

**CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH**

**OA No. 181 of 2011**

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)  
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

1. Central Excise & Customs SC/ST Employees' Welfare Association, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-7 represented by its General Secretary, Sri Ashwini Kumar Majhi, aged 44 years, S/o Gokulananda Majhi, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
2. Sanjay Ku. Chattar, Aged 43 years, S/o Sri Chandra Mohan Chattar, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
3. Rajendra Topppo, aged 43 years, S/o Sri Alphonse Topppo, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
4. Basanta Ku. Naik, aged 43 years, S/o Sri Golak Chandra Naik, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.

.....Applicant

**VERSUS**

1. Union of India, represented through the Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi – 110001.
2. Chief Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar Zone, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
3. Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-I, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
4. Union of India, represented through Secretary, Govt. of India, Ministry of Personnel, Public Grievances & Pension, North Block, New Delhi – 110001.
5. Prafulla Kumar Mohapatra, Aged 50 years, Superintendent of Central Excise, Customs & Service Tax, Berhampur Range, Berhampur, Dist.- Ganjam.
6. Umakanta Rout, aged 56 years, Superintendent of Central Excise, Customs & Service Tax, O/o Asst. Commissioner of Central Excise, Customs & Service Tax, Balasore Division, Balasore.
7. Akhil Kumar Bisawal, aged 55 years, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
8. R.S.Tarai, aged 56 years, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise,

Customs & Service Tax, Bhubaneswar-II, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.

9. A.K.Parida, aged 49 years, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
10. S.K.Patnaik, aged 56 years, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar Zone, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
11. A.K.Azad, aged 56 years, Superintendent of Central Excise, Customs & Service Tax, O/o Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I, Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.
12. J.K.Patnaik, aged 54 years, Superintendent of Central Excise, Customs & Service Tax, O/o Asst. Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar Division, Patia, Bhubaneswar.
13. Priyabadi Mohanty, aged 50 years, Superintendent of Central Excise, Customs & Service Tax, O/o Asst. Commissioner of Central Excise, Customs & Service Tax, Balasore Division, Balasore.

.....Respondents.

For the applicant : Mr.S.K.Pattnaik, counsel

For the respondents: Mr.A.C.Deo, counsel  
Mr.G.Rath, counsel  
Mr.D.K.Mohanty, counsel

Heard & reserved on : 10.7.2019

Order on : 31.7.2019

### **O R D E R**

#### **Per Mr.Gokul Chandra Pati, Member (A)**

The applicants are aggrieved by the promotion of respondents No.5 to 13 vide order dated 23.9.2002 (Annexure A/9). The applicants belong to ST category of employees and claim that no ST category employee was considered for promotion based on the DPC held on 17.7.2002 (Annexure A/8). The applicants submitted representation to the authorities on 16.8.2004 (Annexure A/12) and 31.8.2004 (Annexure A/13) for non-implementation of the reservation policy. The respondents have communicated letter dated 4.10.2004 (Annexure A/14) stating that the reservation policy has been implemented in the department w.e.f. 2.7.1997. The applicants are relying on the DOPT OM dated 11.7.2002 which stated that it will be applicable prospectively and will not apply to promotions made by non-selection vide OM dated 31.1.2005 (Annexure A/4). It is stated that although the applicants were promoted from Inspector to Superintendents on 18.9.2007 (Annexure A/11) but they are entitled to such promotion w.e.f. 15.3.2002 if the reservation policy was strictly followed in this case. In this background the OA has been filed seeking the following reliefs :

- “(i) the order of promotion dtd. 23.9.2002 under Annexure A/9 so far as respondents 5 to 13 are concerned may be quashed/set aside, and
- (ii) the applicant No. 1 to 3 may be declared as promoted as Superintendent of Central Excise, Custom & Service Tax w.e.f. 23.9.2002 with all consequential service benefits like scale of pay, arrear of salary, increments etc. and seniority above the respondents 5 to 13, and
- (iii) the applicant No.4 may be declared as promoted as Superintendent of Central Excise, Custom & Service Tax w.e.f. 31.12.2002 with all consequential service benefits like scale of pay, arrear of salary, increments etc. and seniority above the respondents 5 to 13, and
- (iv) the applicants may be given further promotion as Asst. Commissioner of Central Excise, Customs & Service Tax if the juniors to the applicants are so promoted during pendency of this OA.”

2. The grounds advanced in this OA are at para 5 as under :

- “(1) That the respondents have deprived the applicants of their legitimate right of promotion in gross violation of the judgment of Hon’ble Apex Court in case of R.K.Sabharwal and the OM dtd. 2.7.1997, 11.7.2002 and OM dtd. 10.8.2010 and the constitutional mandate under articles 14 and 16 of the Constitution of India has been grossly violated.
- (2) That the respondents have given promotion to the general category candidates against the posts reserved for the ST category candidates in gross violation of the principles of reservation in spite of the clear direction given in OM dtd. 2.7.1997 and 11.7.2002 as clarified in OM dtd. 10.8.2010 of the Department of Personnel & Training, Govt. of India.
- (3) That the respondents No. 1 to 4 have acted with mala fide in relying on the circular letter of the C&AG No. 9/NGE/98 No. 108/NGE(Ap)/3-97 dtd. 23.1.1998 which was overruled by the DOP&T for giving illegal promotion to the general category candidates and denying promotion to the ST candidates.”

