IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9279 OF 2004

Prabha V. Nair ...Petitioner
Versus
Union of India and anr. ...Respondents

Smt. Delilah Fernandes for the Petitioner.
Mrs. Anjali N. Helekar a/w. Mr. P. Khosla for the Respondents.

CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.

DATE : 14.06.2018.

ORAL JUDGMENT:

1] Heard Ms Delilah Fernandes, learned counsel for the petitioner and Ms Anjali Helekar, learned counsel for the respondents.

2] Rule was issued in this petition on 2.12.2004 and since, there was an apprehension that the petitioner might be reverted, the *status quo* already granted on 19.11.2004 was directed to continue pending the hearing and final disposal of the petition.

3] The challenge in this petition is to the impugned judgment and order dated 29.10.2004 made by the Central

Administrative Tribunal (CAT), Mumbai dismissing the petitioner's O.A. No. 127 of 2004 seeking the following substantive reliefs:

> “*a) This Hon'ble Court be pleased to hold and declare that the Applicant is rightly promoted to the post of Inspector taking into account his year of passing inspector examination vide order dated 21.11.1994.*
>
> *b) This Hon'ble Court be pleased to hold and declare that action on the part of the Respondents in reverting the Applicant/changing his date of promotion to the later year is discriminatory and violative of Article 14 and 16 of the Constitution of India and other similar situation employees whose names were given in the representation are continued to be shown to be promoted on the basis of their year of passing and not on the basis of year of joining.*
>
> *c) This Hon'ble Court be pleased to hold an declare that the Applicant is entitled for promotion to the post of Inspector of Income Tax, on the basis of their seniority in the grade of inspector w.e.f 24.11.1994 promoted taking into account the year of passing of examination.*
>
> *d) To hold and declared that the clarification dated 23.01.2003 is not applicable retrospectively. the clarification dated 23.1.2003 do not provides that it is applicable retrospectively.*”

4] The facts and circumstances, in which, this challenge arises, are as follows:

a) The petitioner was appointed as Stenographer (O.G.) in the Income Tax Department, Mumbai on 7.06.1971.

b) In 1971, the petitioner passed the Income Tax Inspector Examination in Mumbai charge.

c) The respondents, in supersession of the earlier instructions, issued fresh instructions in matter of transfer of non-gazzetted staff from one charge to another. Clause (f) of such instructions, *inter alia* provides that staff member, upon inter charge transfer on compassionate basis will not be entitled to count the service rendered in the old charge for purposes of seniority.

d) The petitioner on account of domestic constraints applied for inter charge transfer from Mumbai to Pune. This application was accepted and the petitioner was transferred from Mumbai to Pune with effect from 24.01.1991.

e) Consistent with the instructions dated 14.05.1990, at Pune charge, the petitioner was placed at bottom of the seniority list in the concerned cadre in the new charge. The petitioner has no grievance on this score since, such placement, was entirely consistent with clause (f) of the instructions dated 14.05.1990.

f) On 24.11.1994, perhaps, taking into consideration the fact that the petitioner had cleared her Income Tax Inspector examination in the year 1977, the petitioner was promoted as Inspector of Income Tax.

g) After seven years, i.e., on 30.03.2001, the respondents, relying upon letter dated 12.02.1987, issued by the CBDT contend that the petitioner on her inter charge transfer from Mumbai to Pune ought to have been placed as junior most in the new charge both in the "*year of passing list*" as well as "*seniority list*". On this basis, the petitioner was informed that it was proposed to hold a review DPC so as to correct the error by which the petitioner was promoted as Inspector of Income Tax wayback on 24.11.1994.

h) The petitioner, upon receipt of communication dated 30.03.2001 submitted her response by letter dated 01.05.2001. The petitioner specifically contended that the letter dated 12.02.1987 was only a clarification to the instruction dated 30.06.1986 and further, the instructions dated 14.05.1990, on the basis of which, the petitioner was transferred from Mumbai to Pune, had specifically superseded the instructions dated 30.06.1986. The petitioner relied upon the ruling of the Hon'ble Supreme Court to contend that promotions to the post of Income Tax Inspectors had to be made on the basis of year of passing examination.

i) Perhaps realizing that there was no provision akin to the provision in letter dated 12.02.1987 in the instructions dated 14.05.1990, the respondents issued a letter dated 23.01.2003 purporting to clarify the instructions dated 14.05.1990. In terms of the letter dated 23.01.2003, the respondents sought to clarify that the reference to the staff member being placed at the bottom of seniority list will include such staff members being placed at the bottom “ *year of passing”* list as well.

