

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No.180/00767/2015

Tuesday, this the 27th day of February, 2018

CORAM:

Hon'ble Mr. U.Sarathchandran, Judicial Member
Hon'ble Mr.E.K.Bharat Bhushan , Administrative Member

Baiju Daniel, S/o.the late Daniel K.Mathai,
Appraiser, Customs House, Cochin,
Willingdon Island, Ernakulam 682 009
residing at Thanal, NBRRA 59, Niravath Road, Maradu.P.O
Kochi- 682 304

... **Applicant**

(By Advocate -Mr.Antony Mukkath)

V e r s u s

1. Union of India
Represented by its Secretary
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
HUDCO Vishala (9th Floor)
Bhikaji Cama Place, R.K.Puram
New Delhi – 110 066
2. Central Board of Excise and Customs
Represented by its Chairman
North Block
New Delhi – 110 001
3. Chief Commissioner of Customs
Custom House, No.60, Rajaji Salai
Chennai – 600 001
4. Commissioner of Customs (Seaport-Import)
Custom House, No.60, Rajaji Salai
Chennai – 600 001
5. Commissioner of Customs
Custom House, Kochi – 682 009

... **Respondents**

(By Advocate - Mr.N.Anilkumar,Sr.PCGC(R))

This Original Application having been heard on 21.2.2018, the Tribunal on 27.2.2018 delivered the following:

O R D E R

Per Hon'ble Mr. U. Sarathchandran, Judicial Member -

Applicant is presently working as Appraiser under respondent no.5. He was directly recruited as Examiner under the Custom House, Kochi on 18.1.1996. According to him as per Annexure A-1 seniority list of Examiners dated 1.4.2002, he is positioned at serial no.55 between Serial No.54, Shri.S.Balakumar and Serial No.56, Shri.K.Uthaman. He was served with Annexure A-2 memorandum of charges dated 19.4.2002 for certain alleged lapses for not observing the prescribed procedure for examination of cargo in passing six shipping bills. Though an Inquiry was conducted under Rule 14 of the CCS (CCA) Rules and the Inquiry Officer had submitted his report finding lapses on the part of the applicant no action was taken thereafter. In the meantime applicant along with 9 others were promoted to the cadre of Appraiser on ad-hoc basis vide Annexure A-3 dated 17.12.2002 wherein Shri.K.Uthaman is shown as his immediate junior at serial no.10. Applicant assumed charge in the post of Appraiser on 18.12.2002 as indicated in Annexure A-3(a). Thereafter he was posted in the Review Cell and in the Legal Sections vide Annexure A-5 office order in the same grade of Appraiser. Subsequently, he was served with Annexure A-6 order dated 6.1.2003 cancelling his promotion as Appraiser. Being aggrieved by Annexure A-6, he filed O.A 22/2003 before this Tribunal. Respondents contented in that case that the DPC considered his adhoc promotion due to an oversight and that the fact that he had been charge sheeted in a departmental proceedings was not noticed. They further informed the

Tribunal that he was not considered for promotion and the findings of DPC are kept in a sealed cover. In that Original Application, this Tribunal had passed an interim order keeping in abeyance the operation of Annexure A-6 order and the said interim order was extended from time to time. The Original Application was finally disposed of vide Annexure A-8 order dated 10.1.2005 directing the respondents to take appropriate steps in accordance with the Inquiry report submitted by the Inquiring Authority and to pass appropriate orders within one month and further that if the applicant is found otherwise eligible and exonerated his name for promotion be considered after opening the sealed cover. It was also ordered that Annexure A-6 order will not be given effect to till such process was completed. On the very next day i.e; on 11.1.2005 respondent no.5 passed Annexure A-9 order finalising the disciplinary proceedings and ordering that one increment of the applicant be withheld in the scale of pay of Rs.7500-250-12000 for a period of one year commencing from 1.4.2005.

2 Assistant Commissioner(Establishment), Custom House issued Annexure A-10 order mentioning that respondent no.4 is reviewing the promotions in the grade of Appraiser for the period from 1.1.2001 to 31.12.2008. By Annexure A-11 order dated 14.10.2013, the promotions of Appraiser was reviewed and wherein applicant's date of promotion is shown as 1.4.2006 further indicating that he will be promoted only after the expiry of the currency of the penalty. In Annexure A-11 the aforesaid immediate junior Shri.K.Uthaman is shown at serial no.86 with the date of promotion as 25.11.2002 whereas the applicant is shown at serial no.135. Applicant states that as his junior was given promotion with effect from 25.11.2002, he also ought to have been assigned the same date of promotion. In Annexure

