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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, BOMBAY

1. Shri A.V.Ambekar ... Applicant in OA.No. 95/87
2. Shri K.M.Samuel ... Applicant in OA.No. 611/87
3. Shri U.N.Ponda ... Applicant in OA.No. 806/88
4. Shri M.Y.Patel ... Applicant in OA.No. 944/88

V/S.

Union of India & Ors. ... Respondents

CORAM: Hon'ble Vice Chairman Shri Justice M.S.Deshpande
Hon'ble Member (A) Shri M.Y.Priolkar

Appearance

Shri S.Natarajan
Advocate
for the Applicant

Shri A.I.Bhatkar
for Shri M.I.Sethna
Advocate
for the Respondents

ORAL JUDGEMENT

Dated: 21.4.1993

(PER: M.S.Deshpande, Vice Chairman)

The applicants by these applications seek a direction to the respondents to withdraw the order dated 27.1.1977 in consonance with the judgement of the High Court in Misc. Writ Petition No. 529/1978 and a direction to prepare a seniority list of Preventive Officers Grade I on the basis of the orders prevailing prior to the issue of the said Order dated 27.1.1977. Alternatively, they seek a declaration that the order dated 27.1.1977 was invalid and illegal and as such stands quashed and withdrawn and that the respondents should fix the seniority of Preventive Officers Grade I on the same grade on the basis of judgement of High Court in the case of Examiners of the New Customs House, Bombay in W.P.No. 529/1978, with due regard to the directions contained in the Memorandum dated 22.12.1959, 25.4.1972, 16.3.1973 and 17.3.1973 (Ex. A to D) to OA. 95/87.

2. The applicants were appointed by four Circular Orders. Ambekar was appointed on 16.8.1971 as Preventive Officer Gr.I w.e.f. 10.8.1971 in one of the post sanctioned vide Govt. of India Ministry of Finance Letter No.F-2/18/68-Ad.IV, dated 9.7.1971. Samuel was appointed w.e.f. 16.8.1971. Ponda & Patel were appointed by the letters dated 3.8.1971 under the identical circumstances. According to the applicants the principles determining the seniority were laid down in the Ministry of Home Affairs Office Memorandum dated 22.12.1959, Item No. 6 is in the following words :

"A roster should be maintained based on the reservation for direct recruitment and promotion in the recruitment rules. Where the reservation for such method is 50% and roster will run as follows: (1) Promotion (2) Direct recruitment (3) Promotion (4) Direct Recruitment and so on. Appointment should be made in accordance with this roster and seniority determined accordingly."

The Recruitment Rules for the post of Preventive Officers Grade I (OG) provided for filling up of 33 1/3% of vacancies by Direct Recruitment and 66 1/3% by promotion from lower grades. Under the Memorandum dated 24.8.1965 certain guidelines were issued and the letter dated 17.3.73 provided that the seniority of the persons will have to be refixed on the basis of 22.12.1959. Pursuant to this letter seniority list was prepared by the respondents. The said seniority list, however, contained certain discrepancies in interpretation and irregular interpolations of names. In the year 1969, a large number of Central Excise Inspectors became surplus on account of the introduction of self-removal system in the Central Excise Department. These surplus Inspectors were appointed against vacancies in the grade of Preventive Officers and Examiners in the Customs Department on deputation basis without deputation allowance, for a maximum period of 3 years subject to the Government's right to revert them earlier, to their parent department. These appointments were on a purely temporary basis. They came to be reverted to their

parent department in a phased manner on 9.6.1970 and 11.9.1970. However, by the letter dated 27.1.1977 the Under Secretary, Govt. of India, Department of Revenue and Banking stated that the vacancies in the grade of Preventive Officers Grade I and Examiners released by the Inspectors of Central Excise in each Customs House on or after 11.9.1970 should be treated as fresh vacancies and filled up in accordance with the quota prescribed for direct recruits and promotees and that consequently the seniority of direct recruits and promotees appointed as Preventive Officers Grade I and Examiners on or after 11.9.1970 should be determined in terms of para 6 of the Annexure to the Ministry of Home Affairs Memorandum dated 22.12.1959 i.e. by rotation of vacancies between direct recruits and promotees in the prescribed quota.

3. According to the applicants, the Recruitment rules do not provide for departure from quota plus rota rules and any such departure is ab initio illegal and liable to be set aside. In any event, the Inspectors of Central Excise Department did not acquire any right over the post and as such their repatriation could not be treated as fresh vacancies as was sought to be done. Since the order dated 27.1.1977 was contrary to the settled orders, the Examiners challenged that order in Writ Petition No. 529 of 1978 before the Bombay High Court and by the judgement dated 6/7.3.1981 the letter dated 27.1.1977 was ordered to be withdrawn so far as it concerned the Examiners who had approached Bombay High Court. The applicants urged that since their posts were identical with that of the Examiners who have successfully challenged the order dated 27.1.1977, the seniority list prepared in pursuance of the order dated 27.1.1977 cannot be operated against them. This position was brought to the notice of the Government by the first applicant, Ambekar and he was informed by the respondents by the letter dated 18/23.12.1985 that the matter was receiving attention. As no amendments were made, the applicants approached this Tribunal by 4 separate applications.

4. The submission of the respondents is that draft seniority list came to be prepared and was followed up by the list dated 29.7.1987 and the last date for raising any objection was 10.8.1987. But since no objections were raised, that list became final. The Ministry of Finance, Deptt. of Revenue and Insurance in their letter No. 9/2/69-Ad.IV (ATC) dated 21.1.1969 directed that the vacancies in Customs Houses in Direct Recruitment quota in the grade of Preventive Officer (OG) and Examiner (OG) be filled in by selection from among Inspectors of Central Excise (OG) who had put in more than 5 years in that grade as on 1.1.69 on deputation basis for a period not exceeding three years. Procedure was prescribed and the applications were invited and candidates were selected for deputation. After the letter dated 26.7.1971 the new channel for the promotion to the grade of Preventive Officer I was started from the Ministerial Cadres and the 6 point roster allocating the certain points for Preventive Officer II, Direct recruitment and Promotion (Ministerial Cadre) was prescribed. However, on such allocation of ratio the Ministerial Staff who were promoted as Preventive Officer I (OG) became senior to Preventive Officer II who were senior in the Preventive Cadre as well as some were senior in the Ministerial Cadre. After noticing this anomaly fresh instructions were issued by letter dated 25.4.1972 whereby the principles for fixation of seniority in the cadre of P.O. Gr.I (OG) were laid down. The main issue in the petition filed by the Examiners in Bombay High Court concerned the Examiners and the Preventive Officers were not party to that petition and any observation which might have made in the High Court's judgement would not apply to the case of the Preventive Officers. The respondents deny that the applicants were appointed in the vacancies which arose due to reversion of Inspectors of Central Excise. The vacancies against which the applicants were appointed were the vacancies sanctioned by the Board on the upgradation of post of Preventive Officer II to

Preventive Officer I vide letter dated 9.7.1971 and they cannot make a grievance of the seniority allocated to them. In respect of Examiner's cadre there were only two channels of recruitment one by direct recruitment and the second by promotion from the Ministerial cadre while to the grade of Preventive Officers there were three channels of recruitment one promotion from Preventive Officer II and from Ministerial cadre and direct recruitment. There were separate quotas for each. In view of the prevailing ban to the recruitment of Preventive Officers during the material time and hence the question of any direct recruitment to the post did not arise and the posts were filled in by deputation from the Central Excise Department. The draft seniority list issued on 2.12.1986 was issued correctly except the placement of P.O.II upgraded as Preventive Officer I in the vacancies sanctioned under letter dated 9.7.1971 and 25.4.1972 enbloc senior to the officers who were appointed in the vacancies after 9.7.1971. This had been corrected while issuing the seniority list on 29.7.1987. It is urged that the applicants are not entitled to make the grievance which they are making because their appointment was based on the letter dated 9.7.1971.