j) The petitioner addressed yet another representation dated 4.03.2003 protesting against any attempt to *post facto* amend the instructions dated 14.05.1990.

k) Without taking into consideration the petitioner's representation dated 04.03.2003, the respondents published the eligibility list of Inspector of Income Tax who have qualified for promotion as Income Tax Officer as on 1.01.2003. This list was published on 27.10.2003, in which, the name of the petitioner, which, according to the petitioner, ought to have figured at serial No.21 was omitted. This is despite the fact that in the earlier list published on 11.01.2002, the name of the petitioner was rightly indicated at serial No.158.

l) The petitioner, by her representation dated 4.11.2003 protested her exclusion, even before her pending representation would be considered and disposed of.

m) The respondents published yet another seniority list of Inspectors on 22.12.2003, in which, the name of the petitioner figured at serial No.75. However, as against the name of the petitioner there is an * mark with the remark that the seniority of the petitioner in the Inspector grade will refixed in due course. This was indicated as based upon the Board's letter dated 21.11.2003.

n) As the petitioner was never furnished with the copy of the Board's letter dated 21.11.2003, the petitioner, by her application dated 19.01.2004, sought for a copy of the same so that she could make an effective representation objecting to the seniority list dated 22.12.2003. The respondents, however, did not respond to this request.

o) The petitioner apprehending that the review DPC might be held in pursuance of communication dated 30.03.2001 in order to revert the petitioner from the post of Income Tax Officer and further, since, the case of the petitioner was not being considered for promotion as Income Tax Officer, the petitioner instituted O.A. No.127 of 2004 before the CAT seeking for substantive reliefs as aforesaid.

p) By the judgment and order dated 29.10.2004, the CAT, has dismissed the petitioner's O.A. No. 127 of 2004. Hence, the present petition. As noted earlier, this petition was admitted 2.12.2004 and *status quo* granted earlier on 19.11.2004 was granted to continue pending the disposal and final dispose of the petition.

5] Ms Fernandes, learned counsel for the petitioner, submits that the instructions dated 14.05.1990 are quite clear, inasmuch as they provide that an employee, upon inter charge transfer, looses seniority alone. The instructions dated 14.05.1990, quite consciously depart from earlier instructions and make no variation whatsoever in the year of passing examination list. She submits that the letter dated 12.02.1987, upon which the respondents placed reliance, only clarifies the previous instructions dated

30.06.1986. She submits that the instructions dated 14.05.1990, in terms, supersede the instructions dated 30.06.1986. Consequently, the letter dated 12.02.1987, cannot survive and has been incorrectly relied upon by the respondents in their communication dated 30.03.2001. Ms Fernandes submits that for this very reason the communication dated 30.03.2001 is required to be struck down.

6] Ms Fernandes submits in the alternate that the respondents cannot after almost seven years seek to revert the petitioner, particularly, when there is absolutely no allegation of any misrepresentation on the part of the petitioner. Ms Fernandes further submits that the letter dated 23.01.2003 is not at all applicable to the case of the petitioner. She submits that such a letter can never be given in retrospective effect. She submits that as on the date of petitioner's inter charge transfer such a policy of depriving the transferee of his/her position in the year of passing examination list was not at all one of the conditions prescribed. Ms Fernandes submits that the respondents are estopped from introducing such a condition after the petitioner has altered her position, virtually irreversibly. Ms Fernandes submits that the instructions of such nature, can never be given any retrospective effect.

7] For all these reasons, Ms Fernandes submits that the impugned judgment and order made by the CAT warrants interference.

8] Ms Anjali Helekar, learned counsel for the respondents, submits that the issue of inter charge transfers was entirely governed by instructions dated 12.12.1969, in which, it was very clearly stated that inter charge transferee would be placed in the examination vide list below the persons who have passed the said examination in the new charge up to the date of transfer. She submits that 1969 instructions were superseded by instructions dated 30.06.1986. Since, this position was not very clearly stated in the instructions dated 30.06.1986, instructions were issued on 12.02.1987 making this position clear. She submits that the instructions dated 14.05.1990 also reiterate the same position. Since, some ambiguity was raised, the same was clarified by letter dated 23.01.2003.

