

(14)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

ORIGINAL APPLICATIONS NO:795/87 and 534/87

SHRI H.P.VOHRA

....APPLICANT

V/s

THE ADMINISTRATOR
OF DADRA, NAGAR HAVELI
AND ORS.

....RESPONDENTS

CORAM : Hon'ble Justice Shri U.C.Srivastava, Vice-Chairman

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

Appearance:

Mr.R.S.Mohite, Ady.
for the applicant

Mr.R.J.Naik, and Mr.A.S.Rao,
advocates for the respondents

JUDGEMENT

DATED: 10/4/1992

(PER : JUSTICE U.C.SRIVASTAVA, Vice-Chairman)

As the questions of law and facts are much common in these two cases, the parties are also same, conveniently they can be taken together and has also been desired by the parties, and consequently they are being disposed of with a common judgement.

2. The applicant in O.A.No.534/87 has prayed that order dated 30.4.1987 promoting to the Respondent No.2 Viz.N.M.Parmar to the post of Executive Engineer, PWD, Dadra and Nagar Haveli to be quashed and set aside. In O.A.No.795/87, the applicant has prayed that the order dated 12.5.1987 regularising the adhoc promotions of Respondents No.5 and 6 viz.Shri M.J.Joshi, Executive Engr. PWD, Divn-II and Shri D.K.Waghela, Executive Engineer, PWD, Divn-I, PWD, Silvassa respectively promoting them on officiating basis to post of Executive Engineer, PWD, Dadra and Nagar Haveli, be quashed and that Respondents

No.5 and 6 be reverted to the post of Dy.Engineers, PWD Dadra and Nagar Haveli, and the applicant be promoted to the post of Executive Engineer, Dadra and Nagar Haveli.

The applicant has challenged the order passed by the Administrator of Dadra and Nagar Haveli. The facts is as stated by the parties in nexus appears to be that the applicant joined this service in the Administration of Dadra and Nagar Haveli as a Craft Supervisor on 4.8.68 and on 4.10.1972 he was promoted as Deputy Engineer on Adhoc basis and unrevised pay scale was given and also permanent promotion as Dy.Engineer was given with effect from 4.10.1972. In October 1981, the Collector, Dadra Nagar Haveli, released the Final Gradation list of Deputy Engineers in which the respondent No.5 was shown ^{then the applicant} on top followed by Respondent No.6 and/after being the respondent No. N.M.Parmar, Executive Engineer was shown. As the post of Executive Engineer, which is next promotional post for Dy.Engineer is to be filled on seniority cum merit basis was vacant on 13.4.1982, the Administrator granted adhoc promotion to the said Mr.M.J.Joshi on 13.4.1982 and on 6.8.1982 another post was vacant and on this time also no selection was made and adhoc promotion granted to Mr.D.K.Waghela (Respondent No.6), A fresh provisional list of Executive Engineer issued on 1.1.1984 in which the respondent No.5 and 6 were shown as Executive Engineers on adhoc basis and the applicant and Respondent No.2 were shown as Dy.Engineers in respective order of seniority. Without holding a selection ~~for~~ vide order dated 30.4.1987 the said N.M.Parmar, who was junior to the applicant was also promoted as Executive Engineer in the pay scale of Rs.3000-100-3500-125-4500. The applicant who was superseded, has challenged the same by filing this Original Application before the Tribunal, which is numbered as D.A.No.534/87. Subsequently, an order dated 12.5.1987

