

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR**

Original Application No. 194/2011
Alongwith
Miscellaneous Application No. 103/2011

Date of decision: 23-11-2012

[Order reserved on 03.09.2012]

CORAM:

HON'BLE Mr. G. GEORGE PARACKEN, JUDICIAL MEMBER
HON'BLE Mr. B.K.SINHA, ADMINISTRATIVE MEMBER

Gordhan Lal Bairwa S/o Shri Ramkaan Bairwa, aged about 42 years, resident of B-1-B, Anand Vihar, Jagatpura Jaipur, at present employed on the post of Divisional Accounts Officer Gde-I, in the office of Executive Engineer PWD, MECH Division - 1st Jaipur.

..... Applicant

Mr. J.K.Mishra, Advocate.

Versus

1. Union of India through the Secretary, Ministry of Finance, Department of Expenditure, Government of India, New Delhi.
2. The Comptroller and Auditor General of India, 10 Bahadur Shah Zafar Marg, New Delhi.
3. The Principal Accountant General (A&E), Office of the Accountant General Rajasthan, Jaipur.
4. Shri H.S. Khushwa, Sr. Divisional Accounts Officer, Office of Executive Engineer, PWD Division-I, Balotra District Barmer.
5. Shri Ravi Prakash, Sr. Divisional Accounts Officer, Office of Executive Engineer, Water Resources, Construction Division-III, Deoli, District Tonk.

..... Respondents

Mr. Niranjana Mathur, Proxy for
Mr. Kuldeep Mathur, Advocate for respondents No. 1 to 3.
None present for respondents No.4&5.

ORDER

Per Mr. B.K.Sinha, Administrative Member

This Original Application is directed against the order No. WM
(ACS)Promotion/DAO Gr.I/K.29 dated 27.5.2005 [A1] of the
Principal Accountant General (A&E), Office of the Accountant

General, Rajasthan, Jaipur promoting some of the Divisional Accounts Officer Grade II to the post of Divisional Accounts Officer Grade I including the applicant and Order dated 4.12.2006 [A2] rejecting the representation of the applicant.

Relief(s) sought:

- "(i) That impugned order dated 27.5.2005 (Annexure.A1) to the extent promoting the applicant as DAO-I w.e.f. 1.4.2004 and order dated 4.12.2006 (Annexure.A2) rejecting his representation, may be declared illegal and the same may be quashed.***
- (ii) The respondents may be directed to anti-date his promotion to the post of DAO-I from 1.4.2004 to 1.1.2004 and modify the impugned order dated 27.5.2005, accordingly and allow all consequential benefit including consideration for further promotion(s) as a result of anti-dating of his seniority and also the arrears of difference of pay along with market rate of interest.***
- (iii) That any other direction, or orders may be passed in favour of the applicant which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.***
- (iv) That the costs of this application may be awarded."***

Case of the applicant:

2. The applicant, who belongs to the SC community, joined on 9.5.1995 as Divisional Accountant at Banswara on his appointment as Divisional Accountant, and was conformed on the said post on 19.12.1998 on having qualified the departmental examination. He was, thereafter, promoted as Divisional Accounts Officer Grade-II (DAO-Gr.II for short) w.e.f. 30.6.2003 which was antedated to 1.1.2001 vide order dated 6.5.2005 where he figures at Sl.No.73 in the said list[A4]. The applicant was promoted to the post of DAO Grade I w.e.f. 1.4.2004 vide Order dated 27.5.2005 [A1] and was placed at Sl.No.38 in the said order. Since his name did not correctly figure in the list, he made a representation on 20.11.2006 which was rejected vide the impugned order [A2]. He made another representation on 15.1.2007 [A5] giving complete details of the matter, without eliciting any response. However, some of the DAOs