A-13 seniority list published on 15.10.2013 also the applicant's aforesaid junior was shown at 137 and yet another junior of the applicant Shri.T.Senthil Kumar was shown at serial no.135. According to the applicant he ought to have been assigned seniority above the said Mr.T.Senthil Kumar as 134 A. He submits that the objections raised by him vide Annexure A-15 representation against Annexure A-11, A-13 and A-14 were also not considered In Annexure A-17 All India Eligibility List of Customs Appraisers from 1.4.1997 to 31.12.2002 published on 24.4.2015 the applicant was excluded. When Annexure A-18 draft All India Eligibility List of Appraisers for the period from 1.1.2003 to 31.3.2003 published on 24.6.2015 applicant submitted Annexure A-19 objection to the aforesaid eligibility list but no orders were passed. He, therefore, prays for relief as under:-

“ 1. To declare that applicant is legally entitled to be promoted to the cadre of Appraiser with effect from 25.11.2002, the date on which his immediate junior was promoted with all consequential benefits including seniority and assigning the date of promotion of the applicant in Annexure A-11 as 01-04-2006 is clearly illegal, arbitrary, discriminatory and unconstitutional;

2.To call for the records leading to Annexure A-11, A-13, A-14, A-17 and A-18 and to set aside the same to the extent it deny the date of promotion of 25.11.2002 to the applicant in the cadre of Appraiser;

3.To issue appropriate direction or order directing the respondents to promote the applicant to the cadre of Appraiser with effect from 25.11.2002 with all consequential benefits including seniority and other service benefits forthwith and at any rate within a time frame that may be fixed by this Tribunal;

4.To issue appropriate direction or order directing the respondents to revise Annexure A-13, A-14, A-17 and A-18 and to grant him seniority in the cadre of Appraising reckoning the date of promotion as 25.11.2002 within a time-frame that may be fixed by this Tribunal;

5.To issue appropriate direction or order directing the respondents to promote the applicant to the cadre of Assistant Commissioner of Customs with effect from the date on which his immediate junior Sri.T.Senthil Kumar was promoted;

6.To grant such other reliefs which this Tribunal seems fit, just and proper in the circumstances of the case ; and

7. To allow the above O.A with costs. “

3 Respondents filed reply statement contending that the applicant's challenge of Annexure A-11 is belated by more than one year and 11 months and therefore, the Original Application is hit by the limitation prescribed in Section 21 of Central Administrative Tribunal's Act, 1985. It is also stated by the respondents that Annexure A-17 and Annexure A-18 were based on Annexure A-11 and the subsequent seniority list and since there was no challenge of Annexure A-11 and the subsequent seniority list within time, he cannot challenge Annexures A-17 and A -18 lists also. According to the respondents since the applicant was undergoing penalty up to 30.3.2006, he was promoted only with effect from 1.4.2006 and this was done in terms of the DoP&T O.M No.22011/4/91/Estt.(A) dated 14.9.1992 wherein it is stated that :

“ If any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover/covers shall not be acted upon. His case for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him. “

4 Respondents states that penalty was imposed on the applicant on 11.1.2005 and hence the findings of the DPC was kept in a sealed cover for the panel years 2002-2003 were not acted upon. There was no unreserved vacancy in 2004 (it appears, applicant belongs to un reserved category). As the applicant was undergoing penalty from 1.4.2005 to 30.3.2006, he was promoted with effect from 1.4.2006. He has not challenged the penalty imposed on him. According to the respondents as per the DoP&T O.M

No.21/5/70/Estt(A) dated 15.5.1971 and O.M No.22011/2/78/Estt(A) dated 16.2.1979 a Government servant on whom a minor penalty of withholding of increment etc has been imposed should be considered for promotion by the DPC which meets after the imposition of the said penalty and after due consideration of full facts leading to imposition of penalty, if he is still considered fit for promotion, the promotion may be given effect after the expiry of the currency of penalty. Therefore, respondents pray for rejecting the Original Application.

5 A rejoinder was filed by the applicant refuting the contentions of the respondents and reiterating his pleadings in the Original Application.

