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**CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA**

No. MA 350/00487/2016
OA 350/00979/2016

Reserved on: 05/10/2016
Pronounced on: 9/11/2016

Present:

Hon'ble Mr. Justice Vishnu Chandra Gupta, Judicial Member
Hon'ble Ms. Jaya Das Gupta, Administrative Member

**MADHUMITA ROY
VS
UNION OF INDIA & ORS.
(MINISTRY OF LAW & JUSTICE)**

For the applicant : Mr.S.Samanta, counsel
For the respondents : Mr.P.Mukherjee, counsel

O R D E R

MS. JAYA DAS GUPTA, A.M.

The applicant Smt. Madhumita Roy has approached CAT

under Section 19 of A.T. Act, 1985 seeking the following reliefs :

- a) A direction do issue upon the concerned authorities to immediately complete the process of selection for appointment of Judicial Members in the unreserved category in Income Tax Appellate Tribunal and also to take up final decision on your applicant's candidature for appointment to the post of Judicial Members in the unreserved category in Income Tax Appellate Tribunal;
- b) A direction do issue upon the concerned authorities to immediately issue the appointment letter to the applicant for the post of Judicial Members in the unreserved category in Income Tax Appellate Tribunal;
- c) A direction do issue upon the concerned authorities restraining them from issuing any further notification for

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selection for the post of Judicial Member without first filing up the vacancies in terms of the notification dated 17th April, 2013 in Income Tax Appellate Tribunal and particularly before appointing your applicant in the concerned vacant post;

d) Such further and/or other order or orders be passed and/or direction or directions be given, as to this Learned Tribunal may deem fit and proper.

2. In the MA application the applicant has prayed for inspection of the original records regarding selection, produced by the respondents, as per the order of CAT dated 27.7.16.

3. The case of the applicant in short is that a circular was issued on 17.4.13 by Govt. of India to fill up 20 vacant posts of Judicial Members in the Income Tax Appellate Tribunal. The applicant applied with all required documents on 4.6.13. She was called for an interview vide letter dated 13.5.14. She appeared in the interview which was subsequently held on 31.5.14. It is her allegation that since she has fulfilled all eligibility criteria for appointment to the post, she should be appointed. But till date no such appointment letter has been issued to her and hence she has approached CAT with her grievances.

4. Per contra it is the case of the respondents that based on the marks assigned after evaluation made during the interview, the Selection Board set up for the purpose chaired by the Chief Justice of Supreme Court of India, recommended the names of 60 candidates (48 in the main list and 12 in the waiting list) for appointment to the

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post of Members (Judicial/Accountant) in Income Tax Appellate Tribunal. The Selection Board recommended the name of the applicant i.e. Madhumita Roy as a wait list candidate being placed at Sl. No. 3 of the wait list for appointment to the post of Judicial Member in the unreserved category. Necessary Intelligence Bureau reports were gathered for the recommended candidates. The respondent authorities have further informed that the DOPT vide their communication dated 18.2.16 conveyed the approval for appointment of 17 candidates (9 in the main list and 8 in the wait list) as Members (Judicial/Accountant) in the ITAT. DOPT has also informed that ACC has not approved the appointment of Madhumita Roy, the applicant herein as Member (Judicial) in the unreserved category.

5. Heard both sides. Consulted the records including the original records.

6. After hearing both the counsel, the Tribunal passed an order earlier on 26.9.16 which is extracted as under :

"We have heard the learned counsel for parties at length.

It has been informed that the selection process is over. A list of 17 persons has been prepared out of which 09 persons have been put in the select list and 08 persons have been kept in the waiting list. However, we are not aware how many candidates who were in the select list have taken over charge as Judicial Member against 09 vacancies. If all the nine vacancies have been filled up and the candidates selected have already joined the post, this OA will become infructuous. If the total

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nine persons have not joined and wait list candidates are to be taken then certainly this OA will be looked forward to be decided. So the respondents are directed to inform this Court how many persons have joined against nine vacancies of Judicial Member in the respective recruitment year. The respondents are directed to file an affidavit to this effect within a week.

