

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 157 of 2016

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

Debendra Kumar Rout, aged about 47 years, S/o Bihari Rout,
At/PO-Gualipada, PS – Delang, Dist. – Puri, at present working at
Customs Division, Paradeep.

.....Applicant

VERSUS

1. Union of India represented through its Secretary, Ministry of Finance, Department of Revenue, Central board of Excise & Customs, At 5th Floor, HUDCO, Vishala Building, Bhikajikama Place, New Delhi.
2. Additional Commissioner (P&V), Central excise, Customs & Service Tax, Bhubaneswar-1 Commissionerate, 1st Floor, C.R.Building, Rajaswa Vihar, Bhubaneswar, Odisha.
3. R.K.Swain, Greaser, Customs Division, Paradeep, At/PO-Paradeep, Dist.- Jagatsinghpur.

.....Respondents.

For the applicant : Mr.K.K.Swain, counsel

For the respondents: Mr.S.B.Mohanty, counsel
Mr.P.K.Pattnaik, counsel

Heard & reserved on : 26.7.2019 Order on : 27.8.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

The applicant has filed this OA under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs :

- "a) the impugned order of promotion dated 27.4.2015 under Annexure-9 and the rejection order dated 28.1.2016 passed by the Chief Commissioner (CCA) Central Excise, Customs and Service Tax, Bhubaneswar Zone under Annexure-122 may be quashed/set aside and the applicant may be given promotion to the post of Launch Mechanic from the date his junior (respondent No.3) got promotion to such post with all service, consequential and financial benefits.

AND

- b) any other order/orders or direction/directions be issued to the respondents to grant relief as deem fit and proper.

2. The applicant is aggrieved for being ignored for promotion to the post of Launch Mechanic (in short LM) in the year 2015 when his junior in service, i.e. the respondent No. 3 was promoted. The applicant, initially appointed as Lascar had been promoted as Greaser on 7.7.2009 (Annexure-5 to the OA). In

the seniority list for the Greasers at Annexure-6, the applicant was senior to the respondent No.3. As per the recruitment rules, the next promotion of a Greaser is to the post of LM, for which 5 years of experience as Greaser and qualifying the interview were required. The authorities called for the eligible candidates to appear in the interview held on 20.4.2015 and 21.4.2015 for promotion to the post of LM. Both the applicant and the respondent No.3 appeared in the said interview.

3. It is the case of the applicant that only Chairman of the interview board asked him some questions and other two members did not ask any question to him. It is stated that the respondent No.3 was promoted to the post of LM vide order dated 27.4.2015 (Annexure-9 of the OA), although the applicant was senior to him and had a better career than the respondent No.3. The applicant got the minutes of the DPC through the RTI Act. Copy of the said minutes is at Annexure-10.

4. Then the applicant filed the OA No. 555/2015, which was disposed of vide order dated 27.9.2015 (Annexure-11) directing the respondents to dispose of his representation at Annexure-9 submitted by the applicant. The Chief Commissioner, who has not been impleaded as a party in the OA, passed the order dated 28.1.2016 (Annexure-12), rejecting the applicant's representation on the ground that his case was not recommended by the DPC. Both the order at Annexure-9 and 12 have been challenged in this OA.

5. One of the main grounds advanced in the OA to challenge the decision of the authorities is that no mark has been awarded by the individual members of the DPC, for which the procedure followed by the DPC be held to be arbitrary. It is also mentioned that there should have been a written test and viva voce or practical for the selection. It is also averred that no consideration for the service record of the applicant was considered by the DPC. Another ground mentioned in the OA is that the provision in the 1994 recruitment Rules (Annexure-7) to assess the suitability through an interview is bad in law and the interview should not only mean viva voce only, but written test also.

6. The official respondents have filed Counter, stating that the case of the applicant for promotion to the post of LM was duly considered, but the DPC held on 20/21.4.2015 did not find him fit for promotion. It was stated that the applicant was also allowed the benefit of 2nd MACP to the Grade Pay of Rs. 2000 w.e.f. 13.5.2012. Regarding contentions in the OA to consider the service record, it was stated that the ACR/APAR records of the candidates were placed before the DPC which considered the same.

7. The respondent No.3 has also filed his Counter stating that the interview was conducted as per the provision of the rules. The post of LM is a selection post, which is filled up by persons with the skill to be assessed by the DPC on the basis of the interview. It is stated that out of the candidates,, only the respondent no.3 had a certificate of competency of Inland Driver Class-II and Class-I, copy annexed at Annexure R-3/B and R-3/C. It is stated that the seniority is not a criteria of promotion as per the rules.

