

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 226 OF 2009

.....*FRIDAY*....., this the *13th* day of November, 2009.

CORAM:

**HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Mr.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

1. The Commissioner of Central Excise
and Customs, C.R. Building,
I.S. Press Road, Kochi-682 018.

2. The Chairman,
Central Board of Excise & Customs,
North Block, New Delhi-110 001.

... **Applicants**

(By Advocate Mr. Sunil Jose, SCGSC)

versus

1. The Chief Commissioner,
Office of the Court of the Chief
Commissioner for Persons with
Disabilities, Sarojini House, 6,
Bhagwan Dass Road,
New Delhi – 110 001.

2. Shri. C.A. Joseph,
Deputy Office Superintendent,
P.L.A. Section, Office of the
Commissioner of Central Excise
and Customs, C.R. Building,
I.S. Press Road, Kochi-682 018.

... **Respondents**

(By Advocate Mr. M.V.S. Nampoothiry, ACGSC (R1)
Advocate Mr. C.S.G. Nair (R2))

The application having been heard on 09.11.2009, the Tribunal
on*13-11-2009*..... delivered the following:

ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

W The applicants in this case are the Chairman, Central Board of
Excise & Customs and Commissioner of Central Excise, Kochi.

2. The first respondent is the Chief Commissioner, Office of the Court of the Chief Commissioner for Persons with disabilities. The second respondent is functioning as Deputy Office Superintendent in the office of the first applicant, the Commissioner of Central Excise and Customs. Earlier he was functioning as UDC and is a disabled person, and on his claim for the post of Inspector having been rejected by the applicant No.1, he had, at a later date, accepted the promotion post of Deputy Office Superintendent. Staking his claim on the post of Inspector, the said respondent No.2, preferred to be reverted to the post of UDC and then considered for the higher post of Inspector, as promotion from the level of Deputy Office Superintendent is not permissible.

3. The order impugned is the one passed by the first respondent, which happened to be passed as a decision rendered by the said respondent to the complaint filed by the second respondent against the applicants, under the provisions of the Persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

4. The grievance of the second respondent before the first respondent is that the applicants in this OA have rejected the claim of the said second respondent for promotion to the post of Inspector, during the period from 1996-2001 on the ground that the said respondent is a person with physical disabilities. The rejection of his claim was also on the ground that the said respondent, having opted to become Deputy Office Superintendent, had been so promoted and there being no promotion from the said post to the post of Inspector, he is disabled from being reverted to the post of UDC for the purpose of considering him for promotion to the post of Inspector, vide order

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dated 13th June, 1988.

5. The First respondent had framed the following issues and dealt with the case of the second respondent :-

- (i) Whether the complainant is entitled for promotion to the post of Inspector of Excise after 19-04-1996 (the date of issue of order forbidding promotion of persons with disabilities to the post of Inspector) till the date he exercised his option for promotion as DOS?
- (ii) Whether the complainant is entitled to promotion after he exercised his option in favour of promotion as DOS and whether he is entitled for the benefit of reversion to feeder cadre and thereafter promotion to the post of Inspector.

6. The first respondent has rendered his decision as under:-

"12. Therefore the complainant is eligible for consideration for promotion to the post of Inspector of Central Excise between 19.4.1996 and date of exercising his option for promotion to the post of DOS, if he falls within the zone of consideration. While he can be considered for promotion only on merit against general quota till 30.5.2001, he can also get the benefit of 3% reservation meant for persons with disabilities from 31.5.2001 i.e., the date when the post was notified as identified for persons with disabilities.

13. With regard to the issue of entitlement of promotion after exercising his option & reversion for promotion, it is apparent the matter is subjudice in various Courts of Law. Hence it would be inappropriate to comment or intervene in the matter.

14. In light of the above the respondent is directed to re-examine the case of complainant for promotion to the post of Inspector on merit (against general quota) between 19.04.1996 and 30.05.2001 and by extending the benefit of reservation/merit thereafter till the date of his exercising his option for promotion as DOS and pass speaking orders within 60 days under intimation to this Court."



7. It is against the above that the applicants preferred a writ petition before the High Court of Kerala, which in turn had held that the issue involved being one of 'service matter' remedy lies before the Tribunal. Accordingly, the applicants have moved the Tribunal.

8. Though on the basis of a decision by the High Court of Delhi, the first respondent initially considered that the order of the said respondent cannot be agitated before the Tribunal, as the High Court of Kerala has specifically referred the matter to the Tribunal, this Tribunal, vide order dated 31st July 2006 held that the Tribunal has jurisdiction to deal with the subject matter and thus, directed the respondents to file the reply. Accordingly, replies have been filed by the two respondents.