5. Since the main question centres around the letter dated 9.7.1971, it is necessary to refer ^{to it} It reads :

"In this Ministry's letter F.No.2/18/68 Ad.IV(1) dated the 6th June, 1968, the Government had indicated their decision to replace the cadre of Preventive Officer Grade II by Preventive Officer Grade I in a phased manner. Pursuant to this decision 360 posts of Preventive Officer Grade II were replaced by an equal number of posts of Preventive Officer Grade I. The Government have now decided to create permanent/temporary posts of Preventive Officer Grade I in lieu of an equal number of vacant pmt./temporary posts of Preventive Officer, Grade II existing at present in your Custom House. Accordingly, I am directed to convey the sanction of the President to :-

- (a) the creation, on the usual scales of pay and allowances of 107 posts of Preventive Officer, Grade I and the abolition of an equal number of posts of Preventive Officers, Grade II as indicated below with effect from the dates the posts are filled/vacated."

As per that letter dated 9.7.1971, 53 posts were upgraded in the Bombay Custom House. The controversy before us as about applicability of clauses 2,3 & 4 of the instructions contained in the letter dated 25.4.1972 (Ex.I to the reply in OA.806/88) and it is necessary to reproduce them here.

"(2) Vacancies in the posts of Preventive Officer Grade I which arose before 9th July, 1971 will be filled in accordance with the orders in force before the issue of Board's said letter dated 26th July, 1971 i.e. 2/3rds of the vacancies will be filled by promotion of Preventive Officer Grade II and 1/3rd by direct recruitment. To clarify, such vacancies which fall in the direct recruitment quota according to the orders then in force and which were filled, as a temporary measure, by the appointment of the Inspectors of Central Excise on deputation basis, will be filled exclusively by direct recruitment on these posts being vacated by the reversion of the Inspectors of Central Excise to their parent department.

(3) The posts of Preventive Officer Grade I as sanctioned in this Ministry's letters F.No.2/18/68-Ad.IV dated 9th July, 1971 and dated 25th April, 1972 are on account of the upgradation of the equivalent number of posts of Preventive Officer Grade II. In the past as and when posts in a lower cadre had been upgraded en bloc to posts in the immediately higher cadre, the upgraded posts in the higher cadre have, as a general rule, been filled exclusively by promotion of the personnel in the lower cadre subject to their suitability for promotion to the higher cadre. Accordingly, and also having regard to the position stated in the preceding para, the posts of Preventive Officer Grade I sanctioned in this Ministry's letters dated 9th July, 1971 and dated 25th April, 1972 referred to above will be filled exclusively by promotion of the existing Preventive Officers Grade II subject to their being found fit by the competent Departmental Promotion Committee.

(4) The posts of Preventive Officer Grade I referred to in (3) above as exceed the number of the existing Preventive Officer Grade II found fit for promotion by the competent Departmental Promotion Committee and other vacancies arising on or after 9th July, 1971 will be filled to the extent of 20% by promotion of ministerial officers and the remaining 80% by direct recruitment i.e. in the ratio of 1 ministerial officer : 4 direct recruits."

6. The submission on behalf of the applicants was that the applicants were appointed in the category (2) above and according to the respondents they came to be appointed in the excess posts which are covered by clause (4). As we have already pointed out

35

~~that~~ the appointments of the applicants were made pursuant to the position created by the letter dated 9.7.1971 which we have quoted in extenso and that position was made clear in the letters of appointment as would be evident from the reference to Ex.A-2 in OA. 806/88. In respect of Ponda and Patel, their appointment came to be made in one of the 55 upgraded posts. The submission of the applicant that they were appointed prior to 9.7.1971 and should have been appointed which fell to be filled under the instructions in force before the issue of the Board's letter dated 26.7.1971 cannot be accepted in these circumstances. They could not have got any of the appointments prior to 9.7.1971 in view of the position which was pointed out in clause (3)^{which} dealt with the position of the promotees. The only category in which the applicants would fall would be category no. (4) and to that the ratio of 1 ministerial officer : 4 direct recruits will apply.

