

# CENTRAL ADMINISTRATIVE TRIBUNAL ERNAKULAM BENCH

## ORIGINAL APPLICATION NO. 90 of 2013

Thursday this the 25th day of August, 2016

**CORAM**

***Hon'ble Mr. Justice N.K.Balakrishnan, Judicial Member***  
***Hon'ble Mrs. P. Gopinath, Administrative Member***

- 1 K. Achuthan Nayar (Died)  
residing at XI/532, Katlamadom,  
(Paliyam), Chendamangalam,  
Ernakulam 683512.

***Additional applicants 2 to 4 impleaded as per order dtd 16.8.2016 in  
MA N.937/2016.***

2. Varada A Nayar, aged 56 years  
W/o Late K.Achuthan Nayar  
residing at XI/532, Katlamadom  
(Paliyam), Chendramangalam,  
Ernakulam-683512.
3. Yamini Sathyajit, aged 36 years  
W/o Satyajit Sukumaran,  
Kamalalayam, Mambra PO  
West Koratty  
Trichur District.
- 4 P.Radhakrishnan, aged 34 years  
S/o late K.Achuthan Nayar,  
residing at XI/532, Katlamadom (Paliyam)  
Chendamangalam,  
Ernakulam-683512.

***....Applicants***

(By Advocate Mr. S. Radhakrishnan)

Versus

1. Union of India, represented by the Secretary  
to the Government of India, Ministry of Finance,  
Department of Revenue, North Block, Parliament Street,

New Delhi-110 001.

- 2 The Central Board of Excise and Customs,  
represented by its Chairman and Special Secretary  
to Govt. of India, North Block,  
Parliament Street, New Delhi.
- 3 The Commissioner of Customs, Customs  
House, Cochin-682009. **...Respondents**

(By Advocate Mr.N. Anil Kumar, Sr.PCGC by Mrs. Advocate Ms.Tanuja)

This application having been finally heard on 16.08.2016, the Tribunal on 25.08.2016 delivered the following:

### **ORDER**

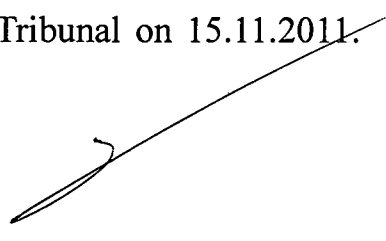
*Per: Justice N.K. Balakrishnan, Judicial Member*

The applicants 2 to 4 are the wife and two children who are the legal representatives of deceased Achuthan Nair (Ist applicant) who approached this Tribunal for a declaration that the deceased Achuthan Nair is entitled to get notional promotion with effect from the date on which his juniors were promoted, to the grade of Assistant Commissioner and then Joint Commissioner and for a direction to promote the deceased applicant (Achuthan Nair) notionally as Assistant Commissioner and Joint Commissioner with effect from the dates on which his juniors were promoted. Another relief sought for is for a direction to grant arrears of salary in the higher post. Since admittedly deceased Achuthan Nair did not work in that post, he is not entitled to get arrears of salary. Similarly, reliefs 8(g) and (h) relating to the release of leave salary and DCRG, were

granted subsequently. Reliefs 8 (e) and (f) are consequent to the claim for notional promotion stated earlier. Relief 8(i) is also dependent on the reliefs sought for under relief 8(b).

2. While entering into service deceased Achuthan Nair was shown as K.Achuthan. Subsequently he got his name changed as K. Achuthan Nair and in some places he was shown in short as K.A.Nair. Achuthan Nair was promoted as Appraiser on 30.1.1985 and it was regularized w.e.f. 1.4.1989. He was just above Mr. OP Falgunan and CG Chandramouli as shown in A12. On 1.1.1998 he changed his name as K.Achuthan Nair @ K.A. Nair and the change was notified in the gazette and recorded in his Service Book as well. The deceased was granted ACP in 2001 with effect from 9.8.1999. Since ACP benefit was given w.e.f. 9.8.1999 it is established that he was eligible and competent to be promoted to the next higher post. As he was promoted as Appraiser on 30.1.1985 on completion of 8 years he became eligible to be promoted as Assistant Commissioner. His juniors S/Shi Phalgunan and Chandramuoli were promoted as Assistant Commissioners in 1997. Chandmouli was again promoted as Joint Commissioner in 2007.

