

**The Commissioner of Central Excise and Another Vs. the Chief Commissioner and Others**

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**Court :** Kerala

**Decided On :** Sep-26-2011

**Reported in :** 2011(4)KLT124(C.No.136)(SN); 2011(4)KHC362

**Judge :** C.N. Ramachandran Nair & P.S. Gopinathan

**Appeal No. :** O.P.(CAT) No.204 of 2010 (S) & W.P.(C) No.14028 of 2010 (S)

**Appellant :** The Commissioner of Central Excise and Another

**Respondent :** The Chief Commissioner and Others

**Judgement :**

COMMON JUDGMENT

O.P. (CAT) 204 of 2010 was filed under Article 227 of the Constitution of India. Whereas W.P.(C) 14028 of 2010 was filed under Articles 226 and 227 of the Constitution of India. Both the petitions are preferred against the order passed by the Central Administrative Tribunal (CAT) in O.A. 226 of 2009 dated 13.11.2009. Petitioners in O.P. (CAT) 204 of 2010 are the applicants before the Tribunal. Petitioner in W.P.(C) is the second respondent before the Tribunal. (Hereinafter the parties are referred to as they are arrayed in the application before the Tribunal). The brief facts leading to the petitions are as follows:

2. The second respondent joined the service of applicants 1 and 2 on 20.3.1989 as an Upper Division Clerk. He, who is one arm disabled, was promoted as Tax Assistant on 11.5.1994. Tax Assistant has got two channels of promotion. One channel is as Deputy Office Superintendent (DOS) which is a ministerial cadre. The other is Inspector of Customs, which is an executive cadre. Though the second respondent cleared the physical test for promotion as Inspector in 1993 and 1996 he was not considered for promotion on the ground that he is disabled. Being aggrieved, he moved the Tribunal below with an application as O.A. 288 of 1997. But he was nonsuited by order dated 20.9.1999. His earnest efforts to appraise the applicants that he was qualified to be promoted as Inspector yielded no result. The second respondent was defended by the applicants in the light of letter F. No. 32011/9/95/Ad III A dated 19.4.1996 in reiteration of letter F No. B-12017/5/92AD.III B dated 13.7.1993 which states that physically handicapped persons can neither be appointed/promoted to the executive post nor any benefits of reservation is admissible to them for appointment/promotion to the executive post. In the meanwhile, the 2<sup>nd</sup> respondent having lost hope of getting promotion as Inspector, opted for promotion as DOS and he was promoted as DOS. Simultaneously, the second respondent moved the first respondent, the Chief Commissioner for Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, (hereinafter referred to as "the Act 1995") alleging that he was denied promotion to the post of Inspector despite the specific prohibition contained under Section 47(2) of Act 1995. By Annexure A1 order dated 30.5.2008 the first respondent directed the applicants to re-examine the case of the second respondent for promotion to the post of Inspector on merits (against the general quota) between 19.4.1996 and 30.5.2001 and by extending the benefit of reservation/merit thereafter till the date of his exercising the option for promotion as DOS and to pass a speaking order within sixty days under intimation to the first respondent. Aggrieved by the said order, the petitioner approached the Tribunal below with the above application.

3. The Tribunal, by the impugned order, allowed the application in Part. Para 20 and 21 of the order reads as follows:

20. "Thus in so far as the period from 31.5.2001 till 30.05.2002, ie. Prior to the promotion as DOS, the case of the applicant has to be considered provided during this period, vacancy occurred against the slot allotted under the 3% quota for disabled persons (that too orthopedic disability). If not, there is no question of the applicant being considered under the reservation.

21. In so far as the period from 30<sup>th</sup> May 2002 onwards, till the post has been graduated to the state of Gazette post, the respondents shall verify whether there had been any vacancy that fell against the slotted point (for disabled as stated above) and if so, the case of the applicant should be considered and if found suitable and fit as per the norms laid down for the said post, the second respondent be technically reverted from the post of DOS (as in the case of Rajasekharan) and promoted as Inspector. If there be no vacancy under the slot for disabled, the applicant be informed accordingly."

4. Aggrieved by the above order, applicants preferred O.P. (CAT) 204 of 2010. Aggrieved by the stipulation contained in the last sentence of Para 21, the second respondent preferred the writ petition. The main objection against the relief sought by the 2<sup>nd</sup> respondent is that since the second respondent was promoted as DOS, he is no more a Tax Assistant to be promoted as Inspector.

