

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A. No. 359/87

198

T.A. No. --

DATE OF DECISION 28-4-1993

M.H.Mahendra

Petitioner

Mr.M.A.Mahalle

Advocate for the Petitioner(s)

Versus

U.O.I. & Ors.

Respondent

~~Mr.A.¹.Bhatkar for Mr.M.I.Seth~~ Advocate for the Respondent(s)
for R.No.1 to 2 and Mr.V.M.Bendre for R.4 to 6

CORAM :

The Hon'ble Mr. M.Y.Priolkar, Member(A)

The Hon'ble Mr. V.D.Deshmukh, Member(J)

1. Whether Reporters of local papers may be allowed to see the Judgement? *yes*
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the Judgement? *no*
4. Whether it needs to be circulated to other Benches of the Tribunal?

MGIPRRND-12 CAT/86-3-12-86-15,000

V.D. Deshmukh
(V.D.DESHMUKH)
M(J)

(25)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A.359/87

M.H.Mahendra,
201/B, Victor Apartments,
Bawdi Cross Lane,
Marve Road, Malad(West),
Bombay - 400 064.

.. Applicant

-versus-

1. Union of India
through
Secretary
Ministry of Industry,
(Department of Industrial
Development)
Udyog Bhavan,
New Delhi - 110 001.
2. Controller-General of
Patents, Designs and Trade
Marks,
Old C.G.O. Building,
101, Maharshi Karve Road,
Bombay - 400 020.
3. Shri H.P.Shukla,
Assistant Registrar of
Trade Marks,
Trade Marks Registry Branch,
15/1, Chowringhee Square,
First Floor,
Calcutta - 700 069.
4. Shri K.K.Sharma,
Assistant Registrar of
Trade Marks,
Trade Marks Registry,
Old C.G.O. Building,
101, ~~Maharshi~~ Karve Road,
Bombay - 400 020.
5. Shri V.Ravi,
Senior Examiner of Trade Marks,
Trade Marks Registry,
Old C.G.O. Building,
101, Maharshi Karve Road,
Bombay - 400 020.
6. Miss Beena Mithal,
Senior Examiner of Trade Marks,
Trade Marks Registry,
Old C.G.O. Building,
101, Maharshi Karve Road,
Bombay - 400 020.
7. Shri U.S.Sharma,
Senior Examiner of Trade Marks,
Trade Marks Registry Branch
Okhla Industrial Estate,
New Delhi - 110 020.
8. Shri M.C.Gupta,
Senior Examiner of Trade Marks,
Trade Marks Registry,
Old C.G.O. Building,
101, Maharshi Karve Road,
Bombay - 400 020.

9. Shri R.V.Yadav,
Senior Examiner of Trade Marks,
Trade Marks Registry,
Old C.G.O. Building,
101, Maharshi Karve Road,
Bombay - 400 020. .. Respondents

Coram: Hon'ble Shri M.Y.Priolkar,
Member(A)

Hon'ble Shri V.D.Deshmukh,
Member(J)

Appearances:

1. Mr.M.A.Mahalle
Advocate for the
Applicant.
2. Mr.A.I.Bhatkar
for Mr.M.I.Sethna
for respondents
No.1 to 2
3. Mr.V.M.Bendre
advocate for
Respondents No.
4 to 6.

JUDGMENT:
(Per V.D.Deshmukh, Member(J))

Date: 28-4-1993.

The applicant has filed this application against the alleged wrong seniority in the cadre of Senior Examiner of Trade Marks and making a grievance that he was denied the promotion to the grade of Assistant Registrar of Trade Marks. The applicant moved the application for interim relief and on 12-5-1987 when this Tribunal passed an interim order that any promotions to the post of Assistant Registrar of Trade Marks will be subject to the result of this application and the respondents were directed to make a mention about this position in subsequent promotion orders if any. This interim relief came to be continued till the final hearing of this application.

2. In view of certain developments during the pendency of this application the applicant filed amendment petition which was

allowed and the amendments were consequently carried out. This amendment was as a result of the disciplinary proceedings started against the applicant resulting in minor penalty which was ultimately quashed by this Tribunal by the judgment dt. 13-2-1992 in O.A.239/89.

3. The respondent No.2 in the application, during the pendency of the application, issued an order dt. 21-1-1992 promoting Ms.Beena Mithal, Shri U.S.Sharma, R.V.Yadav and H.L.Nariyani to the post of Assistant Registrar of Trade Marks. The applicant therefore filed an amendment application making his grievance against these promotions which was allowed and the consequent amendment was carried out. In view of these developments the applicant added two more reliefs, without prejudice to the earlier reliefs that the applicant may be promoted to the post of Assistant Registrar of Trade Marks from 21-1-1992 and that the applicant be confirmed in the cadre of Senior Examiner of Trade Marks with effect from 30th October,1984.