3. There was a disciplinary proceedings and Rule 27(2) proceedings under the CCS (CCA) Rules against the deceased applicant and thus he was not considered for promotion till the matter was culminated by Annexure A8 order passed by this Tribunal on 15.11.2011. After completion of the



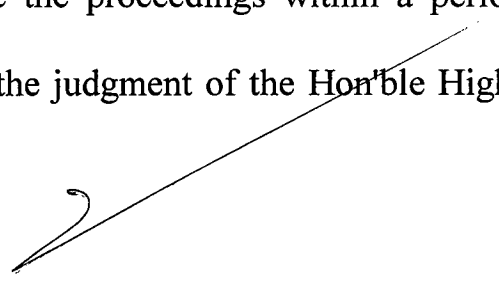
disciplinary proceedings/criminal prosecution, the department was bound to follow sealed cover procedure and so on the culmination of the inquiry, the applicant was entitled to be promoted. The further fact that the applicant was granted arrears consequent upon revision of pay which is discernible from Annexure A17 would also show that the applicant was eligible to be promoted. Achuthan Nair approached this Tribunal for the reliefs as aforesaid. He died pending this Original Application. Hence, his legal representatives have come on record. The claim for notional promotion and fixation as prayed for in the OA are to be allowed.

4. The respondents resisted the application contending as follows.

Disciplinary proceedings were initiated against the applicant who was then an Appraiser. Charge sheet was issued to him. The allegation is that the applicant attempted to plant a non-existing informer with the malafide intention of appropriating the reward amount of Rs. 87 lakhs which would have been disbursed to a non-existing informer but for the subsequent inquiry. The other charge was that while the deceased applicant was functioning as Appraiser he exceeded the jurisdiction of his official work assigned to him and actively engaged in anti smuggling work like patrolling in the sea although there was a regular set up of preventive unit with an Additional Collector and other officers to do the anti smuggling work. An Arab Dhow, with 250 slabs of silver bar, was seized by the

Customs Officials on the night of 17/18.12.1990 near Mangalore. It was stated to be based on a secret information given with regard to the same. The allegation was that the applicant planted a non-existing informer so as to get the commission amounting to nearly Rs. 87 lakhs. Inquiry was conducted in the matter. It was found by the inquiry officer that Charge No.1 (Article 1) stood proved; whereas Article II stood not proved.

5. The disciplinary authority disagreed with the findings of the Inquiry officer and issued show cause notice to the applicant. After considering all the aspects, the disciplinary authority imposed a penalty of reduction of pay from Rs. 8100/- to Rs. 6500/- in the time scale of Rs. 6500-200-10500 for a period of one year with a further direction that he will not earn any increment of pay during the said period and on expiry of the said period the reduction will not have the effect of postponing future increments of his pay. That was challenged by the deceased applicant in appeal. After issuing notice and following the procedure prescribed, the appellate authority re-considered the matter and imposed a penalty of dismissal from service. That was challenged before this Tribunal and later before the Hon'ble High Court. The Hon'ble High Court as per judgment dated 20.12.2006 in WP(C)No.25841 of 2006 upheld the order of this Tribunal directing to complete the proceedings within a period of four months. In compliance with the judgment of the Hon'ble High Court the