9. Some further details of the facts of the case at this juncture would be appropriate. The applicant has the locomotor disability in one arm. He joined the office of the first applicant as an Upper Division Clerk in 1989 and was promoted as Tax Assistant in 1994. The next promotion is of two branches – Inspector in the Executive Branch and Deputy Office Superintendent in the Administrative Branch. The applicant applied for the post of Inspector in 1996 and thereafter, but was not selected on the ground of his disability in accordance with the Ministry of Finance letter dated 3rd November 1995 and letter dated 19th April 1996 as per which physically handicapped candidates are not at all eligible for appointment/consideration to the executive post of Inspector of Central Excise. However, later on the post of Inspector was identified as suitable for persons with disabilities in one leg, vide notification dated 31st May 2001. However, the second respondent had not been considered for the said post. Effort to delete this post of inspector

from being identified for reservation under the physically disabled quota made by the applicants before the Ministry of Social Welfare did not succeed, the decision of the Ministry having been exhibited vide letter dated 15-07-2005. Thus, the Ministry of Finance, thereafter clarified that reservation shall be applicable in case of direct recruitment to the post of Inspector from 31-05-2001, the date on which notification dated 31-05-2001 of the Ministry of Social Justice & Employment (vide which the post of Inspector was identified) was published in the official gazette. As regards promotion from Tax Assistant, the reservation shall be applicable from 31-05-2001 upto 11-12-2003 i.e. the date when the post of Inspector was reclassified as Group B Non Gazetted Post. No reservation shall apply thereafter. It is this decision of the Ministry of Finance, which has been pressed into service by the applicants in the case of the second respondent that has been agitated before the first respondent.

10. Referring to the decision in the case of Kunal Singh vs Union of India AIR 2003 SC 1623 and an Andhra Pradesh High Court decision in W.P. No.12942 of 2002, the first respondent had aforesaid, decided the issue, para 12 to 14 of the impugned order, which has already been extracted above.

11. In the impugned order the fact that the applicant had already agitated against his non consideration for the post of Inspector, in 1997 moved O.A. No. 282/97 praying for equal treatment with non disabled candidate in matter of promotion to the post of Inspector but the said OA was dismissed with the observation - "*Inspectors of Central Excise are uniformed officers whose duties involve prevention of offences and apprehension of the offenders. The prescription of perfect health and physique as eligibility for*

appointment against such post can never be termed arbitrary, irrational or unconstitutional for any reason. As the applicant is admittedly a physically handicapped person we are of the considered view that the respondent cannot be faulted for not including the applicant in the eligibility list."

12. Counsel for the applicant submitted that two aspects are involved in this case :-

- (a) As regards the claim of the respondent No.2 for being considered for promotion from 1996 to 30-05-2001, on merit under General quota, the physical standard should be available which the applicant did not possess. Again, at this distance of time, it would be unsettling the fully settled affair.
- (b) As regards the claim for reversion to the post of Tax Assistant for the purpose of promotion to the post of Inspector from 31-05-2001 onwards, the Ministry of Finance has clearly stated in order dated 13-06-1988, that such a reversion is impermissible.

13. Counsel for the first respondent has referred to the counter filed by the said respondent and prayed that the matter be decided on merit.

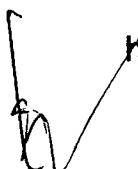
14. Counsel for the second respondent submitted that the said order dated 13-06-1988 had been nullified by certain subsequent orders as could be seen from Annexure R-2 (a) and R-2(b).

15. Arguments were heard and documents perused. The first respondent had directed the applicant to consider the case of the applicant for promotion to the post of Inspector during the period from 1996 to 30-05-2001 under the general quota. First, the said aspect had already been decided by the Tribunal in O.A. No.282/97 and the second respondent having not challenged the same, the said order has attained finality and thus, *res-judicata*



stares at the face of the said respondent. Further, for consideration of the case of the applicant for the post of Inspector during the aforesaid period, the conditions as fastened to promotion to that post should be kept in view. One of the conditions is the absence of physical disability as stated in the earlier order in the said OA No. 282/97 (already extracted) and admittedly the applicant having the disability cannot fill the bill. The Apex Court has in the case of **Union of India vs. Devendra Kumar Pant & Ors C.A. No. 4668/2007 decided on 10th July 2009 held**, "*We are of the view that the section 47(2) provides that a person who is otherwise eligible for promotion shall not be denied promotion merely on the ground that he suffers from disability. The use of the words, 'merely on the ground' shows that the section does not provide that if the disability comes in the way of performing the higher duties and functions associated in the promotional post, promotion shall not be denied. In other words, promotion shall not be denied to a person on the ground of his disability only if the disability does not affect his capacity to discharge the higher functions of a promotional post.*" This decision applies to the case of the applicant. Thus, from the point of view of res-judicata, coupled with the above decision of the Apex Court, **the applicant cannot be considered for promotion under the general quota during the period from 1996 to 30-05-2001.**