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including R4 who was promoted against SC point No.20, were further promoted to the post of Sr.DAO vide letter dated 8.1.2007 [A6]. The applicant has produced Annexure.A7 OM dated 2.7.1997. Para 10 of Annexure to the above OM says "***the roster is to be operated on the principle of replacement and not as a 'running account' as hitherto. In other words, the points at which reservation for different categories applies are fixed as per the roster and vacancies caused by7 retirement etc., of persons occupying those points shall be filled by appointment of persons of the respective categories'.***" The applicant submits that there were

five points reserved and marked for SC at the relevant time but the reserved points were filled from general category candidates. However, the applicant was promoted only from 1.4.2004 overlooking the reservation rules. He has mentioned the names of 5 persons from general category promoted against the reserved points w.e.f. 1.1. 2004.

The claim of the applicant is that he should have been promoted against point No.20 w.e.f. 1.1.2004 instead of point No.38 w.e.f. 1.4.2004. He has stated that the earlier OA No. 96/2007

along with MA for condonation of delay was dismissed by this Tribunal vide order dated 3.8.2007 which was challenged before the Hon'ble Rajasthan High Court at Jodhpur and the same was allowed vide judgment dated 3.3.2010 condoning the delay in filing the OA and remanding the matter for fresh decision. [A9]. This OA along with

OA 52/2004 was heard and both were allowed vide order dated 30.3.2011. However, no specific order has been passed in regard to the reliefs claimed by the applicant. The RA filed by the applicant has been dismissed vide order dated 9.5.2011 [A10]. Since the Tribunal has already settled the position that the applicant is the employee of

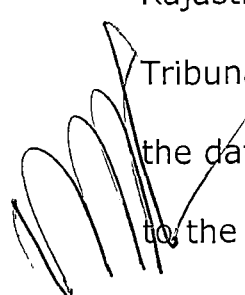
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CAG, the Tribunal has jurisdiction to entertain the OA. The applicant has filed this OA for the aforesaid reliefs, since his application had not been decided on merits. The applicant has mentioned amongst the grounds that the roster has no relation with the seniority or panel position in view of Para 10 of the Annexure to the OM dated 2.7.1997 and the action of the respondents is ex-facie illegal and cannot be sustained in law being violative of Articles 14 and 16 of the Constitution.

3. Applicant filed MA 103/2011 for condoning the delay in filing this OA stating that in the Review Application in OA 96/2007 it had been observed that if at all the applicant is aggrieved, he can do so only through another legal process impleading the concerned parties and not in review. Thereafter, he obtained the advice of his counsel and filed this OA, which took some time. He states that there is no intentional delay on his part and prays for condoning the delay in filing the OA.

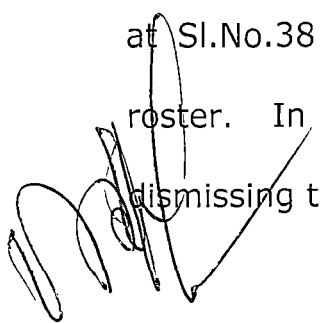
Reply of the respondents:

4. The respondents 1 to 3 have filed their reply opposing the Original Application. Respondents took a preliminary objection of jurisdiction of this Tribunal as the applicant is presently posted at PWD Mechanical Division No.1, Jaipur. The OA filed by the applicant for the similar relief had been dismissed by this Tribunal earlier as was the RA filed by him. As per the direction of the Hon'ble Rajasthan High Court, the matter was again considered by the Tribunal and dismissed the same on 9.5.2011. They have stated that the date of promotion to the post of DAO-II was ante-dated according to the High Court DB order dated 17.9.2004 and according to the HQ



