

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NO.: 238 of 1996.

Dated this Thursday, the 26th day of July, 2001.

Sureshbhai D. Dhodi, Applicant.

Shri I. J. Naik through Ld. Proxy Advocate for the
Counsel, Shri M. S. Ramamurthy, Applicant.

VERSUS

Union of India & Others, Respondents.

Shri R. K. Shetty through Ld. Proxy Advocate for
Counsel, Shri R. R. Shetty, Respondent Nos. 1 & 2.

Shri Suresh Kumar, Advocate for
Respondent No. 3.

CORAM : Hon'ble Smt. Lakshmi Swaminathan, Vice-Chairman (J).

Hon'ble Smt. Shanta Shastry, Member (A).

(i) To be referred to the Reporter or not ? *yes*
(ii) Whether it needs to be circulated to other *Benches of the Tribunal* ? } No,
(iii) Library.

Lakshmi Swaminathan
(Smt. LAKSHMI SWAMINATHAN)
VICE-CHAIRMAN (J).

OS*

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NO.: 238/96.

Dated this Thursday, the 26th day of July, 2001.

CORAM : Hon'ble Smt. Lakshmi Swaminathan, Vice-Chairman (J).

Hon'ble Smt. Shanta Shastray, Member (A).

Sureshbhai D. Dhodi,
Excise Guard,
Department of Excise,
Administration of Daman & Diu,
Fort Area, Moti Daman,
Pin Code - 396 220.

Applicant.

(By Advocate Shri I. J. Naik through Learned Proxy Counsel, Shri M. S. Ramamurthy).

VERSUS

1. *The Development Commissioner,
Administration of Daman & Diu,
Secretariat, Fort Area,
P.O.: Moti Daman,
Pin Code No. 396 220.*
2. *The Union of India through
The Secretary,
Ministry of Home Affairs,
Central Secretariat,
North Block, New Delhi.*
3. *Shri Jose S.A.M. Lopes,
Excise Sub-Inspector,
Excise Department,
Fort Area,
P.O. Moti Daman,
Pin Code - 396 220.*

Respondents.

(By Advocate Shri R. K. Shetty through Learned Proxy Counsel, Shri Ravi R. Shetty for Respondents No. 1 and 2. By Advocate Shri Suresh Kumar for Respondent No. 3)

O R D E R (ORAL)

PER : Smt. Lakshmi Swaminathan, Vice-Chairman (J).

The applicant has impugned the validity of the order issued by the Respondents dated 01.02.1993 promoting Respondent No. 3 as Excise Sub-Inspector (hereinafter referred to as E.S.I.). According to the applicant, even though he was senior to respondent no. 3, he was not given the similar promotion.

2. According to the applicant, the aforesaid promotion order was on ad hoc basis and he was senior to respondent no. 3 as on February, 1992. He has relied on the circular issued by the respondents dated 10.2.1992 in which, under the remarks column it is mentioned that they are on ad hoc basis. The applicant is shown in this list at sl. no. 7 and respondent no. 3 at sl.no. 9 and they have been shown as working in the grade of Excise Guard (E.G. for short) w.e.f. 9.8.1989. He has submitted that under the relevant recruitment rules applicable to promotion to the post of E.S.I. i.e., the Government of Goa, Daman & Diu, Rules of November, 1986, both the applicant and respondent no. 3 did not fulfil the eligibility condition, i.e. three years regular service in the grade of Excise Guard. Shri M.S. Ramamurthy, learned counsel, has contended that respondent no. 3 in any case did not fulfil the eligibility condition for promotion to the post of E.S.I. under the relevant recruitment

rules and so also the applicant at the relevant time when the D.P.C. met, in pursuance of which the aforesaid impugned order dated 1.2.1993 was issued. His main contention is that, since the eligibility conditions prescribed in the recruitment rules were not fulfilled by any of the candidates at that time, the promotion could have been made only on ad hoc basis. Admittedly, the applicant made a representation against the aforesaid impugned order on 10.10.1995, in which he had questioned the action of the respondents in promoting respondent no. 3 as E.S.I. and praying for its cancellation, as according to him the same has been passed erroneously. This O.A. has been filed on 04.03.1996 praying for, inter-alia, the reliefs as set out in paragraph 8. This includes quashing of the impugned order dated 01.02.1993 promoting the applicant's junior/respondent no. 3 to the next higher grade and for a direction to respondent no. 1 to consider his case for ad hoc promotion to the post of E.S.I. as per the D.O.P. & T. O.M. dated 30.03.1988 with consequential monetary benefits.

