

(1989) 02 BOM CK 0031
In the Bombay High Court
Case No : Writ Petition No. 300 of 1986

Gajanan Andhare

APPELLANT

Vs

Commandant General, Home Guards and Others

RESPONDENT

Date of Decision : 01-02-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 309, 311
Maharashtra Public Services (Subordinate) