTS RAISED BY THE APPLICANT

- i) It is improper to ask him to appear in test required for the work that he successfully discharged during his past service.
- ii) He has completed 09 years of service and after that he was asked to undergo type test which is not proper so far as related rules are referred and that no attempt was made by office to carryout such test in time.



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- iii) Under FR 26 after completion of 45 years of age, such asking of type test is illegal.
- iv) Under Rule 6 of Service Rule and Rule 311 of CCS(CCA) Rule the authority has power to exempt. The authority ought to have regularized his promotion by relaxing the irregularity if any in view of his long years of valuable service in the higher post of compiler.

CONSIDERATION MADE BY THE RESPONDENTS

- i) Possessing necessary typing skill is essential qualification for the post of Assistant Compiler. By virtue of the work discharged by him for the previous 9 years, it cannot be claimed with certainty that he shall also be able to discharge the work needing requisite skill.
- ii) The irregularity in his appointment came to notice in pursuance to the report of National Commission for scheduled Tribes in 2006. Accordingly, he was asked to appear in the typing test in 2007.
- iii) There is a provision under FR 26 to grant exemption from typing writing test after completion of age 45. However, this exception is only relevant to the post of Lower Division Clerk and not to Assistant Compilers.
- iv) Under Column 6 of Recruitment Rules there is a provision of relaxation of recruitment Rules, wherein the Government can relax any provision of the Rule. However such relaxation is applicable to class or category of persons. Relaxation cannot be made only in individual case; more so, when other employee is going to be adversely affected by such relaxation. In his case another employee namely Shri LaxikantDehury is also staking claim

[Signature]

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for promotion awarded to him. So grant of such relaxation only to him will amount to discrimination with Shri Dehury.

In view of the above, the representation of Shri K.B.Mohanta for grant of exemption from typing test cannot be agreed to.

8. It is not the case of the applicant that any of the points raised in his representation dated 7.8.2009 has been left out of consideration in compliance of the direction of the Tribunal in O.A.No.578/2009. However, it is the case of the applicant that in compliance of further direction of the Tribunal in O.A.No.578/2009, he had exercised his option/willingness vide A/7 dated 27.7.2012 to appear the test (proficiency in operating calculating machine, viz., electrically hand model), which is the condition precedent as per Recruitment Rules for promotion to the post of Assistant Compiler, but the Respondents have not at all considered the same and on the contrary, they issued the order of reversion vide A/9 dated 1.4.2013.

9. To this, the Respondents in their counter have replied that as the applicant's promotion to the post of Assistant Compiler was against a vacancy which was not in existence, the option exercised by the applicant has not been considered. It is the further submission of the Respondents that the Tribunal in order dated 19.6.2012 in O.A.No.578/2009 also held that "**since the Respondents have made out a case that the applicant's**



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promotion to the post of Assistant Compiler in the year 1998 had been made against a vacancy which was not in existence, they are free to take such action, as deemed fit and proper in accordance with rule of law, after complying with the principles of natural justice and if necessary, after giving an opportunity to the applicant of being heard in person" and accordingly, reversion order dated 1.4.2013 has been issued after hearing the applicant in person.

10. From the recital of above facts, the first and foremost point that needs to be determined is whether there existed any vacancy in the post of Assistant Compiler against the 10% promotion quota earmarked for group-D in the year 1998, when the applicant was promoted and if the answer to this is in the negative, whether by his continuance in the post of Assistant Compiler for a period of eight years till 2006, when he was further promoted to the post of Compiler, any right has accrued to the applicant to continue in the promotional post. Conjointly, the issue is also whether at this distant point of time, two promotions already given to the applicant can be called in question by the respondents by a process of review.