3. We have seen the reply filed by the respondents and heard Shri R.R. Shetty, learned proxy counsel for respondents 1 and 2 and Shri Suresh Kumar, learned counsel for respondent 3. In the reply filed by respondent nos. 1 and 2 dated 31.5.1996 they have submitted that both the applicant and respondent no. 3 were

were promoted to the post of E.G. on ad hoc basis by the order dated 9.8.1989. They have admitted that neither of these persons had put in three years of regular service in the grade of E.G. at the relevant time when the impugned promotion order in respect of respondent no. 3 was issued. They have further stated as follows :

"However, this fact was not brought to the notice of the Departmental Promotion Committee by the concerned department and hence the promotion to the post of Excise Sub-Inspector being a selection post was accordingly considered by the Departmental Promotion Committee and the Departmental Promotion Committee recommended the Respondent No. 3 alongwith two others for promotion to the post of Excise Sub-Inspector."

In the reply, they have further submitted that realizing their error which they have committed in furnishing the relevant information to the D.P.C., they had initiated action for regularising the service of the applicant and other employees also. This action, according to the learned counsel for respondents, has been done when they have issued the order dated 17.12.1996 (Exhibit R-1). By this order, the ad hoc promotion of 18 Assistant Excise Guards to the post of Excise Guards, which were earlier done on ad hoc basis, were regularised. In other words, both, the applicant who belongs to a Scheduled Tribe community and respondent no. 3 were shown as holding the post of Excise Guards on regular basis w.e.f. 9.8.1989. He has also

submitted that the respondents have continued to maintain the seniority of the applicant above respondent no. 3. Hence, according to him, the action of the respondents cannot be faulted. He has further submitted that the impugned order, regularly promoting respondent no. 3, is, therefore, correct and legal because even if a review D.P.C. is ordered at this stage, that D.P.C. would also presumably come to the same conclusion as has been arrived at by the D.P.C. held in 1992. He has submitted that the selection to the post of E.S.I. has been done in accordance with the relevant recruitment rules and, there is no infirmity. His contention is that since the applicant has also been considered in the D.P.C. held on 28.01.1993, there is no question of any further Review D.P.C. being held in this case. He has also agreed with the submissions made by the learned counsel for respondent no. 3 that the application is barred by limitation.

4. Learned counsel for respondent no. 3 has more or less taken the same grounds as have been taken by the learned counsel for official respondents. He also relies on the judgement of the Hon'ble Supreme Court in Union of India v/s. K. B. Rajoria [2000 (1) SC SLJ 504].

5. We have carefully considered the pleadings and submissions made by the learned counsel for the parties.

6. Regarding the preliminary objection taken by the learned counsel for respondents on limitation, we are constrained to note what has been stated by the official respondents themselves in their reply filed on 31.05.1996. In this reply they have clearly stated that "the fact that all the incumbents in the grade of Excise Guards were on adhoc basis were not brought to the notice of the Departmental Promotion Committee, the matter came to light only when the applicant made a representation", which was admittedly made a few years later on on 10.10.1995. In other words, it appears that but for the fact that applicant had raised the point, the official respondents were blissfully unaware even after more than two years that they had given wrong information and facts to the D.P.C. which was held on 28.01.1993. Shri M.S. Ramamurthy, learned counsel had also pointed out the contradictory stand taken by the respondent no. 3 in his rejoinder wherein it has been stated, inter alia, that on the one hand the application is barred by limitation and at the same time it is premature. It is also relevant to note that in the representation submitted by the applicant, he has stated that taking into account the rule position, he had correctly assumed that the promotion was purely on temporary/adhoc basis and,