5. The factual position that the second respondent was qualified in the physical test conducted in 1993 and 1996 is not disputed. The fact that the second respondent opted for promotion as DOS only when his attempt to get promotion as Inspector failed and he was promoted as DOS only on 31.5.2002 are also not disputed. The earnest attempt of the second respondent to get promotion to the post of Inspector was declined only for the reason that he was disabled by one arm. If he was not disabled he would have got promotion as Inspector as he was duly qualified in the physical test and there was vacancy. Now it is admitted that by Notification No.16/25/99-N1.1 dated 31.5.2001 issued by the Ministry of Social Justice and Empowerment, the post of Inspector is identified as a post where persons with disability can be promoted/appointed. That being so, even before the second respondent opting for promotion as DOS and promoted so, he could have been given promotion to the post of Inspector. But, the applicants were not good

enough to give what was legally due and the second respondent was persuaded to opt for the post of DOS. In effect, the second respondent was denied justice. Therefore, the objection that was raised by the applicants that since the second respondent was promoted and posted as DOS, he is not liable to be reverted to the post of Tax Assistant and then to be promoted as Inspector is devoid of merit. The reason is that the said circumstance is a creation of the applicants in utter disregard to the statutory provision and administrative instructions. The second respondent has no contribution. The error was committed by the applicants despite the earnest demand by the second respondent. Therefore, the second respondent can no way be asked to suffer for the error committed by the applicants.

6. In supersession of the earlier direction that physically handicapped persons are not eligible for promotion as inspector, Notification F. No. A1203/64/2005/ADB.3.B dated 27.11.2006 was issued by the Central Board of Excise and Customs stating that one arm affected person is entitled to be promoted as Inspector. Further, letter No.12034/62/2005/AD.3B dated 25.9.2007 issued by the Ministry of Defence would clarify that the benefit of promotion to persons with disabilities including one arm affected, with retrospective effect is permissible, It is basing upon these communications, the first respondent issued direction to the petitioners to consider the eligibility of the second respondent for promotion to the post of Inspector.

7. Adding to the above, there is statutory prohibition against denial of promotion on the basis of the disability. Sub-clause (2) of Section 47 of Act 1995 specifically stipulates that no promotion shall be denied to a person merely on the ground of his disability. For easy reference, we quote Section 47(2):

- ii. "No promotion shall be denied to a person merely on the ground of his disability:
- iii. Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

There is no case for the petitioners that the applicants are exempted under the proviso so as to decline the benefit of promotion as per the above proviso. On the other hand, by notification dated 31.5.2011 mentioned above, it is clarified that persons with disabilities are eligible for promotion as Inspector. In the light of the above statutory provision, we find that the denial of promotion to the second respondent is in clear violation of Section 47(2) of Act 1995. In this view also, Annexure A1 order of the first respondent is justified.

8. Section 33 of Act 1995 provides reservation for the disabled persons in appointment. A reading of Section 33 would be relevant for ready reference.

Section 33 reads as follows:

“Reservation of Posts:- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three percent for persons or class of persons with disability of which one percent each shall be reserved of persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy in the posts identified for each disability;

(a) provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

We also notice that by virtue of Notification No.1625/99/NI.I dated 31.5.2001, in case of promotions, reservation was made applicable with effect from 31.5.2001 up to 11.12.2003 ie. the date when the post of Inspector was classified as Group B - Non Gazetted post, obviously as an interim arrangement to make good the gap due to denial of promotion on ground of disability. That means, as stated earlier, when the second respondent was promoted as DOS on 31.5.2002, he was entitled to be promoted as Inspector as per the standing administrative instructions and by

the reservation as per letter referred above in addition to the prohibition contained under section 47(2) against the denial of promotion. It is ignoring the above, the second respondent was denied promotion as Inspector, but promoted as DOS. Therefore, the argument that since the petitioner was promoted as DOS, he cannot be reverted back to Tax Assistant and to promote as Inspector, is devoid of merit and bonafides. It is the applicants who had violated the statutory bar and denied the right accrued to the second respondent as per the instruction of Ministry of Finance and Ministry of Social Justice and Empowerment. The denial of promotion to the second respondent as Inspector and promoting him as DOS is, no doubt, arbitrary and illegal. In the above circumstances, we find that the first respondent had duly considered the claim made by the second respondent and rightly issued Annexure A1 order. The challenge made by the applicants against Annexure A1 order is without any merit.

9. We notice that by the impugned order, the Tribunal below had made certain stipulates for no good reason, instead of directing the petitioners to implement Annexure A1 order. That stipulation is not at all justified or warranted for the reason mentioned earlier. We find that the order of the Tribunal, to that extent, is therefore, not sustainable. The second respondent is entitled to get Annexure A1 order implemented in letter and spirit without anyway diluting it.

In the result O.P. (CAT) 204 of 2010 is dismissed. While allowing W.P.(C) 14028/2010 the order of the Tribunal impugned so far as it modified Annexure A1 order is set aside. Petitioners are directed to implement Annexure A1 order within one month. This judgment would be maintain in W.P.(C) 14028/2010 and a copy thereof shall be maintained in the other petition. No costs.

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