the Administration, Dadra and Nagar Haveli, issued a common order, regularising the adhoc promotion of Mr. M.J.Joshi and D.K.Vaghela as Executive Engineer with effect from 13.4.1982 and 6.8.82 respectively and promoting them as Executive Engineer on officiating basis in the pay scale of Rs.3000-100-3500-125-4500, which order ^{is} said to have been passed on recommendation of DPC. In the DPC, which is said to ~~be~~ ^{have} met on 26.3.1987, only there were/two candidates, the applicant and the respondent No.2 and in which the respondent No.2 was promoted by-passing the claim of the applicant. According to the applicant, that appears, because of the adverse remarks in his C.R. for the period which was communicated to him after delay. He was not promoted. This adverse remarks which according to the applicant were not fairly given to the applicant for obvious reasons. The period for adverse remarks is spread over between the years 1975 to 1986 (Anex.D) and the communication ^{of} ~~all these~~ ^{was delayed} for the ~~two~~ 1975-76 except that between the year 1977 and 1980 the adverse remarks ^{to} were not given to the applicant, they were given /him every year upto 1986 and as per the plea of the applicant in ~~and the~~ year 1986 the revised pay scale was fixed at Rs.2375 and all the ~~ed~~ previous adverse entries ^{are} deemed ^{of} to have been waived and become/no consequences. Moreover, the adverse entries which were not communicated to him within 6 months were to be ignored, mostly these were communicated to him after six months, except one. According ^{to} the applicant, the Administrator has initiated an inquiry against the applicant on 1.4.1985 and 4.5.1987 ^{which} were still pending and notwithstanding ^{to} this, and it appears, that the so called DPC ~~was~~ also took the same into account instead of adopting a sealed cover procedure. But in the matter of respondent No.2 in this behalf a d

a different rod was applied in as much as he was found guilty vide order dated 21.3.1979 after an Departmental inquiry a major penalty of reduction in three stages lower in present scale of pay for 5 years was given to him. This period was reduced ^{to} for two years vide order dated 20.6.1981. According to the applicant he had also earned adverse entries between the years 1976-78 1981, and 1982 and on 15.6.1977 he was suspended from service pending inquiry in respect of 5 charges, which were held proved ^{it} yet appear the same was ignored as his chequered career ^{is} given ^{precedence} over the applicant, who was much qualified earned several additional qualification for which he made prayer for entry of the same in the record, but which prayer as earlier, but the same was not ~~pleased~~ ^{granted} to. The applicant has challenged his promotion on variety of grounds, including that the DPC, which was made selection ^{is} not properly constituted committee and including that the so called DPC also took into consideration of the facts of non release of E.B. and further and further that the DPC itself was not a duly constituted DPC and such the selection made by ~~him~~ ^{it} was illegal and honest. Similarly so far as the adhoc appointment and subsequent regularisation of Respondents No.5 and 6, the applicant has also raised the very same ground, that the DPC which considered their cases was not ~~illegally~~ constituted DPC and it has no power to make any recommendation. According to the applicant his name was not considered for regularising as adhoc appointment as Respondents No.5 and 6, since the adverse remarks were made against the applicant by Respondent No.6, who was reporting, when he was acting Executive Engineer, and these

entries were made deliberately by him knowing it fully well that the applicant will be his competitor for the post of Executive Engineer. The service book of the applicant for the year 1982-86 are said to be in the custody of the respondent No.6, ^{it} was said to have been missing and the delayed adverse remarks so given to him were taken into account is not promotion ^{precedence} him and given ^{precedence} president to the respondents No.5 and 6 and not even the procedure required for keeping the result in the sealed cover was followed. According to the 45 roster the first post was to be filled by the Scheduled Caste candidates, but it was not given to the same and was given to Mr. M. J. Joshi, who was not a member of SC community.

3. Regarding the constitution of the committee, the contention of the applicant is, that the DPC ^{not} was constituted by ^{one} ~~as~~ persons who ^{was} step over the post in which the promotion was to be made as is required under rule 4 of the G. I. cabinete Secretariate MEMO22011/6/75-Estt dt.30.12.1976 eve No.dt.11.1. 1972. The DPC in the instant case ^{was} following constituted of ~~consisting~~ members whose designation and pre-revised scale as under

1. Secretary to Administrator	Scale 700-1300
2. Dy. Conservator of forest	Scale 1000-1660
3. Executive Engineer	Scale 1100-1600
4. Collector	Scale 1200-2000

and the scale of the post in question being a scale of post pre-revised from 1100-1600. ~~did not~~ atleast 3 members were not a step up of the post for which the promotion was made except that of Collector.