Urgent certified copy of this order be furnished to the parties on payment of the fees as per the rules.

Call this matter on 5th October, 2016."

7. Accordingly the respondent authorities submitted a report on affidavit, producing the relevant File No. 14/19/2014-EO(SM.II), giving a full picture regarding appointment of Judicial Members against the vacancies advertised. The details are given hereunder :

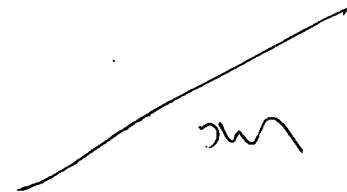
JUDICIAL MEMBER VACANCIES ADVERTISED (Vide advertisement in the Employment News dated 20-26 th April 2013)					
	UNRESERVED	OBC	SC	ST	TOTAL
No. of vacancies	9	2	7	2	20
CANDIDATES RECOMMENDED BY THE SELECTION BOARD FOR CONSIDERATION OF ACC					
Main List	9	2	7	2	20
Waiting List	3	1	0	1	5
CANDIDATES CLEARED FOR APPOINTMENT BY ACC					
Main List	8	2	7	1	18
Waiting List	2	1	0	0	3
NUMBER OF OFFERS OF APPOINTMENT ISSUED					
JUDICIAL MEMBER	10#	2	7	1*	20

NUMBER OF CANDIDATES JOINED AS MEMBER					
JUDICIAL MEMBER	8 \$\$	2	7	1	18

- * The Appointments Committee of Cabinet cleared the name of only one candidate for appointment.
- # Two candidates did not join. One candidate refused to join citing personal reasons. Another candidate was not relieved by his parent department. However, he has represented stating that if a vacancy is still in existence and a communication is sent to his parent department to this effect, he could obtain release from his department.
- \$\$ One candidate, after joining as Judicial Member, resigned from service."

8. From the above chart, it appears that one candidate refused to join citing personal reason. Therefore, as per the order of the Hon'ble Supreme Court, this vacancy cannot be filled up through the present recruitment process and can only be filled up by a subsequent recruitment process. Also there is another candidate who was not relieved by his parent department. He has represented that if a post still continues to remain vacant and a communication is sent to his parent department, he could obtain release from his department. Therefore, there is a chance that another appointee may get appointment against the 9 UR vacancies.

9. It is observed that out of the 3 candidates recommended in the waiting list by the Selection Board under unreserved category, ACC has approved the candidature of 2 candidates only and as mentioned in the Reply of the respondents in the original application, the case of the applicant Smt. Madhumita Roy has not been approved by ACC. Consequently, out of eight UR vacancies (one



UR vacancy has to be carried forwarded to the next selection process), eight candidates have already joined. Moreover there are two wait listed candidates who have been placed, on merit, above the applicant, Smt. Madhumita Roy. So in no way the applicant can be considered for appointment to one of the vacancies under UR category of Judicial Member in ITAT.

10. Ld. Counsel for the applicant has strongly refuted that no reasons have been submitted by the respondent authorities for rejection of the candidature of the applicant by ACC. In support of his contention he cited the following Apex Court/Delhi High Court judgments :

(1) Judgment of Apex Court in *H.M.Singh -vs- UOI & Ors. pronounced on 9.1.14 in Civil Appeal No. 192/14 (arising out of SLP(C) No. 2008/10)*. The relevant portion of the judgment is extracted as below :

18. Referring to the factual position depicted in the joint counter affidavit filed on behalf of the respondent nos. 1 and 2, it was the vehement submission of the appellant, that the Appointments Committee of the Cabinet exceeded its jurisdiction in examining the validity of the orders by which the appellant was granted extension in service. It was the submission of the appellant, that the only question before the Appointments Committee of the Cabinet, consequent upon the recommendations made by the Selection Board on 27.2.2008, was in connection with the merits of the claim of the

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appellant, for promotion to the rank of Lieutenant General.

