

1
CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.

OA No. 473/2017

Date of decision : 18.03.2020.

Coram: R. Vijaykumar, Member (A).
Ravinder Kaur, Member (J).

Shri Vijay Nhanu Warang,
Age 54 years,
S/o Nhanu Warang,
Working as Superintendent,
ITAT, Pune Bench,
residing at A/2, 205, Borivli Shyamkrupa
CHS Ltd., Borivali (West),
Mumbai- 400 091.

... Applicant.

(By Advocate Shri S V Marne).

Versus

1. Union of India,
Through the Secretary,
Ministry of Law & Justice,
Department of Legal Affairs,
'A' Wing, Shastri Bhavan,
New Delhi- 110 001.
2. The President,
Income Tax Appellate Tribunal,
Pratishtha Bhavan, 3rd & 4th Floors,
101, Maharshi Karve Marg,
Mumbai- 400 020.
3. The Registrar,
Income Tax Appellate Tribunal,
Pratishtha Bhavan, 3rd & 4th Floors,
101, Maharshi Karve Marg,
Mumbai- 400 020.

... Respondents.

(By Advocate Shri R R Shetty).

Reserved on : 11.06.2019.

Pronounced on: 18.03.2020.

Order

Per : R. Vijaykumar, Member (A).

This application has been filed on 01.08.2017 under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

"a. This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same quash and set aside the impugned transfer order dated 26.07.2017 reverting the applicant from the post of Superintendent to the post of Assistant as well as the order dated 27.07.2017 seeking to transfer the Applicant from Pune Benches to Kolkata Bench with all consequential benefits.

b. This Hon'ble Tribunal may graciously be pleased to hold and declare that the Applicant has been validly promoted to the post of Superintendent by order 24.07.2012.

c. Costs of the application be provided for.

d. Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

2. In this OA, the applicant had challenged the respondents' orders of reversion from the post of Superintendent to that of Assistant and also a transfer order in the grade of Assistant from Pune to Kolkata. Subsequently, the respondents have filed a reply on 20.07.2018 in which they have stated that the proposed transfer has been modified by declaring his Headquarters at Pune. In the face of the transfer orders having been

modified, the reliefs claimed by the applicant are accordingly limited to the aspect of reversion of the applicant from the post of Superintendent through conduct of a Review DPC.

3. The applicant had commenced service with the respondents as LDC on 17.07.1982 and was promoted to the post of UDC on 02.07.1993. Thereafter, he became eligible for promotion as Head Clerk on completion of five years regular service but subject to availability of vacancy. The respondents abolished eight posts of UDC who were handling complex duties and getting special pay and instead created an equal number of posts of Assistant in the pay scale of Head Clerk in orders of respondent No. 1 dt. 30.11.2000 (Annexure A-4). The posts were distributed in four zones with Mumbai getting four posts of Assistant, Delhi with two, Calcutta with one and Chennai with one post. The applicant and seven others were then promoted as Assistant in orders of respondents dt. 17.06.2002 (Annexure A-6) according with the zonal allotment of these posts and on 21.06.2002, four days later (Annexure A-9), two persons at Kolkata and Bangalore were promoted as Head Clerk. The person promoted in Kolkata as Assistant was junior

to his senior at that station who was promoted as Head Clerk at Kolkata. Similarly, the person promoted as Assistant in Mumbai, although senior to both the persons promoted as Head Clerk at these other locations was clearly not located either at Kolkata or at Bangalore. No objections, if any, have been averred or placed on record by applicants. The applicant was at S.No. 29 in the Seniority List of UDC as on 01.02.2002 (Annexure R-1) and was well below the two persons promoted as Head Clerk. No contentions are raised to this list even now. This observation is relevant in the context that the applicant suggests that he was compelled to take the promotion as Assistant whereas respondents have argued that he had made a voluntary option for being promoted as Assistant to take advantage of the available vacancies pending the availability of future vacancies of Head Clerk.

