(2010) 02 OHC CK 0054

In the Orissa High Court

Case No : Writ Petition (C) No''s. 10571 of 2004 and 11529 of 2005

Sarojkanta Sarangi APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Citation : (2010) 109 CLT 617

Hon'ble Judges : L. Mohapatra, J;B.K. Patel, J

Bench : Division Bench

Advocate : P.K. Rath, P.K. Satpathy, R.N. Parija, A.K. Rout, S.K. Pattnaik, Jaydeep Pal and M.K. Sarangi, in W.P.C No. 11529 of 2005 and S.D. Das, Asst. Solicitor General in W.P.C No. 10571 of 2004, for the Appellant; S.D. Das, Asst. Solicitor General for O.Ps. 1 and 2, S.B. Panda, P.K. Beura and M.K. Das for O.P. No. 5 in W.P. (C) No. 11529 of 2005 and DP. Dhatsamanta, P.K. Betters, J. Pal, M.D.G. Madani, M.R. Patra, M.K. Sarangi, S.B. Panda, P.K Rath, P.K. Satpathy, R.N. Parija, A.K. Rout and S.K. Pattnaik for O.P. No. 1 in W.P. (C) No. 10571 of 2004, for the Respondent

Judgement

B.K. Patel, J.—Legality of order dated 30.03.2004 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuitack (for short the Tribunal) in O.A. No. 497 of 1998 has been assailed in both the writ applications. O.A. No. 497 of 1998 was preferred by Petitioner in W.P.(C) No. 11529 of 2005 against Union of India, represented through the Secretary to Government of India, Ministry Finance, Department of Revenue as well as Commissioners of Central Excise & Customs, Bhubaneswar-I and II, who have preferred W.P.(C) No. 10571 of 2004, and nine private opposite parties working as Inspector of Central Excise & Customs.

2. Applicant (hereinafter referred to as ''the Appellant'') in O.A. No. 497 of 1998, who was initially recruited to the cadre of Stenographer Grade III, was selected and appointed as Inspector of Central Excise & Customs on ad hoc basis with effect from 30.10.1991 pursuant to departmental appointment order dated 30.10.1091. He had to undergo interview and physical test for the selection.

Grievance of the applicant in the O.A. was that though the private Respondents were appointed as Inspectors of Central Excise & Customs on ad hoc basis subsequent to him, they were appointed on regular basis earlier. The case of the applicant was overlooked for regular appointment to the cadre of Inspector of Central Excise & Customs because of the fallacious appointment order dated 30.10.1991 issued with regard to his promotion on ad hcc basis and the fallacious order of his promotion to Stenographer Grade il issued on 1.4.1993. Though by order dated 1.4.1993 applicant was promoted as Stenographer Grade II and his services were utilized in the Divisional Office as Stenographer Grade II from 1993 to 1997, the applicant continued to enpoy the oenelit of pay scale of Inspector of Central Excise & Customs He was later on posted as Inspector of Centra! Excise & Customs in Kajuriga-I Range with effect from 7.7.1997. In spite of his representations to the authorities to grant him regular promotion to the grade of Inspector of Central Excise & Customs with effect from either 30.10.199'' or 11.4.1994 when one of the private Respondents, wno was appointed as inspector of Central Excise & Customs on ad hoc basis subsequent to him, was regularly promoted, here was no response to his representations. Therefore, the applicant approached the Tribunal with a prayer to direct the departmental Respondents to regularize his service in the grade of Inspector of Central Excise & Customs with effect from 31.10.1991 and accordingly to fix his seniority and grant other service benefits.

