Central Administrative Tribunal
Madras Bench

OA/310/1111/2016 & MA/310/789/2017

Dated Friday the 8th day of June Two Thousand Eighteen
P R E S E N T
Hon'ble Ms. Bidisha Banerjee, Member (J)&
Hon'ble Mr. R.Ramanujam, Member(A)

1. Ravikumar Battini
2. Mangannadorasambha
3. Krishna G
4. Ramesh Vanaparthi
5. Masthan Vali Nama
6. G. Nagendra
7. Ejjirothu Srihari
8. Anjaneyulu Reddi
9. Pitta Ashok Kumar Reddy ... Applicants

By Advocate **M/s. Menon, Karthik, Mukundan & Neelakantan**

Vs.

1. Union of India, rep. by
The Secretary to Government
Department of Industrial Policy
Ministry of Commerce & Industry
Udyog Bhavan, New Delhi 110 001.

2. The Controller General
Patents, Designs and Trade Marks
Boudika Sampada Bhavan
First Floor, S.M. Road, Antop Hill, Mumbai 400 037.

3. The Director General
Council of Scientific & Industrial Research
Anusandhan Bhavan, New Delhi 110 001.

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(By Advocates **Mr. J. Vasu (R1&R2)**
Mr. M.L. Ramesh (R15 & R42 - R44)

ORAL ORDER

(Pronounced by Hon'ble Mr. R. Ramanujam, Member(A)

Heard both sides. The applicant has filed this OA seeking the following relief:-

> "To set aside (1) Order No. Lr. No. 2/8/2008-IPR-I dated 18.02.2014, issued by the 1st respondent (2) Order No. CG/F/1/2(11)2015/04 dated 28.05.2015, issued by 2nd respondent and consequently direct the respondents to confirm the provisional seniority list issued vide circular dated 14.01.2013 as the final seniority list with all consequential benefits flowing there-from and pass such further or other orders as may be deemed fit and proper."

2. It is submitted that the applicants were selected for appointment as Examiner of Patents & Designs on the basis of a competitive examination and their seniority was provisionally determined on the basis of their merit in terms of the marks secured in the examination. The order of merit was published by Annexure A7 dt. 14.01.2013. However, subsequently the respondents, after receiving objections from some of the candidates who figured lower down in the merit order that they were entitled to normalisation of marks as all the candidates had not appeared on the same subjects, took a policy decision and issued Annexure A9 communication dt 18.02.2014 by which the principles of methodology and preparation of seniority list were determined. It was also decided that the methodology mentioned therein should be adopted in future recruitments of Examiners of Patents and Designs through CSIR for finalisation of merit /seniority list of Examiners of patents and designs.

3. The grievance of the applicants is that once their seniority was determined on the basis of their merit which was published in the year

2011, the respondents could not take a policy decision to their detriment and apply it with retrospective effect. The respondents have relied upon the orders of the Hon'ble Madras High Court in WP No. 16915/2011 in the case of Anjana Sathyanath Vs Govt. of Puducherry and Ors that concerned admission in colleges which had no applicability to determination of seniority in services. Even assuming that a normalisation was permissible, it should have been declared upfront and done in a transparent manner before the merit list was drawn. The rules of the game could not be altered after the game had commenced and concluded. In as much as these principles violate the vested rights of the applicants, the impugned order is bad in law, it is contended. Learned counsel for the applicant seeks to rely on the judgment of Hon'ble Supreme Court in (2006) 10 SCC 346 in the case of Uttaranchal Forest Rangers Assn (Direct Recruitment) and Others Vs State of UP and Others and (2010) 7 SCC 560 in the case of Mohd. Raisul Islam and Others Vs Gokul Mohan Hazarika and Others. Accordingly, he would seek quashment of the impugned policy and the impugned seniority list at Annexure A12 along with reinstatement of Annexure A7 seniority list.

4. Learned counsel for the respondents would, however, argue that normalisation is a principle adopted by all recruitment agencies and seeks to rely on the order of the Hon'ble Supreme Court in Sunil Kumar and Ors Vs The Bihar Public Service Commission and Ors in Civil Appeal in the 8606-8610/2015 decided on 14.10.2015. It is contended that the applicants had no vested right on the basis of the original merit list which was published without adoption of the principle of moderation. It is also

submitted that the respondents had not taken any new policy decision but only decided the matter in accordance with law. As it was no new rule or policy, the alteration of the seniority list based on a retrospective application of the correct law was only fair and served the interests of justice. The applicants deserved to be awarded marks and placement as in the revised seniority list only. The previous list was erroneous as an important principle was overlooked inadvertently and, therefore, no grievance could be made out against its correction.