4. Two persons from these Assistants later opted to be reverted as UDC on 02.01.2004 and were considered for the posts of Head Clerks at their locations at Kolkata and Mumbai respectively and came to be promoted on 05.01.2004. Further posts became available only on 01.06.2005 when the

immediate junior of the applicant at Mumbai was promoted as Head Clerk. The applicant has not stated if he had filed a protest against this promotion to his junior at that stage to this post drawing an equivalent Pay Scale and grade pay which the applicant had already obtained by becoming an Assistant as early as 2002. Perusal of the pleadings filed by the applicant show that the respondents at Mumbai office formulated a proposal for merging certain posts of Superintendent, Office Superintendent, Senior Accountant, Head Clerk, Assistant and UDC and established a reasonable channel of promotion in their letter dt. 02.08.2005 (Annexure A-8). This proposal contemplated merging the posts of Office Superintendent and Senior Accountant as also of Head Clerks and Assistants so as to create four levels of Secretariat cadre and the proposals intended that adequate promotional avenues could be created in this manner. Thereafter, correspondence ensued with the Government of India and in letter dt. 20.06.2007, as a response to queries of the Ministry, revised draft Recruitment Rules for various posts were proposed for consideration. Meanwhile, it is seen that the

office prepared a seniority list of Head Clerks of the ITAT as on 01.05.2003[Annexure R-3A] and one of Assistants for the same date(page 139 to 141) and then separate seniority lists of Head Clerks and for Assistants as on 01.02.2005 which was prior to the proposal for merger of posts sent in August 2005 and further, another list combining Head Clerks and Assistants as on 01.01.2006(Annexure R-3)(pg. 137 & 138). The seniority list prepared on 01.01.2006 is at complete variance with the seniority lists of 2003 and of 2005 and now includes the applicant and the other Assistants, totalling six persons who are interspersed between and have gained seniority over the Head Clerks promoted in 2002, 2004 & 2005. However, the Assistants have been marked with an asterisk against their names and it is seen that whereas the two Head Clerks promoted in 2002 were at S.Nos. 23 & 27 and the two Assistants, who had reverted and got promoted in 2004 were at S.Nos. 33 & 34, the rest who remained as Assistants were now at S.Nos. 22, 24, 25, 26, 28 & 29. The respondents have challenged the existence of this seniority list. It is also clear from the papers produced that the applicants

have not shown whether this seniority list was ever communicated to the affected parties and whether any protests were made because it is evident on the face of the record that the persons promoted as Head Clerks earlier had been downgraded by virtue of this seniority list. We do not enter into the allegation of abuse of access that the respondents urge against the applicant since that is not within the domain of this examination. In any case, after the Sixth Central Pay Commission recommendations (w.e.f. 01.01.2006) were accepted in 2008, the posts of Office Superintendent, Head Clerk and Assistant all obtained the same Pay Scale of PB-II + Grade Pay of Rs. 4200/- although the Office Superintendent was in a higher scale previous to the Sixth Pay Commission.

5. Subsequent to this, a DPC appears to have been conducted in 2008, inter alia, for the post of Office Superintendent and all the Assistants including the applicant found place in the extended panel which was prepared based on zone of consideration of sixteen(16) persons that evidently referred to this seniority list of the year 2006. None of the Assistants including the

applicant obtained promotion at that point of time although they were considered fit so also the two Head Clerks promoted in 2002, one of whom later appears to have been promoted from the extended panel since the Assistant who had been shown as senior to him had since retired. Another DPC was held in the year 2010 for vacancies of the year 2009 & 2010 and in this DPC, three Assistants were identified for promotion as Office Superintendent and after excluding the second Head Clerk promoted in 2002 who was placed in the extended panel, the remaining two Assistants also found place in the extended panel. Subsequently, in orders dt. 24.07.2012 (Annexrue A-12), four Assistants including the applicant were promoted with immediate effect from the post of Office Superintendent/Assistant as Superintendent on regular basis. It is noted that even at this stage, no final approval for merger of posts or for amendment of Recruitment Rules had emerged in the Government. However, after inquiring of a complaint received by respondents, orders for review were passed and then on 05.07.2017, a review DPC was held for the DPC earlier held on 19-20 July, 2012 which had led to the promotions

ordered on 24.07.2012 and this DPC recommended and consequent orders were passed for the applicant and three of his seniors in the Assistant cadre who had since retired and who had also been promoted as Superintendent, to be reverted to their substantive posts, in impugned orders dt. 26.07.2017.

6. Heard learned counsel for the applicant and respondents at length. The arguments of applicant rest on the factual elements of this case as set out in various documents from 2002 onwards until 24.07.2012 when the applicant was promoted on regular basis to the post of Superintendent and the impugned reversion orders of 26.07.2017 which followed on the basis of a review DPC.

7. The applicant has argued that it was the respondents who had created the posts of Assistant in 2002 and had not included this post in the feeder cadre for the post of Office Superintendent and Superintendent. Further, it was the respondents who promoted the applicant to the post of Assistant although he did not seek or apply for promotion. He submits that two of his seniors in the grade of UDC had later declined promotion and

after losing their seniority in the grade of UDC, were subsequently granted promotion to the post of Head Clerk from 2004. They had to bear the financial consequences of such refusal and delayed promotion and this would have been the consequence for any employee including the applicant, if they had refused promotion to the post of Assistant. Thereafter, he claims that the respondents always treated the post of Assistant on par with Head Clerk and issued combined seniority list for as long as 15 years and cannot now change stance and argue that the post of Assistant is not a feeder category for promotion to Office Superintendent or Superintendent. He also argues that he has been enjoying the post of Superintendent from 24.07.2012 until impugned orders dated 26.07.2017 for five years and cannot be reverted unceremoniously.

8. On the aspect of two persons, who were promoted as Assistant on 01.07.2002 and getting reverted as UDC on 02.01.2004 and thereafter being promoted as Head Clerk on 05.01.2004, the applicant explains in rejoinder that these two persons exploited the opportunity available at the Kolkata and Amritsar Benches. Smt. Tarafdar was

promoted as Assistant on 17.06.2002 and when one vacancy of Head Clerk was created at Kolkata in 2003, she reverted and was immediately promoted as Head Clerk. In Shri R C Lakanpal's case, he accepted promotion to the post of Assistant by transfer from Amritsar to Delhi and when one post of Head Clerk was created at Amritsar in 2003, he opted for reversion and immediate promotion despite the fact, he alleges, that three other seniors to Shri R C Lakanpal who had been promoted as Assistant were not given such an option of reversion and promotion. He admits that Shri R C Lakanpal encashed the opportunity of a vacancy of Head Clerk at Amritsar. He also claims that when a vacancy arose at Mumbai in 2005, he, along with one Smt. Menon, had requested the Deputy Registrar orally for consideration of reversion-cum-promotion but was refused. He contends that the respondents had not made timely amendments in the Recruitment Rules and he cannot be punished for their mistakes. He denies any mischief or manipulation on his part.

9. Learned counsel for the applicant also referred to the subsequent orders of the respondents merging the posts of Head Clerk along

with Assistant that was held by the applicant prior to his promotion to the post of Office Superintendent without any change in pay scale and grade pay in orders F.No. A-60011(1)/19/2015-Admn.III(LA) dt. 26.07.2017(Annexure A-19). These orders were given immediate effect and in later orders dt. 06.02.2019, the merger was given effect from 01.01.2006 which is the date of the Sixth Pay Commission which had recommended the same pay scale for all the three posts. These later orders of 06.02.2019 were also made subject to the condition that merger will not create any administrative difficulty or any demand for higher scale. The learned counsel for applicant submits in an additional affidavit filed on 23.02.2019 by reference to the orders for merger of posts and argues that the applicant had completed six years of regular service in the merged post of Office Superintendent-Head Clerk-Assistant and, therefore, was eligible for promotion even from 01.01.2012 which is prior to the date on which he was promoted on 24.07.2012 by the original DPC. On this basis, this OA should be allowed and reliefs granted by quashing the orders of reversion.