penalty of reduction in pay to one year, was set aside by the appellate authority. A fresh show cause notice was issued to the applicant to show cause as to why on the basis of the grounds mentioned therein, the penalty imposed on the applicant should not be modified to that of dismissal from service. The appellate authority after taking into consideration accepted the facts and circumstances of the case, the advice of the Union Public Service Commission on the appeal filed by the deceased applicant as fair and reasonable. The original order passed by the Commissioner imposing penalty of reduction from Rs. 8100/- to Rs. 6500/- is modified to that of dismissal from service. Challenging this order, the deceased applicant filed OA 481/2008. Again this Tribunal directed that the applicant be reinstated in service forthwith and also directed the appellate authority to re-consider the representation of the applicant against the show cause notice. The appellate authority again dismissed the applicant from service. That was set aside by this Tribunal in OA 481/2008 and thus the applicant was reinstated in service without any back wages on 22.3.2010. On 30.11.2010 the applicant retired from service on superannuation. The appellate authority passed Annexure A3 order directing the disciplinary authority to start further inquiry in the light of procedural infirmities discussed by the Tribunal. In OA 852/2011 the Tribunal set aside all proceedings and restored the original minor penalty which was imposed on 9.5.2001. On

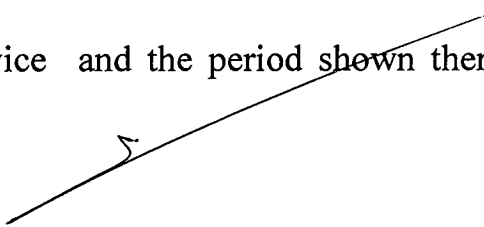
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18.5.2012 the deceased applicant submitted a representation requesting to revise all his service benefits.

6. It is not necessary to delve much on the earlier proceedings which were pending before this Tribunal, in view of the final order passed by this Tribunal which attained finality. Annexure A20 order was passed by the respondents on 28.2.2013 to the effect that he was reinstated into service in pursuance of the order dated 5.2.2010 passed by this Tribunal in OA 481/2008 and the consequential order passed by the Commissioner of Customs on 22.3.2010. It was ordered that the deceased applicant shall be paid full pay and allowances for the period from 15.5.2005 to 18.6.2007 and from 7.5.2008 to 22.3.2010 for which the deceased applicant would have been entitled had he not been dismissed and it was further ordered that the period of dismissal from 15.5.2005 to 18.6.2007 and from 7.5.2008 to 22.3.2010 shall be treated as period spent on duty for all purposes. Therefore, Annexure A20 itself would make the position clear that the deceased applicant was to be given all service benefits treating that he had not been dismissed from service and that he was awarded only the penalty of reduction in rank for one year as originally ordered. Since there was no cumulative effect, after expiry of the period mentioned therein the applicant must be deemed to have been in service and as ordered in Annexure A20 his period of absence should be treated as spent on duty. The further fact that

the applicant was granted benefit under the ACP Scheme to the next higher scale would also strengthen the case advanced by the deceased applicant that the respondents had taken into consideration the period of service rendered by the deceased applicant during that period. In other words that would perforce probabalise the case of the deceased applicant that the orders passed by the disciplinary authority or appellate authority, as the case may be, having been nullified by the subsequent order passed by this Tribunal, for all practical purposes he must be deemed to have been in service. As said earlier the grant of financial benefit under ACP would reinforce that contention raised by the deceased applicant.

7. If the applicant was under cloud of doubt at the relevant time when DPC was convened then sealed cover procedure should have been followed. There is no case for the respondents that there was any other legal inhibition granting promotion to the applicant. See also Annexure A8 order passed by this Tribunal on 5.11.2011. It was only because the applicant had chosen to file appeal against the order passed/penalty initially imposed on the applicant. Therefore, the penalty initially imposed by the disciplinary authority awarding reduction to the minimum of the pay scale for a period of one year was restored. When that is the position, as has been said even in Annexure A20, the deceased applicant must be deemed to have been in service and the period shown therein should be treated as

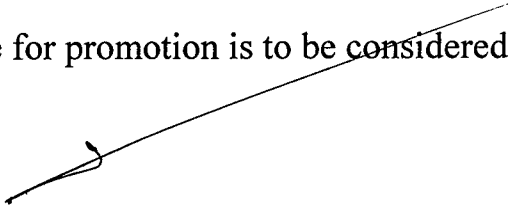




period spent on duty and accordingly the deceased applicant was entitled to get promotion to the next higher post, as was given to his two immediate juniors.