16. In so far as the later period is concerned, i.e. from 31-05-2001 till 2003 when the post of Inspector was upgraded to gazetted post, the question is whether the applicant could be considered for the said post under the reservation and under the Persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Here again, the period has to be divided into two :-



(a) from 31-05-2001 to 30-05-2002 (prior to the applicant having been promoted to the post of DOS); and

(b) from 31-05-2002 till 11-12-2003 (when the post was graduated to Gazetted rank).

17. As regards (b) above, the respondents rely upon the order dated 13th June, 1988 which in unequivocal term provided that once promotion to the post of DOS had been made and the individual had accepted the same, there is no question of reversion. Though the counsel for the respondent submitted that the same had been nullified by Annexure R-2(a) and R-2(b) orders, a reading of the said orders only reiterated the earlier order of 13-06-1988. For the purpose of reference, the said orders have been reproduced below :-

(a) order dated 13-06-2008 :-

"F.No.A-32011/10/88-Ad.III-A
Government of India
Central Board of Excise and Customs

.....
New Delhi, the 13th June, 1988.

To

All Heads of Departments under
Central Board of Excise and Customs.

Subject :- Promotion - Policy to be followed where a person after getting promotion to a higher grade seeks reversion-clarification-regarding.

Sir,

A point has been raised by a Collector of Central Excise as to whether UDCs who have been promoted to the grade of Dy. Office Supdt. Level-II can be reverted to their substantive grade of UDC, at their own request, for consideration of their promotion to other grades such as Inspector of Central Excise etc. The matter has been considered in consultation with Department of Personnel and Training and they have observed that when the individuals have already accepted the promotion, their reversion to the lower post is not in order as it would create administrative problems in filling up the posts.



Department of Personal and Training have, therefore, advised that reversion of the persons working in Dy. Office Supdt. Level-II to UDCs simply for the purpose of considering them for promotion to other posts is not in order. The advice of Department of Personnel and Training may be noted for compliance in future.

2. Receipt of this letter may please be acknowledged.

(Hindi Version will follow).

Yours faithfully,

Sd/-

(PRAKASH CHANDRA)
UNDER SECRETARY
CENTRAL BOARD OF EXCISE AND CUSTOMS

Copy to : Collector of Central Excise Jaipur with reference to his telex F. No.II-3(23)ET.I/86/73 dated 11.5.88."

(b) Order dated 16th August, 1992 :-

"F.No.A.32022/24/1992-Ad.III A
Government of India
Central Board of Excise and Customs

.....
New Delhi, the 16th August, 1992.

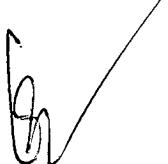
To

- i) All Principal Collectors of Central Excise & Customs.
- ii) All Collectors of Central Excise.
- iii) All Collectors of Customs.
- iv) Narcotics Commissioner of India, Gwalior.

.....
Subject :- Promotion - Promotion to the Ministerial Grade and subsequent reversion to lower grade for promotion to the Executive Grade.

Sir,

.....
Of late, some instances have come to the notice of the Board where Ministerial Staff after his promotion to the grade of DOS(L-II) and subsequent regularization in



that grade was allowed reversion to lower grade i.e. UDC to enable him to avail promotion opportunity to the Executive posts of Inspectors etc.

2. Your attention is invited to Board's Circular F.No.A-32011/10/83-Ad.III-A dated 13/06/1988 which categorically lays down that once an officer accepts promotion to the grade of DOS (L-II) and is confirmed in the grade, he cannot be reverted to a lower grade nor can he be considered in future for promotion to the Executive grade.
3. I am directed to reiterate that above provisions may please be followed without any exception.
4. Please acknowledge.

Yours faithfully,
 Sd/-
 (R.K. MITRA)
 UNDER SECRETARY
 CENTRAL BOARD OF EXCISE & CUSTOMS."

(c) Order dated 26th July 2005 :-

"F.No.A.32011/20/2004-Ad.III A
 Government of India
 Ministry of Finance
 Department of Revenue

.....
 New Delhi, the 26th July, 2005.