5. We have carefully considered the matter. It is not in dispute that when the applicants were appointed in 2012 pursuant to their success in the competitive examination held earlier, the principle of moderation/normalization had not been adopted for drawing up the combined merit list. Such principle came up accepted for the purpose of re-determining the seniority only after Annexure-A/9 Circular dated 18.2.2014 was issued. If the candidates from the different disciplines had appeared for a combined competitive examination for a merit based selection to a single cadre where the posts are not divided into specific disciplines, adoption of a normalization principle expost facto would upset the entire result inasmuch as some who had been selected on merit on the basis of a pre-normalisation score may be pushed down or even excluded while some others who had not even been selected earlier would have to be admitted in based on their post normalisation merit. Such a possible outcome would itself be a strong enough argument against adoption of normalization expost facto in a situation where appointments

had already been made and the appointees had been working for over two years.

6. In the present case, however, it appears that separate merit lists were prepared for each of the 13 disciplines to the extent of the number of posts advertised for each in 2010. A perusal of the discipline-wise distribution of the 257 posts advertised reveals that the number of vacancies varied from a high of 53 for Mechanical & Industrial Engineering to a low of 5 for Polymer Technology. It is not clear how many candidates appeared for the examination in each discipline and whether the intensity of the competition across disciplines was comparable.

7. Annexure-A15 correspondence between the 3rd and the 1st respondent dated 02.09.2013 reveals that in terms of Para 3(xi) of MOU which described the process for preparation of a single combined merit list based on the marks obtained in the main written examination, the 3rd respondent was not required to adopt any process of normalization in preparing the merit list. To justify the adoption of a process of normalisation retrospectively, the 1st and 2nd respondents have essentially relied on the methodology delineated in the judgment of the Hon'ble Madras High Court in WP 16915 of 2011. Accordingly, the highest marks secured by a candidate in each discipline were considered equal to 100%. The percentage of other candidates in the same discipline was adjusted relative to the highest marks secured by a candidate in the discipline.

8. A careful perusal of the aforesaid judgment of the Hon'ble High Court would, however, reveal that the matter considered therein was the validity of the normalization adopted by the Government of Puducherry

for the purpose of normalizing/equalizing the marks secured by persons from different State Boards to determine merit for the purpose of admission to professional courses. There was no competitive entrance examination as such. The method of normalization had been clearly delineated upfront in the information bulletin for admission to the first year professional degree courses. The Hon'ble Madras High Court, referring to various Apex Court decisions merely upheld the procedure already explained in the prospectus. It was held that the petitioner therein having been a candidate who applied for admission in terms of the prospectus which laid down the rule of selection, was bound by the same which in turn determined the merit of the candidate. However, in the instant case no such principle of normalization had been announced upfront either at the time of advertising the posts or while entering into an MoU with the 3rd respondent for conduct of the examination. To this extent, the procedure could not but be viewed as non transparent and accordingly its validity suspect in the eyes of law especially, when adopted retrospectively after the results were known and long after the appointment to the posts had been made.

9. It appears that the 1st and 2nd respondents decided to adopt the principle of normalization ex-post facto on the ground that the marks secured by candidates in the different disciplines varied widely to the extent that the highest marks secured in some disciplines fell below the cut off marks in some others. Accordingly, in the interest of justice, it was felt necessary to re-determine the merit for the purpose of combined seniority list, it is contended. However, the respondent have been unable

to point to any laid down law in this regard that whenever such a situation occurred, normalization should be adopted mandatorily or even justifiably and in the manner in which it has been adopted by them. The first and second respondents seek to rely on the judgments dated 14.10.2015 of the Hon'be Apex Court in Sunil Kumar & Others Vs. The Bihar Public Service Commission & Others in CAs No.8611-12/2015 in support of their justification of the principle of normalisation. However, a careful perusal of the judgment reveals that the Hon'ble Apex Court was in that case dealing with a procedure adopted by the recruitment agency i.e., the Bihar Public Service Commission in the matter of recruitment to the State Civil Services where candidates of different academic back ground appeared for compulsory common papers as well as optional ones and there was no separate merit list to be prepared for different disciplines based on the number of posts available exclusively for persons of each discipline. On the other hand, the following observations made in the said judgment would appear to question the methodology adopted by the respondents in the instant case:-