therefore, he had not made any grievance at that time but since the promotion of respondent no. 3 continued even till the year 1995, he has submitted the representation. In view of the facts and circumstances of the case, since admittedly the official respondents themselves became aware of their errors in not following the statutory provisions of the recruitment rules till after two years of the impugned promotion order and that too, only when the applicant made a representation to them to consider the matter, and the fact that they had issued the order dated 17.12.1996 during the pendency of this O.A., we are of the view that this is a fit case where the delay should be condoned and the bar of limitation has to be rejected and we do so. In any case, the respondents cannot reply on their own wrong and take this plea of limitation when they themselves have admittedly corrected their apparent mistakes in violation of the statutory provisions only in 1996, whereby they chose to regularise the ad hoc promotions of the incumbents to the post of E.Gs. with retrospective effect from 9.8.1989. Therefore, in the facts and circumstances of the case, the preliminary objection of bar of limitation is rejected.

7. On the merits of the case, from the facts mentioned above, it is clear that the official respondents have not placed the relevant, correct and material facts before the D.P.C. which

met on 28.1.1993, on the basis of which the impugned order dated 1.2.1993 has been issued. In the facts and circumstances of the case, therefore, we are unable to agree with the contentions of Shri Ravi Shetty, learned counsel, that this is not a case fit for holding a review D.P.C. In the Government of India, D.O.P. & T. Instructions, dealing with Review D.P.C. (referred to in Swamy's Complete Manual on Establishment and Administration, 7th Edition, page 807), it has been stated that the proceedings of any D.P.C. may be reviewed wherein ineligible persons were considered by mistake or there has been procedural irregularity, etc. In the facts of this case, as the correct facts had admittedly not been placed by the official respondents before the earlier D.P.C., we consider it appropriate that the same should be done by a review D.P.C. in accordance with the relevant provisions of law, rules and instructions.

8. An argument was also advanced by the learned counsel for respondent no. 3 based on the judgement of the Hon'ble Supreme Court in Union of India V/s. K. B. Rajoria (supra) that under the relevant recruitment rules of 1986, the three years regular service in the grade of E.Gs. who were eligible for consideration for promotion to E.S.I. will include the actual service put in, even if it is on ad hoc basis. We are unable to agree with this contention as what was being considered in

Rajoria's case (*supra*) is with regard to the service consequent upon notional promotions given to the eligible officers. The facts in the present case are, distinguishable from facts in K.B. Rajoria's case (*supra*). In the circumstances, the contention of Shri Suresh Kumar, learned counsel, that the admitted ad hoc service rendered by respondent no. 3 and applicant should be taken as regular or actual service in terms of the recruitment rules cannot be accepted. The judgement in Rajoria's case will, therefore, not assist respondent no. 3 in the facts of the present case.

9. Considering the facts and circumstances of the case and also noting that the impugned order dated 1.2.1993 by which respondent no. 3 had been promoted to the post of E.S.I. has been done by the erroneous action of the official respondents and not attributable to any wrong or fraudulent action of respondent no. 3, we do not quash that order at this stage. However, for the reasons given above, we direct respondent nos. 1 and 2 to hold a review D.P.C., taking into consideration the relevant facts, above observations and rule position, within two months from the date of receipt of a copy of this order. In the circumstances of the case, respondent no. 3 shall be allowed to continue in the post of E.S.I. in the administrative interest, if he is still

continuing in that post, till the recommendations of the review D.P.C. are made. Thereafter, respondent nos. 1 and 2 shall take appropriate decision in the matter on the recommendations in accordance with applicable law and rules.

10. The O.A. is disposed of in terms of para 9 above. No order as to costs.

Shanta Shastray
(Smt. SHANTA SHAstry)
MEMBER (A)

Lakshmi Swaminathan
(Smt. LAKSHMI SWAMINATHAN)
VICE-CHAIRMAN (J).

os*