4. The applicant belongs to Scheduled Caste. The applicant was initially appointed as Assistant Examiner of Trade Marks in the Trade Marks Registry, Bombay. On 16-11-78 he was selected by the Union Public Service Commission as Examiner of Trade Marks against the reserved post. He was selected as the Examiner of Trade Marks along with others. Admittedly prior to his selection by the U.P.S.C. as Examiner of Trade Marks, S/Shri J.P.Shastri, M.N.Vasave, P.N.Havanur, S.G.Borkar, K.N.Naik, I.S.Parkar

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and H.P. Shukla were working as Examiner^s of Trade Marks in officiating capacity in the first seven points available in the roster of Examiner of Trade Marks. It is the contention of the applicant that he ought to have been shown as the seniormost amongst the Examiners of Trade Marks.

5. In 1981, nine posts of Examiner of Trade Marks were upgraded in pursuance of the Third Pay Commission's recommendation to provide more promotional opportunities to Examiners of Trade Marks and a new cadre i.e. Senior Examiner of Trade Marks (Group-A Gazetted) was created under the Recruitment Rules, 1981. In all six posts out of the nine senior grade posts were to be filled in by direct recruits and three were to be filled by the promotees from the cadre of Examiner of Trade Marks on the recommendations of the UPSC and Departmental Promotion Committee. On 26-9-1981 three persons were appointed on ad-hoc basis as Senior Examiner of Trade Marks, but admittedly these three persons were senior to the applicant. Thereafter on 13-10-1981 Shri K.K. Sharma, respondent No.4 was appointed on ad-hoc basis in the same senior grade. The applicant was appointed on ad-hoc basis as a Senior Examiner of Trade Marks on 28-12-1981. Ms. Beena Mithal respondent No.6 was also appointed along with him on ad-hoc basis on the same date. Thus the appointments made to the Senior Grade so far were all on ad-hoc basis.

6. The U.P.S.C. advertised six posts of Senior Examiner of Trade Marks for direct

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recruitment ~~on~~ 6-2-1982 and one post was reserved for Scheduled Caste. The applicant applied in pursuance of the said advertisement and was selected for the said post along with other five candidates on 12-10-1982.

7. Pursuant to the above selection the applicant joined as a Senior Examiner of Trade Marks(Group A - Gazetted) in the reserved post w.e.f. 30-10-1982. It is the admitted position that there was only one post which was reserved for Scheduled Caste and the applicant was the only Scheduled Caste candidate who was selected as a direct recruit to the post of Senior Examiner of Trade Marks. It is the contention of the applicant that he should have been shown in the seniority list at No.1 as a result of the selection and appointment as a direct appointee. It is necessary to point out one relevant circumstance at this stage only viz. ^{that is} before the candidates were considered for promotion to the post of Asstt. Registrar of Trade Marks the option was offered to the applicant, whether he wanted to be treated as a direct recruit in the grade of Senior Examiner of Trade Marks or a promotee, and admittedly the applicant opted that he should be treated as a direct recruit.

8. After being selected and appointed as a direct recruit as Senior Examiner of Trade Marks the applicant made various representations as regards his seniority in the cadre of Examiner of Trade Marks and also in the cadre of Senior Examiner of Trade Marks. He claims¹ that he should

also be confirmed retrospectively w.e.f. 16-11-80 in the cadre of Examiner of Trade Marks. The list of provisional seniority of Senior Examiners of Trade Marks became available at the office of the Controller General of Patents, Designs and Trade Mark on 17-5-1985. This provisional seniority list was drawn as on 1-1-1984. In this provisional list (Annexure A-21) the applicant was placed at Sr.No.7. The applicant was aggrieved by this placement and made representations claiming that the provisional seniority list may be cancelled or in any case it be corrected and the applicant be shown as No.1 in the rank of Senior Examiner of Trade Marks. This representation was made on 30-5-1985 which was followed by other representations. It appears that there was correspondence regarding the option offered to the applicant as well. It is an admitted position that the applicant had given the option that he should be considered as a direct recruit in the cadre of Senior Examiner of Trade Marks. The applicant was finally informed by the O.M. dt. 15-1-87 (Annexure A-36) that the seniority as fixed and communicated under the O.M. dt. 26-11-86 shall be final and binding in all respects and no further correspondence in the matter shall be entertained. It is thereafter the applicant filed the present application.