Adding to the above contention, it was also the submission of the appellant, that the Selection Board, consequent upon its deliberations held on 27.2.2008, arrived at its findings based on the appellant's service record, past performance, qualities of leadership, as well as, vision, that the appellant was worthy of promotion to the rank of Lieutenant General. The Appointments Committee of the Cabinet, during the course of its deliberations, did not find fault with the above conclusion drawn by the Selection Board. As such, it was sought to be asserted, that even the Appointments Committee of the Cabinet must be deemed to have endorsed the merit and suitability of the appellant, for promotion to the rank of Lieutenant General.

19. In order to contest the submissions advanced at the hands of the appellant, learned senior counsel representing (respondent nos. 1 and 2) emphatically relied upon the proceedings of the Appointments Committee of the Cabinet. The proceedings under reference have been extracted by us hereinabove. Referring to the above proceedings, learned senior counsel for the respondents laid great emphasis on the observations recorded in paragraphs 8 and 9 thereof. It was pointed out, that in terms of the orders issued by the Department of Personnel and Training, promotion during the period of extension was unquestionably barred. In this behalf it was the contention of the learned senior counsel for the respondents, that with effect from 1.3.2008, the appellant (who had attained the age of retirement on superannuation on 29.2.2008), was on extension in service. There was, therefore, no question of his being considered for promotion during the period of such extension. In addition to the aforesaid categoric stand adopted by the learned senior counsel for the respondents, it was sought to be reiterated, that the orders dated 29.2.2008 and 30.5.2008, by which the appellant was granted extension in service, for periods of three months and one month respectively, were not sustainable in law, inasmuch as, they were in violation of Rule 16A of the Army Rules which

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postulates, that an officers who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in service for a further period by the Central Government, only if the exigencies of service so require. It was the submission of learned senior counsel for the respondents, that retention in service of the appellant was not on account of any exigency of service.

20. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the rival parties. First and foremost, we have no hesitation in endorsing the submission advanced at the hands of the appellant, that the Appointments Committee of the Cabinet did not in any manner upset the finding recorded by the Selection Board, in respect of the merit and suitability of the appellant for promotion to the rank of Lieutenant General. On the instant aspect of the matter, the Appointments Committee of the Cabinet has maintained a sullen silence. Even in the pleadings filed on behalf of the respondents, there is an ironic quiescence. Therefore, all other issues apart, the appellant must be deemed to have been found suitable for promotion to the rank of Lieutenant General, even by the Appointments Committee of the Cabinet.

(2) Judgment of Delhi High Court in *Sunil Alag - vs- UOI & Anr. pronounced on 28.5.15 in WP(C) 8152/13 and WP(C) 8156/13*, the relevant portion of which is as under :

31. Thus executive decision-making in regard to public appointments is to conform to public law and Constitutional standards. It is insufficient for a state agency or authority to rest its decision on a bald or superficial appreciation of the materials in the circumstances of any given case. The record should manifest that there was due application of mind, which preceded the decision and that such decision was impelled by reasons which were germane or relevant to the subject matter. The reasons may not necessarily be elaborately spelt out; inherently, executive decision making follows a pattern different from judicial reasoning. Yet, the

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decision must be founded on a discernable and germane rationale or applicable principle.