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guidelines vide Office DO letter No.71/1c/160-2002 dated 31.1.2005 that the two year period spent on probation by the candidates may have to be included while considering eligibility of length of service for promotion to the post of DAO Gr.II. As per recruitment rules for the post of DAO Gr.I, the DAO Gr.II having minimum of 3 years of regular service in the grade on crucial date that is 1st January each year to which panel pertains were eligible for promotion as DAO Gr.I. The promotion was made on the basis of seniority-cum-fitness and the panel was prepared on the basis of post based roster. Among eligible candidates 5 SC category and 2 ST category candidates were eligible and no such de-reservation was required. Accordingly for promotion for DAO Gr.I, 37 eligible candidates were empanelled as per their inter se seniority, as per sonority list and the remaining 3 SC candidates were empanelled at the bottom in order of their seniority. Accordingly, the name of the applicant was placed at Sl.No.38 rightly according to the rules and instructions on post-based roster and he was rightly promoted on 1.4.2004 as the 38 vacancy become available on that date. The respondents have further stated that the copy of the roster which applicant enclosed with the OA is for the year 2005 whereas the applicant was promoted for the panel for the year 2004 as per seniority. The applicant was not promoted from 1.1.2004 because the vacancy became available on 1.4.2004 as per panel for the year 2004 and names were released as per position in panel on the availability of post. Hence, he has been rightly placed at Sl.No.38 according to rules and instructions on the post based roster. In view of their above contentions, the respondents pray for dismissing the OA.



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5. Respondent No.4 also filed a reply following most of the contentions raised by the official respondents. Respondent No.4 states that he is senior to the applicant and, therefore, the applicant cannot claim anything which has the effect of naming applicant senior to the answering respondent or adversely affecting the promotion granted to the answering respondent.

6. The applicant filed a rejoinder to the reply of the official respondents reiterating most of his contentions in the Original Application.

Facts in issue:

7. After having carefully considered the documents adduced by the parties and heard the arguments of learned counsel for applicant and official respondents, the following facts-in-issue emerge for consideration:

1. Whether the roster points meant for the SC/ST candidates in the roster have been filled w.e.f. 1.1.2004 from general category candidates thereby denying promotion to the applicant?

2. Whether the applicant should have been promoted against point No. 20 w.e.f. 1.1.2004 against the point vacant that existent and not against point No. 38 meant for the unreserved category candidates?

3. Whether the applicant's representation has been rejected by means of non-speaking order without having assigned any reason?

4. What relief(s), if any, can be granted to the applicant?

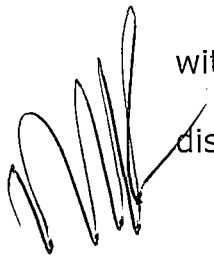
Whether the roster points meant for the SC/ST candidates in the roster have been filled w.e.f. 1.1.2004 from general category candidates thereby denying promotion to the applicant?



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8. In respect of the first Issue, the applicant has submitted that the second respondent promoted the applicant to the post of Divisional Accounts Officer (DAO) Grade-I w.e.f. 1.4.2004 vide the order dated 27.5.2005 and his name being placed at Sl. No. 38. As per 200 points reservation roster, his name ought to have been placed at Sl. No. 20 instead of Sl. No. 38 and his date of promotion would have been 1.4.2004 and not 1.1.2004 as mentioned in the impugned order for the reason that one should have completed three years of service on the feeder post. The applicant submitted several representations to this effect. The applicant has further contended that the roster is to be operated on the principle of replacement and not as a running account. However, the applicant alleges that the respondents have not adhered to this principle and has given a list of general candidates promoted against the reservation point w.e.f. 1.1.2004 to the post of DAO Grade-I from the roster of 2005.

9. The roster point No. 38 is meant for unreserved category, a fact which is adequately reflected in the OM 27/1997. The applicant has been promoted against reserved point No. 38 which is meant for unreserved category. Here, it is to be considered that the applicant joined in the office of the CAO Mahi Project, Banswara on 9.8.1995. As per the existing rules, he was to undergo two years of periodical and practical training on completion of which he has to appear in the departmental examination for Divisional Accountant Grade Examination. In the case that he did not clear the examination within the number of attempts allowed it would entail an automatic discharge from service. He passed his Divisional Accountant Grade