To

All Chief Commissioners of Customs & Central Excise
 All Commissioners of Customs & Central Excise
 All Director General of Customs & Central Excise
 All Directorates of Customs & Central Excise
 The Narcotics Commissioner of Central Bureau of
 Narcotics, Gwalior.

.....
 Subject:- Promotion to the Ministerial Grade and
 subsequent reversion to lower grade for
 promotion to the Executive Grade.

Sir,

.....
 I am directed to say that the DOP&T
 instructions contained in O.M. No.18011/1/86-Estt.(D)

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dated 28.3.88 provide confirmation only once in the service of an official in the entry grade. The Board had earlier issued instruction vide letter F.No.A.32022/24/92-Ad.III.A dated 16.8.92 wherein it has been laid down that once an officer accepts promotion to the grade of DOS L-II and is confirmed in the grade he cannot be reverted to a lower grade nor he can be considered in future for promotion to the executive grade. These instructions are not in conformity with the Board's instructions issued vide Board's letter F.No.A.32011/10/88-Ad.IIIA dated 13.6.88. Moreover, this instruction dated 16.8.92 have been issued without consultation of DOP&T.

2. It has therefore been decided to withdraw the instructions contained in Board's letter F.No.A.32022/24/92-Ad.IIIA dated 16.8.92. Accordingly, the Board's instruction contained in F.No.A.32022/24/92-Ad.IIIA dated 16.8.92 has been withdrawn and may not be followed.
3. This issues with the approval of Member (P&V).
4. Kindly acknowledge the receipt of the letter.

Yours faithfully,
 Sd/-
 (S.K. THAKUR)
 Under Secretary to the Govt. of India.

18. The above orders relied upon by the second respondent fully supports contention of the applicant that once promotion is accepted, reversion is not permitted. From this point of view, the applicant may not have a case, but, the counsel for the second respondent did refer to the case of one Shri. K.V. Rajasekharan, vide Annexure R2 in whose case, the respondents themselves permitted reversion from the post of DOS to enable the individual to reap the benefits of promotion as inspector. Thus, the counsel contends hostile discrimination in so far as the second respondent is concerned. This calls for a detailed analysis.



19. The question thus is whether the applicants could adopt different norms for different individuals in as much as in the case of Rajasekharan reversion was permitted, while in the case of the second respondent, the same is denied indexing the order dated 13th June, 1988 as the authority in this regard. Certainly not, save if the decision in the case of Rajasekharan was not by an error. Perhaps, the case of Rajasekharan could be one of reversion from ad hoc or officiating status in the said post (prior to declaration of probation if any). For, order dated 13-06-1988 clearly states that there is no question of reversion from the post of DOS **subsequent to regularization in that post**. Instead, if on the basis of the fact that confirmation is under the extant rules only at the entry post, and that there is no question of probation at the promoted post, then the benefit granted to the said Rajasekharan cannot be denied to the applicant, notwithstanding the fact that there had been an order prohibiting such reversion, vide order dated 13th June 1988. For, consciously in the case of Rajasekharan, the applicants have allowed reversion, even when the said order of 13th June, 1988 was extant, and thus, it is to be treated as a deviation, by way of relaxation, within the discretionary powers of the competent authority. In that event, whatever good ground was there to give such a relaxation to Rajasekharan, if the same are prevailing with reference to the case of the second respondent, then rejection of his request on the basis of order dated 13th June, 1988 without distinguishing the case from that of Rajasekharan, would be a glaring example of hostile discrimination, which is thoroughly impermissible.

20. Thus, in so far as the period from 31-05-2001 till 30-05-2002, i.e. prior to the promotion as DOS, the case of the applicant has to be considered **provided** during this period, vacancy occurred against the slot allotted under



the 3% quota for disabled persons (that too orthopedic disability). If not, there is no question of the applicant being considered under the reservation.

21. In so far as the period from 30th May 2002 onwards, till the post has been graduated to the state of Gazetted post, the respondents shall verify whether there had been any vacancy that fell against the slotted point (for disabled as stated above) and if so, the case of the applicant should be considered and if found suitable and fit as per the norms laid down for the said post, the second respondent be technically reverted from the post of DOS (as in the case of Rajasekharan) and promoted as Inspector. If there be no vacancy under the slot for disabled, the applicant be informed accordingly.

22. The above exercise be conducted within a period of three months.

The OA is disposed of accordingly. No cost.

(Dated, the 13th November, 2009.)



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER

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Dr. K.B.S. RAJAN
JUDICIAL MEMBER