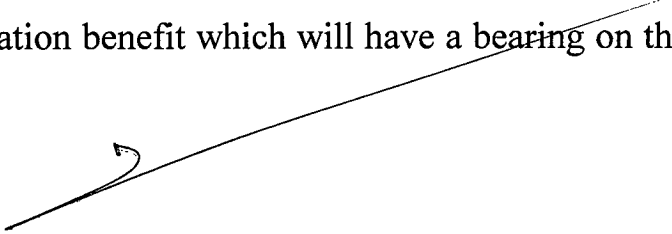
8. It is not disputed that applicant was promoted as Appraiser on 30.1.1985. On completion of eight years of service, he was eligible to be promoted as Assistant Commissioner. Shri Chandramouli was junior to the deceased applicant in the cadre of Appraiser who was promoted as Assistant Commissioner in 1997. That Chandamouli was again promoted as Joint Commissioner in 2007. It was only due to the pendency of the disciplinary proceedings and proceedings under Rule 27(2) of CCS (CCA) Rules, the deceased applicant was not considered for promotion till the matter was culminated by Annexure A8 order of this Tribunal. Therefore, the deceased applicant was entitled to get notional promotion with effect from the date on which his junior in the grade of Appraiser; namely Shri Chandramouli was promoted. Consequently the deceased applicant would be entitled to get further promotion as Joint Commissioner in the next hierarchical scale as pleaded by the deceased applicant.

9. If a penalty is imposed on a government servant based on disciplinary proceedings, the sealed cover procedure has to be adopted. After the penalty period the sealed cover is to be opened and acted upon as per the rules. His case for promotion is to be considered by the next DPC in



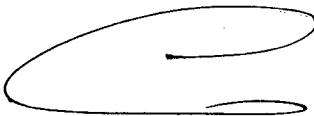
the normal course and having regard to the penalty imposed on him. Since the deceased applicant Achuthan Nair was found guilty in the inquiry and was imposed a penalty of reduction in pay for one year and that stood restored as per the order passed by the Tribunal in Annexure A8, the deceased applicant was very much available to be considered for promotion. It is contended that in view of the order passed under Annexure A8 the deceased applicant accepted the original minor penalty imposed by the respondents authority. Since even as per Annexure A20 the applicant was granted all other benefits, it has to be held that the applicant was for all practical purposes entitled to get promotion to the next higher post when his immediate junior Shri Chandramouli in the list was promoted as Assistant Commissioner and later as Joint Commissioner.

10. Since the penalty initially imposed by the disciplinary authority is restored on completion of the period of one year, he should be restored to the original position and as such the deceased applicant was entitled to be considered for promotion on the dates when his immediate junior was considered and granted promotion as Assistant Commissioner and later as Joint Commissioner. But it is made clear that the applicants 2 to 4 are not entitled to get any arrears of pay consequent to the notional promotion of the deceased applicant, but the applicants 2 to 4 would be entitled to get only notional fixation benefit which will have a bearing on the computation



of retiral benefits/pension applicable to the deceased applicant. The pension payment order has to be revised accordingly.

11. In the result this OA is disposed of directing the respondents to grant notional promotion to the deceased applicant as if he was in service as on the date when his immediate junior was granted promotion as Assistant Commissioner and later as Joint Commissioner. It is made clear that the deceased applicant would not have been entitled to get arrears of salary had he been alive and consequently the additional applicants 2 to 4 will not be entitled to get arrears of pay/salary because of the notional fixation ordered to be done. The aforesaid notional promotion and fixation of pay will be counted for re-fixing the pension/retiral benefits due to the deceased applicant Achuthan Nair. Since Achuthan Nair died subsequently the family pension would also have proportionate change in tune with the pension amount to be consequently fixed. The aforesaid direction shall be complied with within a period of two months from the date of receipt of a copy of this order. No order as to costs.

  
(Mrs. P. Gopinath)  
Administrative Member

kspps

  
(N.K. Balakrishnan)  
Judicial Member