3. The respondents have filed the counter submitting that as per the DOPT OM dated 2.7.1997 (Annexure A/2) if any reserved category candidate is appointed on the basis of merit and not on account of reservation this should not be counted towards the quota meant for that reservation category and he should be treated as general category candidate. The post based roster was introduced in this circular and prior to 1997 the reservation was based on vacancies. Regarding promotion the DOPT issued the OM dated 11.7.2002, which stated that the 1997 circular policy would be also applicable for promotions but it will be effective from 11.7.2002 (Annexure R/2) as clarified in the OM dated 31.1.2005 (Annexure R/3). Subsequently vide OM dated

10.8.2010 (Annexure R/4,) it stipulated that the 2002 circular regarding reservation in promotion will be effective from 2.7.1997, which implies that post based reservation for promotion will be effective from 2.7.1997. It is averred in the OA was that the ST candidates who had been promoted on the basis of merit should not have been counted towards reservation quota. It is further submitted that the promotion to the cadre of Superintendent is made based on seniority-cum-fitness and there is no supersession based on the merit of the candidates. It is submitted that since the criteria of promotion is seniority-cum-fitness for promotion to the post of Superintendent, the stipulation that a candidate has been promoted based on their merit will not apply. Since the merit as laid down in the judgment of Hon'ble Apex Court in the case of K. Manorama -vs- Union of India which referred to open competition and not to the promotion based on the seniority-cum-suitability. The respondents have, therefore, objected to the averment that the Superintendents from ST category who have been promoted on the basis of their seniority will be treated as on reservation category.

4. It is stated in the Counter that there was no vacancies of ST category available when the DPC was held on 17.7.2002 for which the applicants could not be accommodated. The background note prepared for the purpose of DPC, (copy at Annexure A/7), was therefore correctly prepared as contended in para 5 of the counter. It is further mentioned that in the said DPC held on 17.7.2002, the applicants' names did not figure among the first 57 eligible candidates considered by the DPC. It was noted by the DPC that there were total 164 posts of Superintendents out of which 12 posts were earmarked for ST candidates as per the reservation quota. There were 13 persons from ST category working as Superintendents for which it was considered by the DPC that no vacancy was available for ST candidates for promotion. It is also mentioned in the counter that 13 Superintendents of ST category were promoted prior to 1997 under seniority-cum-fitness basis basing on a vacancy based roster, for which it cannot be considered that they were promoted on merit or reservation will not apply in that case. It is stated that the DOPT OM dated 10.8.2010 which clarified that the promotion on merit will be effective from 2.7.1997 was subsequently quashed by Hon'ble High Court of Punjab & Haryana for which the claims of the applicants are not based on correct interpretation of law.

5. The applicants have filed a rejoinder denying the averments made in the counter. It is reiterated that the ST candidates promoted on the basis of merit should not be counted against reservation category since they were not promoted against any reservation quota as explained in para 4.15 of the OA. It is submitted that the judgment of Hon'ble Apex court in the case of

R.K.Sabharwal vs. State of Punjab laid down the principle of post based reservation and the principle that the persons who were not promoted against the reservation quota should not be counted as occupying the reservation category posts. It was stated that the 7 persons from ST category were promoted on merit on 23.9.1996 (Annexure A/10) and that they cannot be counted as belonging to ST category as per the ratio of the R.K.Sabharwal judgment. It is stated that the judgment in the case of R.K.Sabarwal has not been modified in subsequent judgment of the Hon'ble Apex Court. Hence the said judgment will apply in this case.

6. Learned counsel for the applicant was heard at length. He reiterated the stand taken in the pleadings of the applicants and also submitted that vide the information obtained by the applicant as enclosed with the rejoinder (Annexure A/38), it is established that the 3 SC and 7 ST candidates were promoted earlier as per merit and they should have been considered as unreserved category on the post based roster. It was argued that the RTI information at Annexure A/38 shows that the contentions of the applicants are correct and that the information at Annexure A/38 to the rejoinder is at variance with the status note considered by the DPC vide Annexure A/7 in which the 7 ST Superintendents were counted towards ST category posts. Therefore, the DPC held on 17.7.2002 committed a mistake and if the 7 Superintendents which were counted towards reserved ST category are taken as unreserved category, then 5 posts of ST category posts will be available against which the DPC held on 17.7.2002 should have considered the case of the applicants. It was further submitted by the applicant's counsel that the claim of the applicants is for retrospective promotion as Superintendent on the basis of DPC held on 17.7.2002 in place of their seniority in 2007.