9. In the original application the applicant claimed that the seniority list drawn as on 1-1-1984 be quashed and the applicant

accorded seniority at No.1 in the cadre of Senior Examiner of Trade Marks, ^{and} that he should be promoted as Asstt. Registrar of Trade Marks in place of Shri H.P.Shukla who ^{was} ~~works~~ junior to the applicant in the same cadre. He further ^{ed} claim that he be promoted to the post of Asstt. Registrar in the vacancy available on 1-5-1984 and without prejudice to this claim he be promoted w.e.f. 22-10-1986 in place of Shri K.K. Sharma. He also claimed retrospective confirmation in the cadre of Examiner of Trade Marks w.e.f. 16-11-80. As has been stated earlier by way of his amendment application he added the prayer without prejudice to his earlier reliefs that he be promoted to the post of Assistant Registrar w.e.f. 21-1-1992 and be directed to be confirmed in the cadre of Senior Examiner of Trade Marks w.e.f. 30-10-1984. He made certain other claims in view of the developments after the filing of this application ^{Vide} ~~and~~ the amendment ⁱⁿ which was allowed. He also claims the consequential benefits.

10. The respondents No.1 and 2 i.e. the official respondents filed their reply. The application was opposed by the respondents No.4,5, and 6 who are the private respondents and Mr.V.M. Bendre appeared for them. Respondent No.3 filed his reply but no one appeared for him. We heard the learned advocates for the parties. The official respondents do not dispute the basic facts as regards the initial appointments of the applicant and others in the grade of Examiner of

Trade Marks. They also accept that as per the recommendations of the IIIrd Pay Commission nine posts of Examiners were upgraded as Senior Examiners of Trade Mark Group-A. These posts were to be filled in as follows:-

- (i) 33 1/3 % by promotion, failing which by deputation(including short term contract)and failing both by direct recruitment;
- (ii) 66 2/3 % by direct recruitment.

The field for the promotion is the cadre of Examiner of Trade Marks with three years regular service in that grade. These respondents further admit that in 1981 ad-hoc appointments to the grade of Senior Examiners were made pending revision of recruitment rules which were finally notified in January, 1982. They further contend that this ad-hoc appointments were made from among those Examiners who had rendered atleast three years service. The applicant completed three years of service as Examiner of Trade Marks in November, 1981 and it is the case of both the parties that he was appointed as Senior Examiner on ad-hoc basis in December, 1981.

11. According to these respondents the cadre of Senior Examiner came to be filled up for the first time in 1982 when recruitment to the above six posts took place and they accept the contention of the applicant that the applicant was appointed regularly in a vacancy reserved for a Scheduled Caste candidate. The official respondents no doubt dispute and deny the

claim of the applicant that he was entitled to be placed at No.1 position in the seniority list of Senior Examiners. They contend that the seniority as between the direct recruits and the promotees was determined as per the general principles for determining the seniority in such cases. According to them as per the quota fixed six of the nine vacancies in the grade of Senior Examiners were to be filled in by direct recruitment through the U.P.S.C. and one post was reserved for the Scheduled Caste. They contend that as the applicant opted for being considered as a direct recruit he was given the position as per the quota and rotation system and in accordance with the preference indicated by the U.P.S.C. It is their contention therefore that the claim of the applicant for the seniormost position in the grade of Senior Examiners is not at all tenable. They also oppose the various contentions raised by the applicant as regards the DPC proceedings and we shall consider them at appropriate stage. .

12. The applicant by way of his first relief challenges the final seniority list of Senior Examiners as on 1-1-1984 which is part of Annexure 'A'. This list shows Shri K.N.Nayak who was a promotee at No.1, the other Senior Examiners are placed as per the quota and rotation system. The applicant is placed at Sr.No.9. The first contention of the applicant is that as this senior grade was created for the first time in the year 1982 and as he was the seniormost as per the date of entry into the service of the department amongst the direct recruits and also ^{as} he was

the only Scheduled Caste candidate he ought to have been placed as No.1 in the seniority list. He relies in this connection on the judgment of the Hon'ble Supreme Court in the case of State of Bihar and Others vs. Akhouri Sachindra Nath and Others decided with/Baldeo Prasad and Others((1991)16 ATC 936). The Hon'ble Court held that while reckoning the seniority between the direct recruits and promotees retrospective promotion should not date back to a period when the promotees were not born in the cadre so as to adversely affect direct recruits already in the cadre and the seniority ^{to be} was reckoned on the length of service. In our opinion the applicant does not receive any benefit of this judgment as the persons who are shown as senior to the applicant were not the promotees who were not born in the cadre. It is an admitted position that all the Senior Examiners shown in this list were not only initially appointed as the Examiners of Trade Mark before the senior grade was created, but they were also promoted although on ad-hoc basis in the senior grade. Thus although they were promoted on adhoc basis in the senior grade it cannot be said that they were not born in the cadre. As all the incumbents in the impugned list were already in the cadre all that had to be done was to place them according to the quota and rotation system as per the rules applicable.