11. We would like to note here that vide Memorandum dated 15.7.2009, applicant had a been asked to explain as to why he should not be reverted to the post of Peon on the ground that his promotion to the post of Assistant Compiler made on the basis of the recommendations of the DPC held on 18.5.1998



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was irregular inasmuch as he neither fulfilled the requisite essential qualifications as per Recruitment Rules nor had there existed any vacancy in the post of Assistant Compiler on the date of holding DPC against which he had been promoted. To this, applicant had submitted his explanation on 11.6.2009. All those incidents had taken place prior to disposal of O.A.No.207/2007 on 15.7.2009. Had those facts been brought to the notice of the Tribunal, there could not have been any scope, in the face of explanation dated 11.6.2009 already submitted by the applicant in response to Memorandum dated 29.5.2009, to dispose of the O.A.No.207/2007, on the prayer made by the applicant to make representations to Respondent Nos. 1 and 2 seeking exemption from appearing the typing test. It is because of suppression of facts by the applicant before disposal of O.A.207/2007 on 15.7.2009, multifarious litigations came to be filed before the Tribunal and this was the background which made the Tribunal to stick to its order dated 15.7.2009 in O.A.No.207/2007, while issuing direction to dispose of the representation dated 7.8.2009 in O.A.No.598/2009.

12. Be that as it may, the Tribunal is now concerned with the points in issue as mentioned above.

13. It is the case of the applicant that presently, he is holding the post of Compiler. Therefore, his promotion to the post of Assistant Compiler way back in the year 1998 cannot be called



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in question as he is in no way responsible for his promotion to Assistant Compiler and therefore, the principle of waiver and acquiescence stares at the Respondents. The findings of the Review DPC after 11 years of applicant's promotion at the behest of the Inquiry Committee is nothing but non-application of mind, as no roster register was placed before the review DPC regarding the existence or otherwise of vacancy of under 10% quota reserved for Group-D employees for promotion to the post of Assistant Compiler in the year 1998. The facts that a duly constituted DPC recommended the name of the applicant for promotion to the post of Assistant Compiler in the year 1998 and having a good track record, he was further promoted to Compiler in the year, 2006, are quite sufficient to dispel the submission of the Respondents in the counter that applicant's promotion to Assistant Compiler was against no vacancy. While the applicant is approaching fag end of his service career, after passage of 16 years, his reversion by two grades below will bring untold misery, particularly when no mischief is attributable to him.

14. According to Respondents, 10% vacancies in the grade of Assistant Compiler were to be filled by promotion failing which by direct recruitment. It is their further submission that as per the stipulation in Col.12 of the Recruitment Rules that ***10% of the vacancies in each of the offices shall be reserved for being filled up by Group D employees borne on the regular***



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establishment of the respective offices, who fulfills the other conditions of the Rules. But the proposal put up before the DPC for filling up one post of Assistant Compiler was arrived at on the calculation of 10% of 16 sanctioned posts of Assistant Compiler, which, according to Respondents, was wrong and erroneous, in view of the provisions of the Recruitment Rules wherein, it has been categorically mentioned *the maximum number of recruitments by this method would be limited to 10% of the vacancies occurring in a year in the respective offices, and unfilled vacancies would not be carried over.* Therefore, it is the case of the Respondents that since in the year 1998 there were three vacancies in the grade of Assistant Compiler of which 10% works out to 0.30, there existed no vacancy for promotion of the applicant.

15. We have considered the rival submissions threadbare. This is a peculiar matter where the applicant's promotion in the grade of Assistant Compiler has been called in question by the Respondents after he had been given further promotion to the grade of Compiler. The whole structure based on which the Respondents have built up their case is that when the applicant was promoted to the post of Assistant Compiler in the year 1998, there was no vacancy in that grade and, therefore, his further promotion to the post of Compiler is bad.