6 We have heard Shri.Antony Mukkath, learned counsel for the applicant and the learned counsel appearing for the Central Government in this case. An argument note was submitted by Shri.Antony Mukkath wherein his highlight was on Annexure A-11 order acting as prejudicial to the respondents firstly for violating the principles of natural justice as no notice was given to the applicant before the exercise of review of promotion already granted vide Annexure A-11. Secondly he contends that Annexure A-11 amounts to double jeopardy to the applicant because he has been penalised by Annexure A-9 penalty order and further postponing of the date of promotion to 1.4.2006 is yet another punishment for the applicant and hence tantamounting to double jeopardy. Another argument of the learned counsel is that by virtue of Annexure A-20 O.M dated 17.9.1998 issued by the DoP&T, the crucial date for determining the applicant's eligibility for promotion being 1.1.2002 and as no disciplinary proceedings were initiated against the applicant, he is entitled to be promoted. In this connection he

relies on the ruling of the Hon'ble Apex Court in ***Union of India v. K.V.Jankiraman (1991) 4 SCC 109*** that the promotion cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee and to deny the said benefit of promotion such proceedings must be at the relevant time pending at the stage when charge memo/charge sheet has already been issued to the employee. He has also relied on ***Bank of India v. Develala Suryanarayana (1999) 5 SCC 762***. In that case the Apex Court held that subsequent proceedings cannot deprive the benefit of promotion earned on an earlier date of entitlement.

7 Shri.Antony Mukkath argued that in terms of Annexure A-12 office Memorandum issued by the DoP&T on 30.11.1995 the seniority of the applicant is to be assigned in terms of his entitlement against the vacancy of the panel year 2002 and that he ought to have been included in the panel year of 2002 as his juniors were considered for promotion in the panel year 2002.

8 We have carefully considered the contentions of the learned counsel for the applicant and also the arguments of the counsel appearing for the Central Government. Annexure A-12 O.M dated 30.11.1995 issued by the DoP&T requires to be extracted for the clear understanding of the administrative instructions contained therein on the issue of promotion of a government servant on whom penalty was imposed. Annexure A-12 reads:

“New Delhi, the 30th Nov., 1995

OFFICE MEMORANDUM

Subject:- Fixation of seniority in the case of delayed promotion due to penalty.

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The undersigned is directed to refer to the instructions contained in DoP&T O.M No.21/5/70-Estt.(A) dated 15.5.1971 (reiterated vide O.M No.22311/2/78-Estt. (A) dated 16.2.79) according to which *a Govt. Servant on whom a minor penalty of withholding of increment etc. has been imposed should be considered for promotion by the DPC which meets after the imposition of said penalty and if he is considered fit for promotion despite the imposition of penalty the promotion may be given effect to after the expiry of the penalty.* References have been received from various Departments seeking clarification on the question of seniority of such officers on their promotion.

2. It is clarified that the *officer who has been recommended for promotion by a DPC despite his penalty will be promoted only on the basis of the recommendation of the said DPC after the expiry of the penalty and his seniority would be fixed according to his position in that panel.*

(K.K.Jha)

Director (E) “

(Italics supplied)

9 We note that Annexure A-12 OM is being relied on by both sides. What Annexure A-12 postulates is that in a case where a government servant has been imposed with a minor penalty of withholding of increment, s/he shall be promoted only on the basis of the recommendation of the DPC after the expiry of the penalty and that his seniority would be fixed according to his position **in that panel**. This means, he can be considered for promotion only in the DPC which meets after the imposition of the penalty and if he is considered fit for promotion, he can be granted promotion only with effect from the expiry of penalty as per the panel prepared by such DPC. Therefore, we feel that the action of the respondents in postponement of promotion of the applicant from the date of expiry of the penalty and the consequent assignment of seniority is given to the applicant vide Annexure A-11 is absolutely consistent with Annexure A-12. Of course, penalty is a vitiating factor for an official considered for promotion.

10 The argument of the learned counsel for the applicant that in terms of the dictum laid down by the Apex Court in **Jankiraman's** case (*supra*) only if the disciplinary proceedings were pending against the applicant at the time when he becomes eligible for promotion, the applicant's promotion need to be deferred. In support of this contention, learned counsel refers to Annexure A-20 O.M dated 17.9.1998 issued by the DoP&T prescribing the crucial date for determining eligibility of officers to be considered for promotion by the DPC. The relevant portion of Annexure A-20 is extracted below:

“ 2. The matter has been reconsidered by the Government and in supersession of the existing instructions it has now been decided that the crucial date for determining eligibility of officers for promotion in case of financial year-based vacancy year would fall on January 1 immediately preceding such vacancy year and in the case of calendar year-based vacancy year, the first day of the vacancy year, i.e, January 1 itself would be taken as the crucial date irrespective of whether the ACRs are written financial year-wise or calendar year-wise. For the sake of illustration, for the panel year 2000-2001 (financial year), which covers the period from April 1, 2000 to March 31, 2001, and the panel year 2000 (calendar year), which covers the period from January 1, 2000 to December 31, 2000, the crucial date for the purpose of eligibility of the officer would be January 1, 2000 irrespective of whether ACRs are written financial year-wise or calendar year-wise.”