3 There is little dispute from the side of departmental Respondents -:o the factual assertions made by ihe applicant. However, in their counter the departmental Respondents resisted the applicant''s claim for grant of regular promotion from 31.10.1991. It was contended that according to Recruitment Rules, in order to fill up the post of Inspector of Central Excise & Customs, 25 per cent quota is available to be filled up on promotion basis from among the three feeder grades of Stenographer Grade III, Tax Assistant and Upper Division Clerk. For the purpose of promotion, a common eligibility list is to be prepared out of the three feeder grades. According to the departmental Respondents, though such procedure is meant tor granting regular promotion to the grade of Inspector, the department created Anr. establishment for short term cost recovery purpose to be filled up on deputation basis. The specific stand of departmental Respondents is that the applicant was being promoted to the grade of Inspector purely on ad hoc basis against the cost recovery post/deputation by order dated 30.10, 1991. Cost recovery post against which the applicant was promoted was a deputation vacancy. In terms of order dated 7.12.1982 passed by Government of India, Ministry of Finance, Department of Revenue, cost recovery posts would remain operative so long as the user party would continue to deposit the cost and would cease to exist from the date the party fails to deposit the cost and appointment to these posts are to be made on ad hoc basis. At the time of granting the applicant ad hoc promotion to the grade of Inspector on 30.10.1991, the applicant was given terms and conditions of appointment which included a condition thai the period of service put in the grade of Inspector

on ad hoc basis would not count for seniority, confirmation, and qualifying service for further promotion. On the basis of his ad hoc appointment to the cadre of cost recovery Inspector on deputation basis, the applicant cannot claim any advantage of service especially with regard to regular promotion.

4. Learned Tribunal upon consideration of rival pleadings and contentions and upon reference to relevant Recruitment Rules, i.e., Central Excise and Land Customs Department Group ''C Posts Recruitment Rules, 1979 (for short the ''Recruitment Rules'') observed that post of Cost Recovery Inspector has been created outside the regular cadre post of Inspector. In view of the nature of the post, the Government has rightly taken a stand that these posts cannot be treated as regular sanctioned strength of an organization and as such procedure prescribed to fill up regular sanctioned posts cannot be applied. However, the Tribunal was of the view that the applicant''s grievance has arisen because of the lack of clarity in notifying the vacancy of Cost Recovery Inspector. Instead of notifying the post in clear-cut terms, the department used terms which are not in conformity with each other. In the appointment order dated 30.10.1991 it was stated that:

the under noted U.D. Clerk/Stenographer of this Collectorate are hereby promoted to the grade of Inspector purely on Ad hoc basis against Cost Recovery post/Deputation vacancies in the time scale of pay of Rs.1640-60-2600-EB-75-2900/ - plus other usual allowances as admissible under rules with effect from the date of their joining in the grade of Inspector and until further orders.

The learned Tribunal held that the post of Cost-Recovery Inspector being meant for ex cadre establishment and the mode of recruitment/ appointment being on deputation basis, the department should not have used the words ''promotion'', ''ad hoc'' and ''joining in the grade of Inspector''. Deputation and promotion being two distinct methods of recruitment/appointment, these words could not have been used in the same order. Also, the expression ''ad hoc'' could not have been used in the case of an appointment on deputation, because deputation is a regular method of recruitment/appointment whereas ad hoc appointment is an arrangement /appointment made to a higher post without following the method of appointment as prescribed in recruitment rules. Consequently, learned Tribunal held that as the cost recovery posts are all ex cadre posts, these could be filled up only by way of deputation and to that extent the instruction issued by the Central Board of Excise and Customs vide letter dated 4.11.1991 that "these posts are to be filled up by promotion on ad hoc basis" being misleading has to be quashed. Learned Tribunal further held that instead of describing the nature of appointment in the manner as extracted above in the order dated 30.10.1991, the appointment order should have been issued in the following format:

The under noted UDC/Stenographers of this Collectorate are hereby appointed on deputation basis to the post of Cost Recovery Inspector in the time of scale of pay of Rs.1640-60-2600-EB-75-29007- plus other usual allowances as admissible under rules with effect from the date of their joining the post and until further orders.