10. In reply, the respondents have argued that since there was no immediately available vacancy in the post of Head Clerk where the applicant could be promoted from the post of UDC in the year 2002, he had opted for promotion as Assistant and it is noted that he is the junior most of the eight persons so promoted as Assistant. They refer to the two cases in Kolkata and Amritsar who had opted for reversion as UDC on 02.01.2004 and subsequent promotion in situ as Head Clerk on 05.01.2004 and emphasized that the applicant was fully aware of these matters but did not opt for reversion and the subsequent promotion. They also stress that the applicant could have been promoted when the vacancy of Head Clerk arose on 01.06.2005 and when the immediate junior of the applicant came to be promoted but the applicant evidently took a conscious decision to continue as Assistant to which he had already been promoted on 17.06.2002 itself and despite being aware that the Assistant was not a feeder cadre for the post of Office Superintendent/Superintendent. They submit that the applicant was illegally and de hors the Rules promoted to the post of Superintendent on 24.07.2012 since the post of Assistant is not in

the feeder cadre for promotion. With regard to the post of Assistant, they refer to the letter number F74-Ad(AT)/2003 dt. 05.05.2003 (Annexure A-5) which directed filling up of the posts on seniority-cum-merit basis but never stated that it was a supervisory post which could be compared with that of Head Clerk. They argue with reference to the submissions in OA, especially para 4.4, that the applicant was fully aware of the delay in amending the Recruitment Rules and the processes being gone through but also argue that the applicant never made any representation to highlight this status of the Assistants and bring the matter to the notice of the various DPCs in which, they allege that he was involved in preparing proposals for promotion. They submit that the seniority list alleged to have been issued on 01.01.2006 (Annexure R-3) is not authenticated by any responsible officer and lists have been prepared by the applicant himself for placing before the DPC since he was himself the dealing Assistant and this list did not conform to the provisions of Recruitment Rules. This fact is also not brought to the notice of the various DPCs. They also point out that not only the

applicant but other persons who had been promoted from the post of Assistant had also been reverted and there was no discriminatory treatment.

11. In sur-rejoinder filed by the respondents, the respondents emphasized that the applicant's claim that he had gone along with another Assistant, Smt. N K Menon, and discussed reversion-cum-promotion with the Deputy Registrar at Mumbai and further, that the Deputy Registrar gave them some assurances, is not supported by any evidence and is entirely baseless considering that any such view would be quite against the legal position of Recruitment Rules. Further, they submit, this also shows that the Applicant was very much aware of the legal position and the fact that the Assistant was not a post in the feeder cadre for promotion. With regard to the position having altered subsequent to merger of posts ordered w.e.f. 01.01.2006, the respondents have filed an additional affidavit in which they argue that although the posts of Office Superintendent, Head Clerk and Assistant have been merged w.e.f. 01.01.2006, there has been no change in the Recruitment Rules which still need to be modified. Further, the order dated 08.02.2019 itself states

that the said order should not cause any administrative difficulties. In the present case, the applicant and certain others were promoted from the post of Assistant to that of Superintendent without reference to the Recruitment Rules, and therefore, cannot be sustained.

12. Learned counsel for the respondents refers to his pleadings and argues that the issue of manipulation of Seniority List and the Agenda for DPC proceedings including the support given to the DPCs held after 2008 came to light upon receipt of a written complaint from a UDC in 2014 who had subsequently been promoted as Office Superintendent and it was discovered that the complaint was correct and therefore, the respondents had initiated action for a revised DPC which had then led to the impugned orders. He conceded that the three posts had now been merged w.e.f. 01.01.2006 but these were still subject to the condition that the merger cannot create any administrative difficulty. Therefore, the applicant could have been entitled for his promotion only in his turn and not in the manner that had been done and therefore, the conduct of

revised DPC was very much in order.

13. The learned counsels have been heard and since the matter is entirely based on facts residing in documents and all these papers have been contained in the pleadings placed before us, these have been accordingly carefully perused for passing orders.