7. It is apparent that since the applicants came as a result of the post which became available after the instructions were issued, it is not open to them to challenge what had happened before their appointment and they cannot make a grievance as to whether the vacancy caused by the reversion of the Inspectors should be treated as fresh vacancy or not. Their entitlement should be governed by the later instructions. The respondents have made it clear that the position was not properly considered when the seniority list came to be prepared in the year 1973 and the discrepancy which had crept into and the anomalies which were apparent had to be rectified. In this view of the matter, we see no justification for the applicants grievance in these applications.

8. The learned counsel for the applicants urged that since the letter dated 27.1.1977 applied both to the Preventive Officer Grade I and Examiners in various Custom Houses, the Preventive Officers cannot be treated differently from Examiners and the

reliefs which were granted by the Bombay High Court to the petitioners in M.P.No. 529/1978 by the judgement dated 6.3. 1981 should also be granted to them. It must be noticed that the present applicants who were the Preventive Officers were not the parties to that writ petition and the submission of the learned counsel for the applicants that the letter dated 27.1.1977 was quashed is not borne out by what is stated in that judgement. The relief that was sought in that petition was :

"(b) Issue a Writ of Mandamus or a Writ in the nature of mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution directing Respondents 1 and 2 to withdraw the Order dated 27th January 1977 issued by the Central Board of Excise (Exhibit H) and Customs and also the seniority list published by the Collector of Customs, Bombay under his Circular dated 3rd March 1978 (Exhibit J) in so far as it relates to the inter se seniority of direct recruits and promotees from serial No. 60 to serial No. 203 and to restore the seniority list published by the Collector of Customs dated 19th August 1974."

The operative portion of the judgement of the High Court reads :

"In the result, the Petition is allowed in terms of prayer (b) with the addition of words "subject to such modification as may be made in tentative list in accordance with the law."

We were taken through the judgement of the Bombay High Court in this writ petition and it appears to us that the entire judgement turn^{ed} on the concession made in the affidavit in reply that the change was brought about on the representation of the two Federations. Nothing has been said on the factual aspect and the position which ^{we are} were called upon to consider on facts was not placed before the learned judge. The decision that turn^{ed} on facts so far it applied to the petitioners before the High Court. The background which has been placed before us prior to the letter dated 27.1.1977 did not come up for consideration before the High Court and the decision of the

High Court with respect cannot be invoked in the present case either as resjudicata or as a precedent.

9. Shri Natarajan submitted that if we take a view contrary to the one taken by the High Court, it will lead to discrimination between the two categories of Preventive Officers and Examiners. It is apparent that these two categories are different and they fill up different quotas and whatever has been said in the case of Examiners could ~~not~~ have applied to the Preventive Officers only if they belonged to the same class. Such is not the case here and we are not impressed by the arguments that the Preventive Officers before us should be treated similarly as the Examiners before the High Court.

10. With regard to the submission that the 1973 seniority list had not been challenged and that so far as the position of the applicants is concerned ~~for~~ their situation has not been altered by 1978 seniority list. The representation made in 1985 and the reply to it cannot be of any assistance to the applicants ~~so far~~ as challenge of the applicants should have been raised when the draft list of 1973 was published. Since the applicants did not challenge that list, there is considerable force in the submission of the respondents that in view of the considerations involved and the position which came to be settled in the year 1973, we should not permit the challenge to be raised as it will be unsettle the position which was settled qua the applicants in 1973.

11. In the result, we see no merit in the four applications. They are dismissed but with no order as to costs.