Ms Helekar submits that it is consistent practice to deny inter charge transferee even the benefit of the position in the year of passing examination list. Ms Helekar, therefore, submitted that there is no infirmity whatsoever in the communication dated 30.03.2001 and the subsequent action of the respondents based thereupon. She submits that the petitioner was promoted as Income Tax Officer by mistake on 24.11.1994 and there is no limitation, when it comes to correction of mistakes. For these reasons, Ms Helekar submits that there is no jurisdictional error in the view taken by the CAT and therefore, this petition may be dismissed.

9] The rival contentions now fall for our determination.

10] The communication dated 30.03.2001, by which, the respondents proposed to hold a review DPC and revert the petitioner from the post of Income Tax Inspector to which, she was promoted on 24.11.1994, is almost entirely based upon the letter dated 12.02.1987 addressed by the Central Board of Direct Taxes (CBDT), New Delhi. This letter, in terms, not only refers to but purports to clarify the instructions in CBDT's letter dated 30.06.1986 on the subject of inter charge transfers. The letter dated 12.02.1987 is therefore, not some stand alone letter, but this letter only seeks to clarify the instructions in the letter dated 30.06.1986. Therefore, if the instructions in the letter dated 30.06.1986 stand expressly superseded by the instructions in the letter dated 14.05.1990, there is no question of the respondents placing any reliance whatsoever on the letter dated 12.02.1987. Ms Fernandes's contention in this regard is therefore, required to be upheld.

11] The instructions in the letter dated 12.12.1969 had provided for the following matters for determination of seniority and promotions in pursuance of inter charge transfers :

> "*(e) A person transferred to another charge will not be eligible for consideration for promotion or confirmation in the old charge. His lien in the old charge can, however, be suspended undr F.R. 14. He will be eligible for promotion/confirmation in the new charge.*
> *f) A person officiating in a grade will not be eligible for transfer until he has put in at least 3 years service in that grade.*
> *g) The seniority of a person transferred under these instructions shall be reckoned from the date of his/her joining the new charge on transfer.*
> *h) An U.D.C. or other member of the staff who has passed the Inspectors' grade examination*

(Departmental) would be placed in the "Examination-wise List" for purposes of promotion as Inspector below all the persons who have passed the said examination in the new charge upto the date of his transfer."

12] The instructions dated 12.12.1969 were specifically superseded by the instructions dated 30.06.1986. Insofar as the issue of determination of seniority and promotion was concerned, the instructions dated 30.06.1986 provided for the following:

"*(b) The transferee will not be entitled to count the service rendered by him in the former charge/office for the purpose of seniority in the new charge/office. In other words, he will be treated as a new entrant in the charge/office to which he is transferred and will be placed at athe bottom of the list of the temporary employees of the concerned cadre in the new charge/office.*

(c) On transfer, the transferee will not be considered for promotion/confirmation in the old charge/office. He will be eligible for promotion/confirmation in the new charge/office."

13] From the aforesaid, it is quite clear that though the instructions dated 12.12.1969 had provided for a variation in both the seniority position as well as examination-wise list, the instructions dated 30.06.1986 were restricted only to the aspect of seniority position.

14] By letter dated 12.02.1987, however, the CBDT clarified that an inter charge transferee will rank below all the persons who have passed the examination in the new charge upto the date of his transfer. This means that alteration in the examination-wise list was reintroduced in the instructions dated 30.06.1986.

15] The instructions dated 14.05.1990 expressly superseded the instructions dated 30.06.1986. Upon such supersession, the respondents can neither rely upon the instructions dated 30.06.1986 nor clarifications to such instructions has brought about by letter dated 12.02.1987. The instructions dated 14.05.1990 on the aspect of determination of seniority and promotion provided as follows:

> "*(f) The service rendered in the old Charge will not be counted in the new charge for the purpsoe of seniority. He/she will be placed at the bottom of the list of the employees of the concerned Cadre in the new charge. Seniority in the cadre in the Charge to which person is transferred will start from the day that person reports for duty in that charge. However, he will not rank Senior to any official who belongs to a batch selected on merit whose inter-se seniority is not regulated by date of joining.*
>
> *(g) On transfer, the transferee will forfeit all claims for promotion/confirmation in the old Charge. He/she will be eligible for promotion / confirmation only in the*

new Charge in accordance with the seniority allotted to him on transfer.”