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33. This Court finds that to the extent that the ACC in this case relied on reasons and file notings ultimately endorsed by the Cabinet Secretary for its decisions to override two expert bodies on two separate occasions, as well as the elaborate explanations of the DIT. The said decisions - rather the W.P.(C) 8152/2013 & 8156/2013 Page 27 reasons on which they are founded- are so sketchy as to be almost non-existent, and simply make assertions of non-contribution to innovative work. The detailed FCS requirements, and the equally detailed accounting provided by the DIT had clarified any legitimate doubt in this regard as to the Petitioner's possessing field experience. This was based on the conscious understanding of the issue, i.e. whether the petitioner possessed field experience, had any innovative contributions to his credit, etc. These innovations included Digital Library initiatives i.e. digitizing and preservation of new IPR free physical data and lining digital data created under DIT initiatives; addressing policy issues such as redefine what is a "book" and formulation of provision to deposit e-books under delivery of Books and Newspaper Act; IPR/Digital Rights Management; identify/adopt/adopt metadata standards etc. He also conceptualized and initiated a programme for information security education and awareness, with an outlay of '70 crores, at 40 academic institutions. He also conceived and was instrumental in the drafting of the Semiconductor Integrated Circuits Layout Design Act, 2000. The ACC had nothing to contradict that these innovations and the experience indicated to it by the DIT was not the requisite field experience. The Court is of opinion that, even on the exercise of its limited powers of review, the ACC's decision is arbitrary, and cannot stand. This Court also finds considerable force in the submission that if the key component under the FCS scheme was "innovation", then the best judges of such a quality must be field experts. There is nothing on record to show that the ACC's overturning of expert opinion was grounded on any

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expert input; it purely went by bureaucratic input that such innovation and experience was mere application of scientific knowledge. The ACC's W.P.(C) 8152/2013 & 8156/2013 Page 28 decision not to promote the Petitioner therefore, cannot be upheld; it is hereby quashed.

(3) Judgment of Delhi High Court in *Braj Mohan -vs- UOI & Ors.* pronounced on 15.10.12 in WP(C) 559/12, the relevant portion of which is as under :

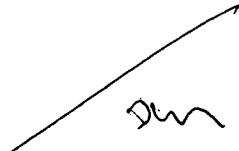
20. Undoubtedly, ACC is the High Power Committee and competent to appoint a candidate for the post in question. The aforesaid Committee acts on the recommendations of the High Power Committee constituted for the said purpose. Therefore the recommendations of such Committee is not a mere formality. The said Committee, being expert, has to see the eligibility, experience, knowledge and expertise of a candidate to be appointed for the post. Undoubtedly, the ACC has power to reject the recommendations made by the aforesaid Committee, but with reasons.

21. In the present case, the ACC rejected the candidature of the petitioner while relying only on the Office Memorandum dated 08.05.1992, which is contrary to the Statute. The said Memorandum would have been effective if as per the direction of the Prime Minister, Railway Claims Tribunal Act 1987 would have been amended accordingly. In the absence of that the said Office Memorandum cannot take the place of the Statute.

22. The petitioner is eligible, qualified and had cleared the interview conducted by the High Power Committee above, therefore, in my considered opinion, there was no reasons before the ACC to reject the candidature of the petitioner.

(4) Judgment of Delhi High Court in *Waris Rasid Kidwai -vs- UOI & Ors.* pronounced on 18.3.98 (equivalent citation - ILR 1998 Delhi 589), the relevant portion of which is as under :

19. Now we may deal with the contention urged by Mr. Jaitley that a court cannot enquire into



the respective opinion which the members of ACC may have expressed while considering cases of such appointments or the manner and mode of voting by the members, in case there is any such voting on difference of opinion between them. In support reliance has been placed by learned counsel on Article 74 of the Constitution of India.

20. Article 74(1) interalia stipulates that there shall be a Council of Ministers with the Prime Minister as the Head to aid and advise the President who shall in the exercise of his functions act in accordance with such advise. In view of bar contained in Article 74(2) the Court is debarred from enquiring into the advise tendered under Article 74(1) of the Constitution. Article 74(2) stipulates that the question whether any and if so what advise was tendered by the Ministers to the President shall not be enquired into in any court. Mr. Jaitley contended that the decision of ACC is in the nature of advise tendered by Council of Ministers to the President and, therefore, this court cannot enquire the question as to what advise was tendered and, therefore, the viewpoint of the different members of the ACC cannot be gone into by this court. This matter, Mr. Jaitley contends, is outside the purview of judicial review. It has been contended that ACC has been constituted to conduct the business of the Government as stipulated by Article 77 and its business is deemed to be a decision of the Council of Ministers and is in the nature of aid and advise to the President. It has, however, to be borne in mind that what is debarred to be enquired into is the aid and advise and not the material on which the advise is tendered by the Council of Ministers. That material cannot be said to be part of the advise and it is thus outside the exclusionary rule enacted in Article 74(2) of the Constitution (See: S.P. Gupta & others Vs. Union of India & Ors, and R.K. Jain Vs. Union of India & others,). Further, such an appointment does not call for any aid and advise to the President as contemplated by Article 74(1). It is only an appointment in the name of the President which is altogether a different matter. Such appointments cannot be said to be based on the advise of the Council of Ministers to the President and thus these appointments cannot be said to be