7. Heard learned counsel for the respondents. He reiterated the main points in the counter and submitted that post based reservation was applicable after the judgment in the case of R.K.Sabarwal -vs- State of Punjab as explained in para 12 of the counter. 13 posts of ST category who were promoted prior to 1997 were on the basis of vacancy based reservation and they were counted as reserved category. It was further mentioned that a review DPC was held on 27.4.2017 after filing of the counter, in which the DPC meeting held on 17.7.2002 was held to be correct. The copy of the review DPC meeting has been filed by the respondents' counsel in a written note. It was further submitted by respondents' counsel that respondents No. 5 to 9 are presently working and all other Private Respondents have retired or have taken voluntary retirement.

8. We have considered the submissions as well as the pleadings of both the parties. Applicants' claim for promotion to Superintendent with a retrospective

date since their name was not considered in the DPC held on 17.7.2002 as per the reservation policy and in the said DPC, the respondent No. 5 to 13 were promoted on 23.9.2002 ignoring the applicants' case for consideration against ST vacancies claimed to be available at that point of time. It is stated in the OA that the applicants had submitted representation in 2004 objecting to the decision taken in 2002 to promote the respondent No. 5 to 13 and the said representation was rejected by the respondents vide letter dated 4.10.2004 (A/14). It is not mentioned in the OA if the applicants had challenged such rejection of their representation on 4.10.2004 by approaching the appropriate forum as per law. The applicants were allowed promotion to the post of Superintendent on 18.9.2007 (A/11) after which they approached again claiming such promotion from 2002. Again the applicants failed to approach the appropriate legal forum when their case was not accepted by the official respondents till they filed this OA in the year 2011. Hence, the OA has not been filed within the time stipulated under the section 21 of the Administrative Tribunals Act, 1985 and no application explaining such delay or condoning the delay has been file by the applicants.

9. The settled position of law is that any claim with regard to seniority or for promotion raised belatedly cannot be accepted due to the fact that such claim will have the effect of unsettling the settled position of the seniority. In case the prayer for retrospective promotion of the applicants in the present OA is allowed, then their position in the seniority/gradation list will go up, which will affect other employees who might have been promoted after the date of promotion now claimed by the applicants (23.9.2002) and before the date of promotion of the applicants i.e. 18.9.2007. Hence, allowing such a claim will unsettle the seniority position and will give rise to claims from other affected employees. Hon'ble Supreme Court in the case of **Shiba Shankar Mohapatra and others vs. State of Orissa and others, reported in (2010) 12 SCC 471** has held the following ratio as under after examining the law in this regard:-

"Thus, in view of the above, the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained. In K.R. Mudgal (supra), this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation."

10. Although the applicants in this OA have not challenged the seniority list, but their prayer for promotion from an earlier date will effectively imply changes in their relative seniority vis-a-vis the employees other than the respondent no. 5 to 13. Applying the ratio of the judgment in the case of Shiba

Shankar Mohapatra (supra), it is clear that the applicants should have challenged the promotion of the respondent no. 5 to 13 within 3-4 years of the promotion of the respondent no. 5 to 13 in 2002. Further, if the applicants' representations in this regard were rejected on 4.10.2004 (A/14) by the official respondents, then such decision should have been challenged within one year time as stipulated under section 21 of the Administrative Tribunals Act, 1985. Further, if it could not be challenged within that time, the reasons for delay in challenging such decision in the present OA were required to be furnished alongwith an application for condoning delay as required under section 21 of the Administrative Tribunals Act, 1985. In absence of an application for condoning delay in this matter, this Tribunal has no option but to come to a conclusion that the present OA is barred by limitation and delay under the section 21 of the Administrative Tribunals Act, 1985.

11. Before we part with the case, it is seen that at the time of hearing of the case, learned counsel for the respondents had submitted that for a similar dispute regarding the date of promotion of some of the Inspectors before this Tribunal, orders were passed in OA No. 104/2010 and in some other OAs of similar nature, directing the respondents to hold the review DPC for considering the case of senior employees who were overlooked at the time of consideration of their cases by earlier DPC while recommending the case of junior employees by wrong application of reservation policy. It was submitted by the respondents' counsel that such review DPC for promotion to the post of Superintendent was held on 27.4.2017 and the dates of promotion of some of the employees belonging to reserved category were taken to subsequent year, applying the post and roster based reservation policy. But we could not have taken such submissions into consideration for this OA, since the applicants as well as the respondents have chosen not to bring such facts on record through their pleadings, which are relevant for deciding the merit of the case.

12. In view of the discussions above and following the ratio of the judgment in the case of Shiba Shankar Mohapatra (supra), we are of the considered view that the OA is barred by limitation and delay under the section 21 of the Administrative Tribunals Act, 1985. Hence without going into merit of the case, the OA is dismissed on the ground of limitation. There will be no order as to cost.

(SWARUP KUMAR MISHRA)  
MEMBER (J)

(GOKUL CHANDRA PATI)  
MEMBER (A)

I.Nath