11 True, in terms of the law laid down by the Apex Court in **Jankiraman's** case (*supra*) and **Devala Suryanarayana's** case (*supra*) the benefit of promotion earned on the date prior to the initiation of the proceedings cannot be denied to a government employee. In this context, we do not feel hesitant to state that right to be promoted is one thing and the actual granting of promotion is another. It is the DPC which considers whether an eligible official is fit to be promoted or not. Only if the DPC finds that the applicant is fit in all respects, he can be promoted. Otherwise, not. In this

case at the time when the DPC conducted a review meeting, it was noted that the ad hoc promotion given to the applicant vide Annexure A-3 on 17.12.2002 was done mistakenly without noticing the fact that the disciplinary proceedings were initiated against him.

12. Annexure A-2 is the memorandum of charges issued to the applicant on **19.4.2002**, initiating disciplinary proceedings under Rule 14 of the CCS (CCA) Rules, 1965. Obviously it was a disciplinary proceeding for imposing major penalty. Nevertheless, by Annexure A-9 order dated **11.1.2005** he was imposed only a minor penalty. The order imposing penalty reads :

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ORDER

Shri.Baiju Daniel is drawing basic salary of Rs.7500/-. Increment is due on 1.4.2005. Therefore it is ordered that one increment of Shri.Baiju Daniel be withheld in the time scale of pay of Rs.7500-250-12,000/- for a period of one year commencing from 1.4.2005. It is further ordered that on expiry of the said period of year the reduction will not have the effect of postponing his future increments of pay.

(G.V.NAIK)

COMMISSIONER OF CUSTOMS

F.No.Dis./2/2002 Estt. Cus

Dated 11.1.2005 “

13. It has to be noted that Annexure A-9 order of penalty was issued immediately on the day next to the passing of Annexure A-8 order by this Tribunal. Annexure A-8 was passed on 10.1.2005 in O.A 22/2003 filed by the applicant herein soon after he received Annexure A-6 order cancelling the ad hoc promotion granted to him vide Annexure A-3. In Annexure A-8 this Tribunal ordered :

“ 3. In the interests of justice, we direct that the respondents shall take appropriate steps in accordance with the report, if it has already been submitted, and pass appropriate orders within a time frame of one month. It is

also directed that, if the applicant is found otherwise eligible and exonerated his name for promotion be considered after opening the sealed cover. Till such process is completed, the impugned order will not be given effect to. “

14. Although the respondents contend that the present O.A challenging Annexure A-11 order, Annexure A-17 and Annexure A-18 All India Eligibility List is time barred, we feel that since the applicant is still in service and as his grievances still persists, the cause of action in this Original Application can be treated as a continuing cause of action without being affected by the limitation prescribed in Section 21 of the Administrative Tribunal's Act, 1985.

15. Respondents submit that in terms of the directions of this Tribunal, the applicant's promotion was given effect after the expiry of the penalty order in accordance with Annexure A-12 O.M. We are of the view that the respondents were justified in postponement of applicant's promotion after the expiry of the period of penalty imposed on him. We have also noted above that the action of the respondents was perfectly in tune with the administrative instructions contained in Annexure A-12 O.M including the assignment of seniority. Since the applicant is entitled to promotion only after the expiry of the period of penalty, he can be assigned a seniority only as per the list of promotions approved by DPC after the penalty period is over. This is exactly what has been done in Annexure A-14 revised seniority list issued on 15.10.2013. In the remarks column against the name of the applicant appearing in Annexure A-14, it is noted :

“ As per DoP&T instruction in O.M No.22011/2/92-Estt.(D) dated 30.11.1995 seniority is fixed according to the position in the select panel of 2006. However, promotion takes effect only from 1.4.2006 i.e. After the expiry of the currency of penalty as per O.M No.22034/5/2004-Estt(D) dated 15.12.2004. “

16. Therefore, we are of the view that the action taken by the respondents in postponing the date of promotion of the applicant and assigning him seniority after the expiry of the period of punishment is perfectly in tune with Annexure A-12 O.M.

17 Nevertheless, in the factual scenario of this case we find some mitigating factors also. It is worth noticing that the applicant was served with Annexure A-2 memorandum of charges on **19.4.2002**. But despite the Inquiry Officer submitted his report of Inquiry, no action was taken by the disciplinary authority except the respondents issuing Annexure A-6 order cancelling of the ad-hoc promotion granted to the applicant. This led the applicant to file O.A 22/2003 and this Tribunal to pass Annexure A-8 order directing the respondents to take steps in accordance with the Inquiry reports and to consider the applicant for promotion if he is exonerated in the disciplinary proceedings. As observed above, though Annexure A-2 memorandum of charges were framed against him for initiating major penalty proceedings, by Annexure A-9 order he was imposed a minor penalty withholding one increment for a period of one year from 1.4.2005.