8. Rejoinder has been filed by the applicant for both the Counters, reiterating the averments in the OA that the interview board did not award any marks and practical test should have been held. The assessment by mentioning only 'fit' or 'unfit' by the DPC was not enough. Regarding the certificate competency, it was stated in the Rejoinder that such certificate was not a requirement as per the rules for promotion to the post of LM.

9. The applicant has filed the MA No. 294/2018 enclosing a copy of the order dated 29.6.2018, by which the applicant was promoted to the post of LM. But he claimed his entitlement to be promoted w.e.f. 27.4.2015 i.e. from the date the respondent No. 3 was promoted.

10. Heard learned counsel for the applicant, who also submitted a detailed written arguments enclosing copy of the following judgments in support of the applicant's case:-

- i) Chairman, Rushikulya Gramya Bank -vs- Bisawamber Patro & Others [(2013) 2 SCC (L&S) 291]
- ii) Anzar Ahmed -vs- State of Bihar & Others [AIR 1994 SC 141]
- iii) Dr.J.P.Kulshrestha & Others -vs- Chancellor, Allahabad University & Others [AIR 1980 SC 2141]
- iv) Director General, Indian Council for Agricultural Research & Others -vs- D.Dundara Raji [(2011) 2 SCC (L&S) 164]
- v) Union of India -vs- Sadhana Khanna (Smt) [(2008) SCC (L&S) 308]

11. Learned counsel for the official respondent was heard. He submitted that the authorities have taken decision in accordance with the provisions of the rules. Learned counsel for the respondent no.3 was also heard. He also filed the written note of submission, reiterating the points made in his Counter.

12. We have considered the pleadings, written notes and oral submissions by the parties in the case and also gone through the judgments cited in the case. Learned counsel for the applicant stressed on the argument that where the assessment of capability of the candidates is done through the interview, a minimum cut off marks should have been specified by the authorities.

13. In the judgment of Hon'ble Apex Court in the case of Bisawamber Patro (supra) cited by the applicant, the issue was whether a cut-off mark can be specified by the employer for a promotion based on seniority-cum-merit and it was held that such a cut-off mark can be specified. The ratio of the judgment does not imply that every selection has to be based on marks or fixing the cut-off mark is mandatory for every selection for promotion. Hence, the judgment does not help the applicant's case.

14. In the case of Anzar Ahmed (supra), it was held that allocating marks between academic performance and 50% for interview was not arbitrary. The judgment does not lay down any law to the effect that the interviews for promotion will be arbitrary if marks are not awarded or if no cut-off mark is specified. In the case of Dr. J.P. Kulshrestha (supra), it was held that conduct of interview specified by the authorities for selection was not arbitrary and the criteria for selection should be followed. The judgment is not helpful for the applicant's case.

15. In the case of D. Sundara Raju (supra), it was held by Hon'ble Apex Court that holding of interview with excessive weightage was arbitrary since the candidates were not aware that such an interview would be held for time bound promotion. In the present OA, the facts are different, since the Recruitment rules for promotion to the post of LM specified the candidates have to face the interview for assessing their suitability. In the case of K. Muraleedharan (supra), the issue before Ernakulam Bench of this Tribunal was antedating of the date of promotion of the applicant to the post of Inspector on the ground that he was not considered to be eligible for promotion since he did not pass the departmental examination. The applicant had claimed that he had passed the departmental examination prior to holding of the DPC and hence, he was eligible for promotion. The factual circumstances in this cited case were quite different from the facts of the present OA, for which, the cited judgment will not be applicable for the present OA before us.

16. The applicant has argued that the interview board should have awarded marks to the candidates and there should have been some practical test for assessing suitability for promotion in question. Undisputedly, the provision of the Recruitment Rules of 1999 specified only the criteria of 3 years of experience and assessment by the interview board. No practical test or assessment of career or seniority position was specified as criteria for such promotion. In other words, the applicant is aggrieved by the Recruitment Rules, which have not been challenged in this OA. He had appeared in the said interview without any protest and he protested when he was not found fit by the interview board for the promotion to the post of LM. There is nothing on

record to show that the interview board has acted arbitrarily or has violated the rules while assessing the suitability of the candidates.

17. In a number of cases Hon'ble Apex Court has laid down the principle that once a person appears in a selection process without any protest, he cannot challenge the selection process after his failure to clear the said selection process. In the case of Chandra Prakash Tiwari and others vs. Shakuntala Shukla and others reported in (2002) 6 SCC 127, Hon'ble Apex Court has held as under:-

"There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not 'palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

18. In view of the discussions above, we are of the considered view that the applicant has failed to furnish sufficient grounds in the application to justify any interference of this Tribunal in the matter. Hence, the OA is dismissed with no order as to costs.

(SWARUP KUMAR MISHRA)

MEMBER (J)

(GOKUL CHANDRA PATI)

MEMBER (A)

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