Learned Tribunal also took objection to the contents in paragraph 3 of appointment order dated 30.10.1991, which reads:-

The ad-hoc appointment will not continue for a period exceeding one year or after the post is filled on regular basis whichever is earlier,

Instead, it was observed the condition should be that appointment is made for ''x'' period which may be terminated earlier also in the exigencies of service. Department was directed to carry out necessary changes in the format of appointment order to the post of Cost Recovery Officer. So far as the grievance of the applicant is concerned, the learned Tribunal held that the department should not have issued the .applicant''s promotion order in Stenographer grade II in 1993 but should have prepared a panel of three officials against two vacancies in the grade of Stenographer II on the ground that the applicant was away on deputation and, should have thereafter, issued proforma promotion order under the Next Below Rule to protect his interest in the parent cadre. The department was directed to take action for issue of proforma promotion order under the Next Below Rule in respect of the applicant and to rectify the error and not to recover any amount from the applicant which he had received towards salary in the pay scale of Inspector.

5. The applicant as well as the department have assailed the impugned order as erroneous. It is contended by the learned Counsel appearing for the applicant that DPC meeting in which the applicant was promoted from the cadre of Stenographer to the cadre of Inspector considered candidates from the three feeder cadres combinedly and the meeting was not specifically held for appointment to the post of Cost Recovery Inspector. Pursuant to appointment order dated 30.10.1991, the applicant was all along paid salary in the pay scale of Inspector. He was never deputed to serve any post of Cost Recovery Inspector. Therefore, the applicant is entitled to be regularized in the post of Inspector w.e.f. 30.11.1991. Learned counsel for the applicant pressed into service the decision of this Court in Pradipta Kumar Mohapatra v. State of Orissa and Ors. 2009 (I) OLR 154 to urge that as the applicant was appointed to the post of Inspector after going through the procedure prescribed under the Recruitment Rules for promotion, the period of service rendered by him on ad hoc basis has to be taken into consideration for regularization and seniority in the post of Inspector.

6. Learned counsel appearing for the department contended that the Recruitment Rules provide that the Cost Recovery Posts are created on short term ad hoc basis on the request of user party who pays for the costs of the posts and cease to exist from the date the party fails to deposit the cost. Also in the appointment letter dated 30.10.1991 it was categorically stated that the applicant once promoted against the Cost Recovery Post/deputation vacancies. Therefore, the applicant cannot claim for regularization on the basis of such ad hoc promotion.

It was also contended that neither the applicant nor the department having assailed the appointment order, learned Tribunal should not have undertaken the exercise to find fault with notification and appointment order.

7. In course of hearing departmental records relating to D.P.C. meeting leading to issuance of appointment order dated 30.10.1991 was produced by the department.

8. We have heard the rival contentions upon reference to relevant records and rules. Having considered the history of creation as weli as the nature of the post of Cost Recovery Inspector, learned Tribunal has rightly observed that the this category of post has been created outside the regular cadre post of Inspector for which provisions have been made in the Recruitment Rules. These posts cannot be treated as regular sanctioned strength of an organization and as such the procedure prescribed to fill up regular sanctioned posts cannot be applied for recruitment of Cost Recovery Inspector. However, while notifying the post, the department used conflicting terms using the expressions ''ad hoc'', ''promotion'', ''deputation'' and ''joining in the grade of Inspector''. Use of such expressions certainly created confusion and anomaly. Promotion and deputation are two distinct methods of recruitment/appointment. The expression ''ad hod could not have been used in the case of appointment on deputation. Cost Recovery Posts being ex cadre posts, such posts could have been filled up only by way of deputation. Therefore, the learned Tribunal rightly quashed the instruction of the Central Board of Excise & Customs vide letter dated 4.11.1991 to the effect that "these posts are to be filled up by promotion on ad hoc basis". As the appointment order dated 30.11.1991 was also not happily worded, we find no infirmity in the direction of the learned Tribunal to amend the appointment order as suggested so that there would not be any confusion in future.