4. The respondents have resisted the claim of the applicant, ~~Apart from taking of the use of the plea of~~ none exhausting of departmental remedy and the maintainability

of the application, ^{which} The One O.A. had been filed by the applicant viz. O.A.No.818/90 has already been dismissed by this Tribunal, in which ^{reliefs were} ~~the~~ vague, claimed. On behalf of the Respondent: No.1 ^{the} ~~an~~ Administrator, it has been stated that the educational qualification of both the applicant and the respondent No.2 are the same. And that there were two departmental enquiries against the applicant, that is why, the case was not considered by the DPC and his juniors were promoted. And the post in question being a Group 'A' post ^{with UPSC} the consultation is compulsory.

5. The SECRETARY to the Administrator in the pay scale of Rs.700-1300/- pre-revised and Dy.Conservator of forest ~~and~~ the Executive Engineer are in pay scales of 1100-1600 they did not participate in the departmental promotion committee as these members pay scales are ^{or} equal for the post for which the promotion was decided. The two ~~vacancies~~ of 1982 against which Shri Joshi and Vaghela was promoted on adhoc basis pending finalisation by the Union Public Service Commission. In the year 1986 one more post was created making 3 posts and the proposal was submitted to the Union Public Service Commission. One of the Members of Union Public Service Commission presided over and the Collector, Dadra and Nagar Haveli was associated as one of the Members of the Departmental Promotion Committee. It considered the candidature of the 4 persons including including that of applicant against the two vacancies. Shri/s Joshi and Vaghela were considered against the two vacancy of 1982 and the applicant and N. M. Parmar ^{weighted graded} was/not yet fit. Again the vacancy of the year 1986

the candidature of respondent No.2, who is also scheduled caste was considered against the reserved vacancy and D.P.C. was assessed him good and thereafter they recommended him fit for promotion to the post of Executive Engineer. The adverse entries of the applicant were of serious nature and even created doubt in his integrity and his appeal against adverse entries were rejected by the Administrator and the adverse entries were not expunged. So far as, the respondent No.2 is concerned the punishment which is given was subsequently fully exonerated vide order dated 3.10.1984. The allegations of the applicant that for not giving information of adverse remarks is malafide and adverse remarks during that period have been communicated and the said were recorded and the same also been denied.. And it has been stated that, during the period it is said that the record was not available and the entries of the applicant was also adverse. The respondent No.2 has also filed a reply and he has pleaded that in the case of the Member of the UPSC is consulted then one member committee is a valid committee and as such the private respondent stated that there is no defect in regularization and further admittedly, they were senior to the applicant. It has been pointed out by Mr.Joshi, Private respondent, when that/he was confirmed as Dy.Engineer the applicant was not in service as Dy.Engineer at all. According to the, official respondents these two persons was quite good. According to Mr.Joshi, when he was appointed there was only one post and as such it could not have been treated to be a reserved post so as to go to the member of Schedule cast

The respondent No.6 has also taken similar pleas, and it has ^{been} stated that he was not regularised on the behest of the DPC challenged by the applicant, which was constituted under notification dated 9.9.1982. The respondent No.2 has also filed a reply, in which it has been stated and taken a similar plea and justified his promotion has also taken plea that the constitution of DPC for the post of Executive Engineer was as under: Member UPSC and Collector, Dadra and Nagar Haveli, who is the head of the Department for Union Territory. So far/the technical pleas are concerned of representation of the applicant, we do not find any substance in the same and the history of the case reveals the applicant has been making representations and representations and in respect of this, no relief has been granted to him or in respect of which representation have been rejected and effective representations not mere formality.