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Examination in the year 1998 and the probation period was completed on 18.12.1998, following which he was confirmed on the post of Divisional Accountant w.e.f. 19.12.1998 vide office order dated 13.6.2001. The applicant was promoted as Divisional Accounts Officer Grade-II vide Office Order No. 37 dated 27.6.2003 and he joined on this post on 30.6.2003. The period of two years spent on probation was to be included in the period of eligibility of length of service for promotion to the post of DAG-II. Accordingly, the panels for 2002, 2004 and 2005 were ante dated and the promotion of the applicant was revived from 30.6.2003 to 1.1.2001 vide Office Order No.12 dated 6.5.2005. As per the Recruitment Rules of post of DAO Grade I and DAO Grade II having a minimum qualifying period of three years of service in the grade on 1st January of each year and the promotions were being made on seniority-cum-merit fitness. The respondents have further submitted that a panel year empanelment for 40 posts was done on which applicant's name existed on seniority No. 38 and 37 vacancies were existed on 1.1.2004 and three more vacancies were to occur on 1.4.2004, 30.4.2004 and 2.10.2004 respectively.

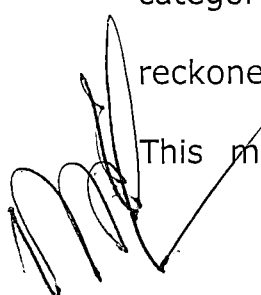
10. The respondents have also given the post based roster reservation position which is mentioned as below:

| | SC | ST |
|--|--------|-----|
| Representation required for 85 Sanctioned posts | 12 | 06 |
| Less representation | 07 | 06 |
| Short-fall | (-) 05 | Nil |



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11. There were 5 SC category and 2 ST category candidates available in the panel. 37 persons were empanelled as per the inter se seniority for promotion to DAO Grade I in the year 2004. 3 SC candidates were empanelled as per their seniority list at the bottom of the panel to give representation to SC candidate in order of their seniority. The respondents contend that the name of the applicant was rightly placed at Sl. No. 38 according to the rules and the instructions on post based roster and, he was rightly promoted on 1.4.2004 as the 38th vacancy had become available w.e.f. that date alone. The applicant had submitted repeated representations which has been rejected and the position has been made known to him. The respondents have also submitted that the roster which the applicant has enclosed with the OA is for the year 2005 whereas the applicant was promoted in the panel of 2004 as per the seniority. The learned counsel appearing for the applicant strongly emphasized that reservation is a continuous process and the rosters are only an aid to determine the entitlement of different category with regard to reservation for them. They are not to determine the inter se seniority amongst the candidates. Here, it is also advisable to look at the rules position. Earlier, the roster was being operated as a running account to be followed on point to point basis in the case of promotion. However, in the case of *R.K. Sabarwal and Others Vs. State of Punjab and Others* (supra) reported in 1995 (1) SLR 791, Hon'ble the Supreme Court held that the persons from reserved category holding posts against a general category were not to be reckoned against the reserved post but against the general post. This made the roster system based on running account in




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compatible with this finding. Para 5 of the judgment of R.K.

Sabarwal is reproduced below:-

"5. We see considerable force in the second contention raised by learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes / Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. '16% of the sposts' are reserved for members of the Scheduled Caste and Backward Classes. In a lot of 100 posts, those falling at serial numbers, 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Caste. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards upto 91st post. When the total number of posts in a cadre is filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at Roster-points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from amongst the general category. By following this procedure there shall neither be short-fall nor excess in the percentage of reservation."