13. The learned advocate for the applicant has also relied upon the judgment of Himachal Pradesh Administrative Tribunal in K.C.Nath & Ors. v. State of Himachal Pradesh

and others(T.A.No.295/86 decided on 30-4-1991)

In this case the rules provide the quota of 50% for direct recruit⁹ and 50% for promotees. During 1972-73 as the candidates for promotion were not available all the posts were filled by petitioners i.e. the direct recruits. The respondents were promoted during 1974-76 and were put above the petitioners in the revised seniority list. The seniority list was challenged and it was quashed by the Tribunal holding that the seniority had to be counted from the date of appointment. It will be quite obvious that the facts in this case were entirely different from the facts in the present case. There cannot be any dispute about the principle that the seniority of the direct recruits should be counted from the date of appointments. This principle was based on a ~~decision of the Supreme Court~~ in the case of Direct Recruit Class II Engineering Officers Association vs. State of Maharashtra(AIR 1990 SC 1607) in which it was held that once an incumbent was appointed to a post according to rules his seniority had to be counted from the date of his appointment and not according to the date of his confirmation. It is obvious that both these decisions lay down that the seniority of a direct recruit had to be counted from the date of appointment i.e. the date of appointment as per rules and not the ad-hoc appointment in any cadre. In the ^{same way} case the Supreme Court further held that the corollary of the above rule was that ^{where} whether initial appointment was only ad-hoc and not according to rules and made as a stop gap arrangement the officiation in such post cannot be

taken into account for considering the seniority. In the present case for the purpose of fixing the seniority of the applicant in the grade of Senior Examiner the date of appointment would be obvious ^{ly} ~~from~~ the date on which he was appointed in that grade as per the selection made by the U.P.S.C. In view of the later part of proposition 'A' in the decision of the Supreme Court in the case of Direct Recruits (supra) it is obvious that the applicant cannot get the benefit, like others, of the period for which he was officiating in the senior grade.

14. We must also examine whether the applicant was given ~~an~~ proper placement as amongst the direct recruits. There cannot be any doubt that as the appointment ^s to the senior grade were to be made by selection by the U.P.S.C. the inter-se seniority had to be fixed as per the preference given by the U.P.S.C. The learned advocate for the official respondents has placed before us the proceedings of the U.P.S.C meeting as regards the selection made on 12-10-1982. These proceedings clearly show that the applicant who was selected as Scheduled Caste candidate was placed at Sr.No.6 i.e. at the bottom of the list prepared by the U.P.S.C. The direct recruits in the senior grade such as Shri Ravi Vedaraman, Shri K.K.Sharma, Miss Beena Mithal, Shri U.S. Sharma, Shri R.V.Yadav were all respectively placed at Sr.No.1 to 5 in the list prepared by the U.P.S.C. All these senior examiners selected by the U.P.S.C. have been given appropriate place in the impugned seniority list as per the quota as between the promotees and the direct recruits. We do not find any reason to take any exception to the list prepared by the U.P.S.C. ^B Once we find

that the seniority has been properly given as per the selection list prepared by the U.P.S.C. there is hardly any ground~~s~~ for interfering with the seniority list.

15. We also find that while ranking the promotees and the direct recruits as per the quota system the official respondents have correctly followed the rules which provided for seniority as between the direct recruits and promotees. The official respondents rely upon O.M. No.2201/7/86 ESTT(B) dt. 3-7-1986 (Swamy's Complete Manual on Establishment and Administration ~~III~~rd Edition page 355.) These rules and the illustration show that the first place has to be given to the promotee~~s~~ and thereafter the quota and rotation system has to be followed as per the prescribed quota and the number of reserved posts. The official respondents have fixed the seniority thus according to the selection list prepared by the U.P.S.C. and the rules and the norms as laid down by the aforesaid memorandum. We do not find therefore that the applicant is entitled to claim the seniority at Sr.No.1 in the seniority list as on 1-1-1984. We also do not find any reason to interfere with this seniority list.