5. During the course of argument, the learned counsel for the applicant contended that, so far as these two cases are concerned, although he has taken number of grounds but this application deserves to be allowed on the ground that the DPC was not duly constituted/if, it included the Member, who ^{legally} could not have been included, merely he did not attend that will not make validly constituted committee and will ^{not} permit the remaining members to function as Member of the DPC, the Coram being also incomplete, if the Member of Union Public Service Commission is also included as a Member, if the committee will be consisting ^{of} ~~of~~ ^{of three}, 5 members, Coram, out of which only two made selection. Before us, a notification dated 6.6.1990 has been produced, which also says for/partial modification of the earlier notification of 1982 reconstituting of DPC for consideration of cases of confirmation etc,

which includes a Member of Union Public Service Commission as Chairman, Chief Secretary and Finance Secretary as Members and Collector as Member. But, in the instant case we are concerned with the Departmental Promotion Committee, which met in the year 1987. The three members there were obviously, there was no denial of the facts, that these 3 members were ~~not~~ either ~~were~~ in the same pay scale or in the lower pay scale and consequently, they could not have been appointed as member of DPC, even if, they did not attend the meeting or they were not invited to attend the meeting, but the DPC was not reconstituted. As such, they continued to be a member of DPC, which was constituted in accordance with the notification for the purpose. A reference has been made of the clause 7 of the O.M.No.22220/11/9/75-Estt/3.12.1976 issued by the Cabinet Secretariate, Department of Personnel Administrative Reforms reads as under : "The Proceedings of the Departmental Promotion Committee will be valid and can be operated upon non-even the member otherthan the Chairman was provided that the member/duly invited but he was absent for some reason or other and there was no attempt to and exclude him from the DPC/provided that the majority of the members ^{present} in the DPC are present in the meeting" In the instant case three members who were not qualified to become a member of DPC absented or they were not invited and if the DPC was included the member of UPSC, and the members was not present and the selection was made by only three members. The Departmental Promotion Committee is to be constituted by three or 4 , which were included the members were qualified, in case unqualified members who cannot

23

participate in the deliberation of the same are included as a member it will not be a duly constituted Committee which can make a selection and in the instant case obviously, the committee was not a duly constituted committee. Even after, as there was no subsequent notification for shortning the size of the D.P.C. which includes two members only. Merely because even then it includes only Administrator and/or Member of UPSC cannot be said, that the selection was made by duly constituted Committee.

6. The learned counsel for the applicant had made a reference to the case of P. Banarjee V. Union of India and another 1986/1/CAT/ pg.9 decided by Principal Bench Wherein it has been held, that one member of DPC was not called to record his recommendation for selection, that the selection made on this basis is invalid. It was held that on the recommendations of such DPC which is invalid and the appointment made on this basis cannot be sustained and has to be quashed. A reference has also been made in the case of Shiv Lal Sonaki and ors. V. Jalore Central Co-operative Bank Ltd Jalore and ors 1986/SLJ 305 (I) wherein it was held that two members participate in the Selection Committee and minimum requirement was of three members, The procedure which was not correct and the which was appointment/made by the committee exercised illegal. We have already taken a similar view in other cases that the DPC not duly constituted includes ^{one} who is not qualified member the constitution of DPC is illegal and any recommendations made by it and ~~an~~ acted upon will not be legal. In this case, it is morethan clear that the DPC was not duly constituted and even if the member who were not eligible for being a member of the same and did not participate in it he was exempted from the DPC which considered the cases of the candidates and not the DPC as such who could alone have considered the cases.

It is not a case in which a duly qualified member is invited but for some reason or other could not attend yet the corum was complete and as such the selection made will not be invalid. In the instant case the constitution of committee itself was illegal and the same goes to the very root of the matter and consequently the selection made by the DPC cannot stand and this application deserves to be allowed on this ground. With the result, that the selection of respondent No.4 by 2 members of illegally constituted DPC will be in-valid. Only a fresh DPC can now consider the matter of promotion though with effect from due date. So far as the reservation of members of SC/ST is concerned, it applies in respect of posts and not the vacancy, and there were more than one posts and will be in respect of existing posts or which may occur hereinafter. It is in this light the matter is to be considered and accordingly with these observations the selection of respondent No.2 in O.A. No.534 of 1987 or regularisation of the respondents No.5 and 6 in O.A. No. 795/87 is quashed. However, it will be open for the respondents to constitute a fresh selection committee which will consider the case of promotion and regularisation ~~maxima~~ of the candidates before it in accordance with the law, and let the Committee be constituted as early as possible. With these observations these applications are allowed to the extent mentioned above. The Respondents No.5 and 6 definitely will be senior to the applicant.