> "20. The entire of the discussion and conclusions in Sanjay Singh (supra) was with regard to the question of the suitability of the scaling system to an examination where the question papers were compulsory and common to all candidates. The deficiencies and shortcomings of the scaling method as pointed out and extracted above were in the above context. **But did Sanjay Singh (supra) lay down any binding and inflexible requirement of law with regard to adoption of the scaling method to an examination where the candidates are tested in different subjects as in the present examination? Having regard to the context in which the conclusions were reached and opinions were expressed by the Court it is difficult to understand as to how this Court in Sanjay Singh (supra) could be understood to have laid down any binding principle of law or directions or even guidelines with regard to holding of examinations; evaluation of papers and declaration of results by the Commission.** What was held, in our view, was that scaling is a method which was generally unsuitable to be adopted for evaluation of answer papers of subjects common to all candidates

resulted in unacceptable results. **Sanjay Singh (supra) did not decide that to such an examination i.e. where the papers are common the system of moderation must be applied and to an examination where the papers/subjects are different, scaling is the only available option. We are unable to find any declaration of law or precedent or principle in Sanjay Singh (supra) to the above effect as has been canvassed before us on behalf of the appellants.** The decision, therefore, has to be understood to be confined to the facts of the case, rendered upon a consideration of the relevant Service Rules prescribing a particular syllabus.

21. **We cannot understand the law to be imposing the requirement of adoption of moderation to a particular kind of examination and scaling to others. Both are, at best, opinions, exercise of which requires an indepth consideration of questions that are more suitable for the experts in the field.** Holding of public examinations involving wide and varied subjects/disciplines is a complex task which defies an instant solution by adoption of any singular process or by a strait jacket formula. Not only examiner variations and variation in award of marks in different subjects are issues to be answered, there are several other questions that also may require to be dealt with. Variation in the strictness of the questions set in a multi-disciplinary examination format is one such fine issue that was coincidentally noticed in Sanjay Singh (supra). A conscious choice of a discipline or a subject by a candidate at the time of his entry to the University thereby restricting his choice of papers in a public examination; the standards of inter subject evaluation of answer papers and issuance of appropriate directions to evaluators in different subjects are all relevant areas of consideration. **All such questions and, may be, several others not identified herein are required to be considered, which questions, by their very nature should be left to the expert bodies in the field, including, the Public Service Commissions.** The fact that such bodies including the Commissions have erred or have acted in less than a responsible manner in the past cannot be a reason for a free exercise of the judicial power which by its very nature will have to be understood to be, normally, limited to instances of arbitrary or malafide exercise of power. **(Emphasis supplied)**

10. The rationale for normalization when persons appear for examination in different disciplines in a combined competitive selection process is that perhaps some disciplines are high scoring while some others are low by virtue of the inherent nature of the subject matter. It is also possible that the difficulty levels of the question papers set in different disciplines are not uniform and, therefore, the marks scored by the candidates fail to be a true reflection of their relative merit. However, whether these assumptions are true and call for application of an

appropriate principle of moderation or scaling up as the case may be could only be decided by a body of experts. In the instant case, there is no evidence of any expert body going into the representations of the private respondents and arriving at the conclusion that certain subjects were indeed more scoring than the others or that the difficulty level of question papers in different disciplines were not comparable.

11. It is the third respondent herein who conducted the examination as the recruitment agency and prepared the merit list. It is interesting to note that not only was there no initiative from the third respondent to normalize the scores of the successful candidates but there was resistance to such a proposal on the ground that the MoU did not provide for any such procedure. As a recruitment agency, it was for the third respondent to conduct the examination in such a manner that the outcome would not call for normalisation or if it did, to adopt an appropriate procedure in consultation with experts even before declaring the results. It is certainly not for the first or second respondents who are not experts to devise a particular formula for normalisation that too, expost facto and seek an altered merit list from the recruitment agency.