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12. Accordingly, the DOP&T came to revise its Circular vide OM No. 36012/2/96-Estt. dated the 2nd July, 1997 paras 4 and 5 of which are reproduced below :-

"4. The principles for preparing the rosters elaborated upon in Explanatory Notes are briefly recapitulated below:

(a) Since reservation for OBCs does not apply in promotions, there shall be separate rosters for directly recruitment and for promotion;

(b) The number of points in the roster shall be equal to the number of posts in the cadre. In case there is any increase or decrease in the cadre strength in future, the rosters shall be expanded / contracted correspondingly;

(c) Cadre, for the purpose of a roster, shall mean a particular grade and shall comprise the number of posts to be filled by a particular mode of recruitment in terms of the applicable recruitment rules. Thus, in a cadre of say, 200 posts, where the recruitment rules prescribe a ratio of 50:50 for direct recruitment and promotion, two rosters- one for direct recruitment and one for promotion (when reservation in promotion applies)—each comprising 100 points shall be drawn up on the lines of the respective model rosters;

(iv) Since reservation does not apply to transfer on deputation / transfer, where the recruitment rules prescribe a percentage of posts to be filled by this method, such posts shall be excluded while preparing the rosters;

(v) In small cadres of up to 13 posts, the method prescribed for preparation of rosters does not permit reservation to be made for all the three categories. In such cases, the administrative Ministries / Departments may consider grouping of posts in different cadres as prescribed in this Department's OM No. 42/21/49-NGS, dated 28.1.1952 subsequent orders reproduced at pages 70 to 74 of the Brochure on Reservation for Scheduled Castes & Scheduled Tribes (Eighth Edition) and prepare common rosters for such groups. In the event it is not possible to resort to such grouping, the enclosed rosters (Appendices to Annexures-II, & IV) for cadre strength up to 13 posts may be followed, principles of operating these rosters are explained in explanatory notes.

5. At this stage of initial operation of a roster, it will be necessary to adjust the existing appointments in the roster. This will also help the excesses / shortages, if any, in the respective categories in the cadre. This may be done starting from the earliest appointment and making an appropriate remark - "utilized by SC/ST/OBC/Gen.", as the case may be, against each point in the rosters as explained in the explanatory notes appended to the model rosters. In making these adjustments, appointments of candidates belonging to SCs/STs/OBCs which were made on merit (and not due to reservation) are not to be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments."

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13. The explanatory note in Annex. A/1 of the OM dated 2.7.1997 Annexure -1 further provides in para No. 10 as under :-

"10. The roster is to be operated on the principle of replacement and not as a 'running account' as hitherto. In other words, the points at which reservation for different categories applies are fixed as per the roster and vacancies caused by retirement, etc., of persons occupying those points shall be filled by appointment of persons of the respective categories."

14. If we start from the very beginning that being the date of appointment of the applicant the chronological event is being given in the table figure :

| | | |
|---|---|-------------------|
| Date of Appointment | : | 9.8.1995 |
| Passing of DAG I | : | Dec 1998 |
| Completion of probation | : | 18.12.1998 |
| Confirmation | : | 19.12.1998 |
| Promoted as DAO II | : | 27.06.2003 |
| Antedated to | : | 1.1.2001 |
| Completion of eligibility of 3 Years | : | 11.2004 |

15. A bare perusal of this table reveals that the applicant has not lost on any of the grounds. As regards his claim for being placed at Sl. No. 20 instead of Sl. No. 38, I find that the reasoning submitted in the counter reply of the respondent - department which stands to reason. In the year 2004, 37 persons had been empanelled for promotion to the post of DAO Grade I as per their seniority. Three SC candidates were empanelled at the bottom of the panel to give representation to SC candidates in order of their seniority. As the new roster system is not a running account system, the name of the applicant has been correctly placed at Sl. No. 38 and I find no infirmity in the same.

16. Let us for a moment assume that the applicant is correct and his name is to be at Sl. No. 20 in such a case what would be the effect in such a case. The applicant will disturb the inter se seniority

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and he could not have been promoted earlier than the year then 1.4.2004 as the 38th vacancy became available at that point of time. In case he is brought to Sl. No. 20 his promotion would take place earlier. However, this would likely to give rise to plethora of litigation as others will also challenge this queue jumping and the earlier member of the SC list would seek to take advantage of the same. Hence, this issue is concluded by holding that the applicant has been rightly considered and rightly promoted.