16. During the course of the submissions the learned advocate for the applicant challenged the proceedings of the DPCs held for the purpose of promotion to the post of Asstt.Registrar of Trade Marks. It appears that the Departmental Promotion Committees were held for promotion to the post of Assistant Regisrgrar of Trade Marks on 18-8-1986 ^{and} again on 22-2-1988 as has been shown by the annexures attached to the written ^{submissions} statement ^{filed} by the applicant. The official respondents

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have shown that the DPC was held on 5-2-91 for promotions to the post of Assistant Registrar of Trade Marks(Group-A) as against the vacancies for the year 1990-91 and 1991-92. The learned advocate for the applicant made submissions as regards to the proceedings of these DPCs, However, we do not find it necessary to examine those submissions as it is an admitted position that if the applicant does not succeed in his first relief i.e. he be replaced at No.1 in the seniority list of Senior Examiners as on 1-1-84, he shall be within the zone of consideration and number of vacancies available ^{only by} ~~either~~ in 1992. He claimed by way of an amendment that the official respondents be ~~be~~ directed to promote the applicant to the post of Assistant Registrar of Trade Marks w.e.f. 21-1-1992. The official respondents have shown that the promotion orders are issued as against the vacancies upto 1991-92. As the applicant fails in his first claim as regards the seniority in the grade of Senior Examiner he could not be within the zone of consideration of the number of vacancies available in the year 1991-92. It is therefore not necessary to examine whether the promotion as against the vacancies available upto 1991-92 were validly done. The proceedings however show that the applicant was considered by the DPC held on ^{5th Feb. 1991} ~~5th December, 1987~~ for the vacancies available in 1991 and 91-92.

17. As regards the question of promotion we find that para 6.3.2 in the guidelines for DPCs which is relied upon

by the applicant is very material. The said para reads as below:

"6.3.2. In the case of SC/ST officers
(i) In promotions by selections to posts/services within Group 'A' which carry an ultimate salary of Rs.5700/- p.m. in the revised scale, the SCs/STs officers, who are senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the select list has to be drawn up, would notwithstanding the prescription of 'bench-mark' be included in that list provided they are not considered unfit for promotion."

It lays down that while examining the cases for promotion by selection to posts within Group-A which carry an ultimate salary of Rs.5,700/- per month the scheduled caste and scheduled tribe officers who were in the zone of consideration and within the number of vacancies shall be included in the list irrespective of whether they fulfil the minimum bench-mark if they are not considered unfit for promotion. Thus if the other requirements are fulfilled the SC/ST officer has to be included in the select list unless he is found to be unfit. There cannot be any doubt that these directions shall be applicable to the case of the applicant. It is not disputed that the applicant is a scheduled caste officer within Group 'A' with an ultimate salary of Rs.5,700/-.

It is also not disputed that although the applicant is not granted the No.1 position in the seniority list as on 1-1-84 of the senior grade examiners,

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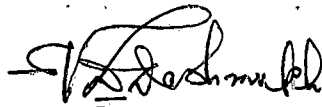
he shall be within the zone of consideration and the number of vacancies available in the year 1992. It would not be proper for us to comment upon the proceedings of the DPC earlier held.


18. The applicant has also alleged malice. However, the malice is not alleged against any particular authority and no authority has been made respondent personally. As regards the contention of malafide his claim is based on the circumstances that he was served with chargesheet on 28-1-87, that after the enquiry two minor charges were proved and the penalty was imposed on 10-2-89, ^{and that is} ~~However,~~ this penalty has ~~also~~ been set aside by the judgment of this Tribunal in O.A.239/89 dt. 13-2-92. We do not find that merely because disciplinary action was taken against the applicant it can be held that the higher authorities acted malafide against the applicant. It was also the contention of the applicant that sealed cover procedure had to be followed after the chargesheet was issued against him. In the first place it is not obligatory on the authorities to follow the sealed cover procedure in every case. In the second place as we find that the applicant would be entitled to be considered for promotion to the post of Assistant Registrar only in the year ¹⁹⁹²⁻⁹³ ~~1991-92~~, All these contentions are not relevant // so far as the proceedings of the earlier DPCs are concerned.

19. In the light of the above discussion we would direct the respondents No.1 and 2 to consider the applicant for promotion to the post of Assistant Registrar of Trade Marks as on 21-1-1992. If the DPC is not held for promotions

to the said post against the vacancies available in 1992-93 the respondents No.1 and 2 shall hold the DPC and the DPC shall consider the case of the applicant in pursuance of ~~with~~ the guidelines referred to above. If the DPC has already been held to promote the officers to the vacancies available in 1992-93 the respondents No.1 and 2 are directed to hold a review DPC and to consider the applicant in the light of the above said guidelines which is based on OM No.A-32012/1/89/E(III) dt. 5th May,1989 para 2.3.2.

20. The application is disposed of ^{directions} on the above ~~line~~ with no order as to costs.


(V.D.DESHMUKH)
Member(J)


(M.Y.PRIOLKAR)
Member(A)

M