14. The applicant claims that the respondents are responsible for promoting him as an Assistant in the year 2002. However, an option came up in the year 2004 itself although at different stations of Amritsar and Kolkata for Assistants who opt for reversion and then get immediately promoted as Head Clerk. Two of the applicant's senior in the cadre of Assistant took this opportunity and the applicant has not stated if any objections were ever raised to their movement in this manner through the cadre. In his case, their comparison does not help since both were senior to the applicant. However, the fact that such reversion and promotions were possible and was evidently in the notice of the applicant suggests that in the year 2005, he could have exercised Such an option and demanded equal treatment by a formal application. It appears

from the relation of the facts by the applicant that no such application was made in writing nor does it appear that the applicant raised any protest when his junior at Mumbai was promoted in the year 2005. Therefore the actions of the applicant belie his claim that he was involuntary promoted by the respondents and that he retained the post of Assistant only by compulsion and could not exercise the option of reversion-cum-promotion which he himself submits was available. As respondents also point out, even assuming that the applicant was not in-charge of administrative positions subject in the Tribunal, it appears to be quite evident that he was aware of the legal position of Recruitment Rules in regard to the disabilities attached to the post of Assistant.

15. Coming to the seniority list alleged to have been issued on 01.01.2006, we have noted previously that the Assistants appear to have regained their seniority despite the fact that certain others had been promoted as Head Clerk from the post of UDC in the period prior to 01.01.2006 and to which the applicants had not raised any objections. No evidence has been let in to show that seniority list was ever published

and objections have been invited thereby since this seniority list is critical for consideration for promotion to the then post of Office Superintendent and of Superintendent. The said seniority list is also in error considering that it cannot include Assistants in the seniority list along with Head Clerks when the Recruitment Rules deny the opportunity for Assistants to be included in the feeder cadre for promotion. In the face of the obvious discrepancies in the list and the fact that list is contradictory to the Recruitment Rules, this seniority list, alleged to have issued on 01.01.2006, cannot be on legal and reasonable basis for any decisions of subsequent DPCs and when it is lacking in basis, it must be quashed and is accordingly quashed without going into the circumstances under which it has been issued.

16. In consequence, therefore, all promotions as Head Clerk prior to 01.01.2006 will confer on such promotees, precedence over any Assistants who could claim to be in an equivalent cadre consequent on merger of Assistants and Head Clerks with the post of Office Superintendent, however re-designated. In such an event, the applicant who are Assistants will naturally take lower rank

compared to those who have already been promoted as Head Clerk on 01.01.2006.

17. The orders of the respondents issued on 06.02.2019 merging the posts of Head Clerk and Assistants with that of Office Superintendent with effect from 01.01.2006 has been made subject to the condition that the merger will not create any administrative difficulty or any demand for higher scale. Without such a condition, the ranking of officials as on 01.01.2006 should be the basis for all subsequent actions. However, that does not bar the correction of any decisions of DPCs that have been taken de hors the Recruitment Rules and by reference to an incorrect seniority list. In the circumstances, the DPCs held for the years 2008(in 2008) and for the years 2009 and 2010(in 2010) will need to be corrected in case any of the six Assistants who remained in that position including retired persons such as Shri Pawar had secured any promotion in preference to those who were genuinely eligible as per corrected seniority list that should be prepared as on 01.01.2006. Therefore, the respondents shall re-examine the decisions of these two DPCs to consider if any review is necessary and if so, review DPCs shall

necessarily have to be conducted. With regard to DPC of 24.07.2012 (Annexure A-12), the respondents have already conducted review DPC and passed the impugned orders.

18. The reliefs claimed in this OA are evidently without any legal basis. While dismissing this OA as devoid of merits and after quashing the seniority list of 01.01.2006, respondents are directed as above to carry out the aforesaid corrections including conduct of Review DPCs within four months of receipt of these orders. Interim orders already granted are withdrawn with immediate effect. Parties may bear their respective costs.

(Ravinder Kaur)
Member (J)

(R. Vijaykumar)
Member (A)

Ram.

JD
07/10/2020