18. Annexure A-9 imposing penalty order was dated 11.1.2005. Ordinarily, a minor penalty proceeding would have completed within a period of one year after the issuance of memorandum of charges. However, in this case it took more than 2 years for the respondents to complete the disciplinary proceedings, that too, only after the directions from this Tribunal in Annexure A-8 order. Therefore, we feel that in the interest of justice the disciplinary proceedings culminated by imposing minor penalty should be

deemed to have concluded within one year. We hold that the order imposing minor penalty should be deemed to have passed on 19.4.2003 (ie. the date on which one year would be expiring after commencement of the disciplinary proceedings). Since, Annexure A-9 minor penalty was for a period of one year, the date of penalty should be deemed to have commenced from 1.4.2003, having currency for a period of one year i.e., expiring on 31.3.2004. Accordingly, we direct the respondents to treat the applicant as eligible for promotion from 31.3.2004 and to assign him a position in the seniority list immediately above the Appraiser who has been promoted on or after 31.3.2004. The Original Application is disposed of with the above directions. Parties shall suffer their own costs.

(E.K.BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

(U.SARATHCHANDRAN)
JUDICIAL MEMBER

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List of Annexures in O.A

Annexure A1 - Photocopy of the relevant page of seniority list of Examiners as on 1.4.2002 along with Circular No.67/2002 dated 10/10/2002 of the 4th respondent.

Annexure A2 - Photocopy of the Memorandum No.DIS 2/2002-ESTT, CUS dated 19.4.2002 of the Addl. Commissioner of Customs, Cochin

Annexure A3 - Photocopy of the Order No.488/2002 dated 17.12.2002 of the 4th respondent

Annexure A3(A) - Photocopy of the Order No.144/2002 dated 18.12.2002 of the 5th respondent

Annexure A4 - Photocopy of the Order No.507/2002 dated 23.12.2002 of the 4th respondent

Annexure A5 - Photocopy of the Office Order No.148/2002 dated 31.12.2002 of the 5th respondent

Annexure A6 - Photocopy of the Order No.8/2002 dated 6.1.2003 of the 4th respondent

Annexure A7 - Photocopy of the Interim Order dated 10.1.2003 in O.A No.22 of 2003 of this Tribunal

Annexure A8 - Photocopy of the Order dated 10.1.2005 in O.A No.22 of 2003 of this Tribunal

Annexure A9 - Photocopy of the Order F.No.Dis/2/2002 Estt. Cus dated 11.1.2005 of the 5th respondent

Annexure A10 - Photocopy of the Establishment Circular No.26/2013 dated 23.10.2013 of the Asst. Commissioner (Estt).

Annexure A11 - Photocopy of the Order No.231/2013 dated 14.10.2013 of the 4th respondent

Annexure A12 - Photocopy of the O.M No.22011/2/92/Estt (D) dated 30.11.1995 of the 1st respondent

Annexure A13 - Photocopy of the Circular No.39/2013 dated 15.10.2013 alongwith relevant page of seniority list of All (DR-PR) Appraisers of the 4th respondent

Annexure A14 - Photocopy of the Circular No.40/2013 dated 15.10.2013 relevant page of seniority list of the 4th respondent

Annexure A15 - Photocopy of the representation dated 23.10.2013 of the applicant to the 4th respondent

Annexure A16 - Photocopy of the letter F.No.S45/50/2005 Estt. Cus dated 23.10.2013 of the Additional Commissioner (P&V) Cochin

Annexure A17 - Photocopy of the Office Memorandum F.No.A-23011/01/2004-Ad.IIA dated 24.4.2015 alongwith the relevant page of the All India Eligibility List of Customs Appraisers for the period from 1.4.1997 to 31.12.2002 of the 1st respondent

Annexure A18 - Photocopy of the Memorandum F.No.A-23011/01/2004-Ad.IIA dated 24.6.2015 alongwith extension of the earlier Seniority List of the 1st respondent.

Annexure A19 - Photocopy of the objection dated 10.7.2015 of the applicant to the 3rd respondent

Annexure A20 - Photocopy of the O.M No.22011/3/98/-Estt(D) dated 17.9.1998 of the 1st respondent

Annexure A21 - Photocopy of the Office Order No.90/2015 F.No.12018/01/2014-Ad.II(Pt) dated 30.6.2015 alongwith Annexure III of the 1st respondent.

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