12. In the absence of recommendations by an expert body, it is difficult to uphold the respondents' decision to mechanically normalize the marks in a particular manner only for the reason that the highest marks in some of the disciplines were below the cut off in some others. Such an outcome could have been due to a number of reasons other than presumed by the respondents. For instance, it is possible that the intellectual calibre of the persons competing across disciplines was not

necessarily comparable. It is possible that the extent and intensity of competition itself was different in different disciplines, determined by the number of posts advertised or the opportunities available elsewhere to the best in the disciplines. The perception regarding differential scope for future rise in the second respondent organization and the existence or absence of challenges and opportunities for particular disciplines therein would also have contributed to whether the best in the field entered the competition or not. If the inherent merit of the competitors across disciplines was not uniform, the outcome in terms of percentage scores could not be expected to be uniform. In such a situation, normalisation would confer an undue benefit to the less meritorious in one discipline over the more meritorious in another.

13. Assuming that the results did not reflect the true relative merit of successful candidates across disciplines, there could also be a view that normalization should not be done merely based on the highest marks in each subject but the actual distribution of marks among the top rank holders should also be taken into account. For example, it is possible that in one discipline, the topper might have scored 100% as an exception whereas the second rank holder may have scored only say 85% and others still below. On the other hand, in a discipline where the topper has scored only 45%, 10 other persons may have scored 42 to 44%. The manner in which normalization should be adopted in such cases where distribution is not consistent and the performance of the topper in one discipline is clearly an outlier would also be for the experts to ponder over. Accordingly, the matter ought to have been referred to an expert

the topper in every discipline was necessarily of equal merit and, therefore, deserved to be granted 100 marks and the performance of others should be assessed relative to the toppers' performance in the discipline was justified in the facts and circumstances after examining the difficulty level of the question papers set as also consensus, if any, regarding the relative ease or otherwise of scoring of marks in different disciplines.

14. Even if an expert body, after considering the whole issue is of the view that normalization/ modernization/scaling is called for and recommends the manner in which it should be done, it ought to be invariably adopted at the time of selection itself while finalising the merit list. There could be no justification to first announce the results and declare the merit list and then see how it could be altered through normalisation as such a procedure is bound to invite criticism and allegations of favouritism and prejudice.

15. From the available records, it appears that the respondents have adopted the normalization principle without much application of mind, without obtaining expert opinion on the subject and based only on their perception of what is fair and just. On the other hand, the 3rd respondent, CSIR which is an expert body and which conducted the examination had not favoured normalization in the instant case as revealed by Annexure-A/15 letter. It is not clear if the third respondent was categorically of the view that normalisation was not at all warranted in the instant case or it was opposed only for the technical reason that

such a procedure was not provided for in the Rule. If the examination had been conducted in a manner that provided an equitable opportunity to candidates across disciplines to establish their relative merit vis a vis others, then such a procedure could not be adopted by the employer post-appointment.

16. It is further seen that a provisional seniority list of Controllers & Examiners in Patent Office as on 01.01.2013 was circulated on 14.01.2013 by Annexure-A/7 Circular. It is clear from the Circular that it only solicited action to bring to the notice of the second respondent discrepancies, if any, in the seniority list. The publication of the provisional seniority list was not for the purpose of inviting suggestions to alter the principles to be adopted to determine seniority. The objections raised by the private respondents based on which the seniority list was altered were not in the nature of pointing to discrepancies in the list but raised fundamental issues based on their own perception of objectivity and fairness. No pre-existing rule or law to determine inter-se seniority among the same batch of direct recruits was relied upon in raising such objections. As such, we are of the view that there was no justification for the respondents to review the whole matter for retrospective application of a principle arrived at ex post facto without consulting the recruitment agency and to the detriment of the applicants who could legitimately argue that a condition of their service had been altered in the process to their disadvantage after they had already served for two years in the organisation.

17. In view of the above, we hold that Anneuxre-A/9 policy Circular dated 18.2.2014 could only be applied to examinations to be held in future, if at all, a body of experts duly constituted by the first respondent recommends such process to be adopted after due examination of all relevant issues. If normalisation or scaling is intended to be adopted as a matter of policy, it should be made transparent and the advertisement calling for applications must disclose that recruitment agency reserved its rights to adopt an appropriate process thereof as a part of the scheme of evaluation. Further, such a process should be adopted by the recruitment agency before declaration of results and not by the employer after entry into the service. Accordingly, the impugned seniority list at Annexure-A12 is quashed and set aside. The respondents are directed to re-fix the seniority of the applicant and the private respondents based on their original position in the merit list published at the time of their appointment.

18. The OA is allowed with the above direction. M.A. for vacation of stay stands disposed of in the light of the above order.