9. However, so far as the present applicant is concerned, there is no challenge to the appointment order dated 30.11.1991 from. any quarters. The department simply took the stand before the Tribunal that the applicant was erroneously allowed to continue as an ad hoc Inspector. Therefore, the interference by the learned Tribunal with the instruction of the Central Board of Excise & Customs vide letter dated 4.11.1991 and appointment order dated 30.11.1991 cannot have retrospective effect so far as the applicant is concerned. An affidavit has been filed before us on behalf of the department stating that the applicant was posted to Cuttack Division after being promoted as Inspector on ad hoc basis and that the applicant was drawing salary from Cuttack Division in the pay scale of Inspector. It was also admitted that the applicant was all along continuing as ad hoc Inspector right from the date of his ad hoc promotion w.e.f. 30.10.1991 and drawing his pay scale and he was not reverted from the said post of Inspector till date.

10. The record of the proceedings of the D.P.C. meeting held on 27.6.1991 reveals that details were furnished to the Departmental Promotion Committee to consider the cases of eligible officers of the feeder cadre "for promotion to the

grade of Inspector of Central Excise. Group C on ad hoc basis to be held on 27.6.1991". The details included inter se seniority list of such persons ''for consideration of promotion to the cadre of Inspector of Central Excise and Customs. The heading of the minutes of the D.P.C. meeting reads:

Minutes of the Annual Group ''C'' D.P.C. meeting 1991-92 held on 27.6.1991 in the Coliectorate of Central Excise and Customs, Bhubaneswar for consideration of U.D. Clerks/ Stenographers/Women Searchers/Draftsmen for promotion to the grade of Inspector of Central Excise (on ad-hoc basis).

It has been stated in the proceedings that D.P.C. was constituted as per instructions contained in Recruitment Rules and instructions of the Board. The committee was informed that there existed 10 (ten) vacancies arising out of new sanction, cost recovery, deputation and ad hoc promotion and 14 (fourteen) vacancies were anticipated during the year 1991 -92 and as such a select panel of 24 (twenty-four) candidates were required. However, only 23 candidates were available in the feeder cadre to fulfill the eligibility criteria. Ail the 23 candidates had passed the written test prescribed under the Recruitment Rules. Of them the candidates who were found deficient in physical standards were not considered for promotion and the D.P.C. called for interview only those candidates who were found physically fit. Thereafter, names of five candidates including the applicant were placed by the Departmental Promotion Committee "in panel of promotion to the grade of Inspector of Central Excise on ad hoc basis. Thus, on scrutiny of record of the D.P.C. meeting, it is found that the applicant was selected for promotion in a common test held for promotion to the vacancies arising out of new sanction, cost recovery, deputation and ad hoc promotion. There is nothing to suggest that selection was meant for vacancies of the post of Cost Recovery Inspector on deputation only. That apart, though in the appointment order dated 30.10.1991 it was stated that the applicant was promoted to the grade of Inspector against cost recovery post/deputation vacancies, the applicant was never deputed to any cost recovery post. As has been slated earlier, admittedly, the applicant all along continued as an ad hoc Inspector in course of which he was posted to different divisions.

11. Relying on the Constitution Bench decision of the Hon''ble Supreme Court in The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, , it has been reiterated by this Court in Pradipta Kumar Mohapatra v. State of Orissa and Ors. (supra) that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. Decision in the above said cases were rendered while adjudicating rival claims of seniority of direct recruits and promotes to a cadre. In the present case also, after being promoted on ad hoc basis to the grade of Inspector after being subjected to scrutiny and tests, the applicant has continued in the promotional post without break in the department. Therefore, we find no justification to deny the applicant''s regularization in the post of Inspector with effect from the date of

initial ad hoc promotion. We, accordingly, direct regularization of the applicant''s promotion to the post of Inspector from 30.10.1991.

Both the writ applications are, accordingly, disposed of.

L. Mohapatra, J.

12. I agree.