16] Significantly, the instructions dated 14.05.1990 make it clear that the seniority position of inter charge transferee will be affected but the reference to the position in the examination-wise list is only conspicuous by its absence. This will have to be construed as a conscious departure because the CBDT before issuing instructions dated 14.05.1990 had before it the instructions of 1969, 1986 and the clarification of 1987. Despite having all such instructions before it, the CBDT whilst issuing the instructions dated 14.05.1990 quite consciously chose not to alter the examination-wise list at the new charge.

17] At the stage when the petitioner had applied for inter charge transfer from Mumbai to Pune and at the stage when the petitioner was actually transferred from Mumbai to Pune on 24.01.1991, the instructions which were holding filed were the instructions dated 14.05.1990. Following such instructions, the respondents themselves, chose not to alter the petitioner's position in the examination-wise list and further, even promoted the petitioner as an Inspector of

Income Tax on 24.11.1994 upon the petitioner completing three years at the new charge.

18] For a period of over seven years, there was no issue whatsoever was raised either regards the interpretation of instructions dated 14.05.1990 or the petitioner's promotion to the post of Inspector of Income Tax on 24.11.1994. After seven years, the respondents, purporting to rely upon the instructions dated 12.02.1987 sought to revert the petitioner from the post of Inspector of Income Tax by insisting that the petitioner's position in the examination-wise list ought to have to been downgraded. As noted earlier, the communication dated 30.03.2001 is *ex facie,* illegal and ultra vires, since, it is based upon the letter dated 12.02.1987, which letter, was already superseded by the instructions dated 14.05.1990.

19] Apart from the above reasons, we find merit in the contention of Ms Fernandes that even the respondents cannot seek to alter the promotion effected almost seven years earlier in this manner. Apart from the issue of inordinate delay, it is pertinent to note that there is no allegation of any misrepresentation on the part of the petitioner. This is an additional reason to declare the communication dated 30.03.2001 as illegal and ultra vires.

20] The so called clarification dated 23.01.2003, obviously cannot apply to the case of the petitioner. The instruction dated 23.01.2003 has styled as clarification, but in fact, they seek to alter the instructions dated 14.05.1990. The only reason it has been styled as clarification is perhaps to attempt to give it a retrospective effect. The instructions themselves do not state that they have to apply retrospectively. In any case, in the peculiar facts and circumstances of the present case, the principles of estoppel will apply. Had the petitioner, known on 14.05.1990 itself that she stood to loose her position in the examination-wise list as well, perhaps, she may not have opted for an inter charge transfer. The petitioner, opted for inter charge transfer on the basis of instructions dated 14.05.1990, which were in force at the relevant time. On such basis, the petitioner was not only granted inter charge transfer, but further, the petitioner's position in the examination-wise list was specifically protected and the petitioner was on 24.11.1994, even promoted to the post of Inspector of Income Tax. All this, cannot be simply taken away on the basis of so called clarification dated 23.01.2003. As noted earlier, the instructions dated 23.01.2003 do not themselves state that they were to apply with retrospective effect.

21] The CAT has proceeded on the basis that the instructions in letter dated 12.02.1987 were stand alone instructions and therefore, such directions were not superseded by the instructions dated 14.05.1990. This, in our opinion, is an error apparent on the face of record. Besides, the CAT failed to appreciate that equities which had arisen in favour of the petitioner, in the peculiar facts and circumstances of the present case. These are sufficient reasons to interfere with the impugned judgment and order.

22] Accordingly, we dispose of the petitioner with the following order:

(a) The impugned judgment and order dated 29.10.2004 made by the CAT is hereby set aside.

(b) We declare that the petitioner was validly promoted as Inspector with effect from 24.11.1994 by taking into consideration the year of her passing the prescribed examination.

(c) We declare that the clarification in letter dated 23.01.2003 will not apply to the case of the petitioner and on basis of the same or otherwise, the respondents are restrained from reverting the petitioner.

(d) We direct that the case of the petitioner be considered for promotion by DPC to be constituted within three months from today on the basis that the promotion of the petitioner to the grade of Income Tax Officer with effect from 24.11.1994 was legal and valid.

(e) If the DPC finds that the petitioner deserves further promotion, then, the petitioner to be granted all consequential benefits within period of three months from the date of determination by the DPC. There is no question of actual promotion, since, the petitioner has already retired from service.

(f) Rule is made absolute in the aforesaid terms.

(g) There shall, however, be no order as to costs.

(M.S. SONAK, J.) **(ACTING CHIEF JUSTICE)**