16. Except making a bald submission that the findings of the review DPC at the behest of the Inquiry Committee after 11



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years of applicant's promotion tantamount to non-application of mind as no roster register was placed before the review DPC regarding existence or otherwise of the vacancy under 10% quota reserved for Group D employees for promotion to the post of Assistant Compiler in the year 1998, applicant has not been able to defend his case by producing any incrementing evidence to show that at the relevant time his promotion to the post of Assistant Compiler had been made against a vacancy earmarked for promotion under 10% quota reserved for Group-D employees. This apart, applicant has also not challenged the maintainability of the report of the Inquiry Committee. As indicated above, had the Memorandum dated 15.7.2009 calling upon the applicant to explain as to why he should not be reverted to the post of Peon on the ground that his promotion to the post of Assistant Compiler made on the basis of the recommendations of the DPC held on 18.5.1998 was irregular inasmuch as neither he fulfilled the requisite essential qualifications as per Recruitment Rules nor had there existed any vacancy in the post of Assistant Compiler on the date of holding DPC against which he had been promoted as well as the explanation submitted by him on 11.06.2009 been brought to the notice of the Tribunal prior to disposal of O.A.No.207 of 2007 on 15.07..2009, the Tribunal, in O.A.No.578 of 2009 could have taken a different view. It is significant to



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note that in O.A.No.207 of 2007, The Tribunal has observed as follows:

“But the fact remains that both the promotions are not in accordance with the Rules, as the applicant does not possess the prescribed qualification in order to meet the above requirement of Rules ...”.

17. In this backdrop, as quoted above, while disposing of O.A.No.578 of 2009 on 19.06.2012, the Tribunal had left the matter open to either of the parties for taking follow up action, without however, adjudicating or expressing any opinion on its merit. Therefore, the entire edifice is now erected on the question of non-existence of vacancy in the grade of Assistant Compiler in the year 1998, when the applicant was promoted under 10% quota reserved for Gr.D employees. Undoubtedly, applicant's promotion to the grade of Assistant Compiler in the year 1998 had been made against no vacancy falling under 10% quota for Group-D employees. Apart from the above, applicant's promotion to Assistant Compiler ought to have been made after his qualification in the typing test, which was a condition precedent for promotion. This irregularity could be noticed by the respondents in pursuance to the report of National Commission for Scheduled Tribes in 2006 and accordingly, applicant was asked to appear the typing test in the year 2007. Be that as it may, since promotion of the applicant to the grade of Assistant Compiler was made in the year 1998 when there existed no vacancy under 10% quota



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reserved for Group-D employees, prima facie, this promotion was not only illegal but also de hors the recruitment rules. By no stretch of imagination, we can approve of such promotion of the applicant notwithstanding the fact that he has been further promoted to the grade of Compiler in the year 2006. At the same time, we can unhesitatingly say that Respondents are not divested with powers to rectify their own mistake that has occurred due to administrative lapse, of course, after following the due procedure of rules of law. We are in entire agreement with the Respondents that they have left no stone unturned in following such procedures. Law is well established that appointment de hors the recruitment rules cannot confer any right on an employee for permanent absorption. The manner in which applicant's promotion to Assistant Compiler has been made is not only irregular but illegal and this illegality, on being noticed, should not be allowed to perpetuate. However, the fact of the matter is that the applicant was promoted in 1998 as Asst. Compiler as against a non-existent vacancy, and without this lapse being detected he was further promoted in the year 2006 as Compiler. The respondents should have realized that such grave administrative errors must be attributable to some officials who are responsible for perpetrating such a situation, and taken suitable administrative action against persons who owe accountability for this lapse.



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18. We have gone through the decisions relied on by the learned counsel for the applicant in support of his case. The decisions so relied ^{upon} being distinguished contextually from the facts of the present case, are of no assistance to him. Since the basic structure of promotion of the applicant to the grade of Assistant Compiler is weak and vulnerable, his further promotion to Compiler cannot be considered legally tenable. In this connection, we cannot lose sight of the legal maxim - *sublato fundamento cadit opus* - which means - remove the foundation the structure or work fall. In our considered view, therefore, promotion of the applicant to the grade of Assistant Compiler being de hors the recruitment rules is void ab initio and therefore, his further promotion to Compiler falls to the ground by consequence.

19. For the reasons what has ^{ve} been discussed in the preceding paragraphs, we hold that the applicant is not entitled to any relief sought and accordingly, the O.A. being devoid of merit is dismissed. No costs.

(R.C.MISRA) *R.C.*
MEMBER(A)

A.K.
(A.K.PATNAIK)
MEMBER(J)

BKS