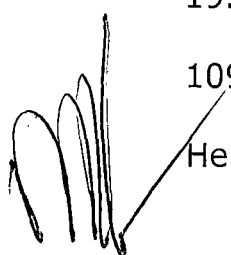
Whether the applicant should have been promoted against point No. 20 w.e.f. 1.1.2004 against the point vacant that existent and not against point No. 38 meant for the unreserved category candidates?

17. This issue has also been covered under the Issue No. 1 and would need no separate elucidation here.

Whether the applicant's representation has been rejected by means of non-speaking order without having assigned any reason?

18. In so far as the third issue is concerned, one has also to go into the series of litigation that this case has generated. The applicant himself admits that his representation dated 20.11.2006 was considered and turned down by the respondents vide their order dated 1.2.2006 placed at Annex.A/2. On the face of it, it does not appear that this order is not a reasoned or speaking order.

19. The applicant has vide OA No. 96 of 2007 along with MA No. 109 of 2007 before this Bench which was dismissed as time barred. He again filed RA No. 15/2007 which was dismissed on the ground



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that the applicant did not challenge the order dated 27.5.2005. Against this, the applicant moved in appeal before the Hon'ble High Court in D.B. Civil Writ Petition No. 546 of 2009. The Hon'ble High Court remanded the matter back to this Bench of the Tribunal with the following observation:

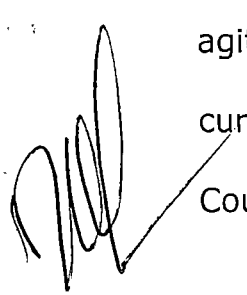
"Upon perusal of the order impugned, it is revealed that none of the grounds taken by the petitioner for condonation of delay has been dealt with by the learned Tribunal; and, straight away, in limine the original application has been dismissed only on the ground of delay. In our opinion, for imparting justice technicalities should not normally come in way for adjudicating any matter on merit. Here, in this case, before approaching the Tribunal, admittedly, a representation was made by the petitioner on 20.04.2006 for granting promotion on the post of Divisional Accounts Officer Gr.-I w.e.f. 01.01.2004 instead of 01.04.2004 but the same was not replied till filing the original application; meaning thereby, the petitioner applicant was waiting for the redressal of his grievance and when no response was given up till 26.04.2007 and further promotions were made, then, he preferred original application before the Tribunal.

In our opinion, the Tribunal has committed error while rejecting the miscellaneous application filed by the petitioner for condonation of delay, so also, in dismissing the original application filed by the petitioner in limine solely on the ground of limitation. The matter was required to be considered on merit while condoning the delay occurred in filing the original application because the relief prayed was only for granting promotion w.e.f. 01.01.2004 instead of 01.04.2004 on the post of Divisional Accounts Officer Gr.-I."

20. The applicant again came to this Tribunal vide MA No. 13/2011 which was dismissed along with application No. 52 of 2004 without any direction. The applicant once again filed RA No. 10/2011 before this Bench which was disallowed with the following observation:

"If at all the applicant is aggrieved he can do so only through another legal process impleading the concerned parties accordingly notice has been issued vide OA No. 194 with MA No. 103/2011."

21. This once again reveals that the applicant has been pursuing his claim before the different fora wherein his grievance could be agitated and what is lacking in the order dated 4.12.2006 has been cured in the subsequent considerations of the issue by different Courts.



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22. We have also considered the MA No. 103/2011 for condonation of delay. We find that the delay has been on account of the fact that the applicant had used some time in obtaining legal advice after the decision in the RA 96/2000 and as such it was inadvertent and not deliberate. Hence, the delay stands condoned and the MA is allowed. The OA has been otherwise considered on its merit.

23. We have considered the matter carefully. We find that the plea of the applicant is not sustainable in the light of the issues resolved as above. Hence, the OA is disallowed with no order as to costs.



[B.K.Sinha]
Administrative Member



[G. George Parackal]
Judicial Member

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