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protected under Article 74(2). The limited provision contained in Article 74(2) cannot override the basic provisions in the Constitution relating to judicial review in respect of the Appointments of this nature. As stated by the Supreme Court in famous S.R.

Bommai's case, Article 74(1) deals with the acts of the President done "in exercise of his functions", whereas Article 77 speaks of the executive action of the Government of India which is taken in the name of the President of India. Insofar as the executive action of the Government of India is concerned, it has to be taken by the Minister/officer to whom the said business is allocated by the Rules of Business made under clause (3) of Article 77 for more convenient transaction of the business of Government of India. All the business of the Government is transacted by the Minister or other officer empowered in that behalf, of course, in the name of the President. There is no occasion in such cases for any aid and advise being tendered to the President by the Council of Ministers. The President did not really come into the picture so far as Article 77 is concerned. Though expressed in the name of the President they are the acts of the Government of India which are distinct from the acts of the President "in the exercise of his functions contemplated by Article 74". Paras 320 and 321 of Bommai's case leaves no manner of doubt that such appointments are only in the name of the President and do not have the protection of Article 74(2) of the Constitution. We may further note that the learned Attorney General did not urge that the decision of ACC is protected from judicial scrutiny on account of Article 74(2). In view of the above, the contention of Mr. Jaitley deserves to be rejected.

21. This takes us to the last contention, namely, the manner and mode of consideration by ACC.

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24. The ACC cannot act arbitrarily. It is required to act reasonably. The absence of meeting of mind of members of ACC would show arbitrariness.

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In Union of India & Ors Vs. N.P.Dhamania and Others, the question that came up for consideration before the Supreme Court was whether it is open to the ACC to differ from the recommendation of the Departmental Promotion Committee and, if so, whether the reasons must be given for so differing. The Supreme Court answered the question by holding that though it was open to ACC to differ from the recommendations of DPC, it must give reasons for so differing to ward off any attack of arbitrariness and the reasons have to be recorded in the file though there is no need to communicate the reasons to the officer affected. In the said case it was found that no reasons had been recorded in the file for ACC differing from the recommendations of DPC. The Supreme Court held that the ACC may reconsider the cases in the light of the decision. The following directions were issued by the Supreme Court:-

"The Appointing Authority shall consult the UPSC once again by making reference back to them indicating the reasons for making a departure from the panel recommended by the Commission and also forward the material on which it has reached the conclusion not to appoint the respondent and obtain their views before taking final decision in the matter. In case after consultation with the UPSC, in the manner indicated above, the name of the Respondent is restored to its original position as recommended by the UPSC, the case of the respondent for promotion to the post of Commissioner of Income Tax, shall be considered on merit and necessary orders be passed within 3 months from the date of the receipt of the file from the UPSC."

11. However, we have consulted the original records submitted by the counsel for the respondents and have noted that reasons have been given for not considering the case of the applicant

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viz; the applicant did not submit the Income Tax Return for the Year 2010-2011.

12. Hence for the reasons set out in paragraphs 8 & 9 (supra), there is no chance for the applicant for being appointed as Judicial Member in I.T.A.T. This OA is accordingly held to be without any merit and is accordingly dismissed. Consequently, the MA stands dismissed. No costs.

13. Registry is directed to return the original selection file produced, in pursuance of the direction of this Bench, to the learned counsel appearing for the Respondents with due acknowledgement forthwith.



(JAYA DAS GUPTA)
MEMBER (A)



(JUSTICE V. C. GUPTA)
MEMBER (J)

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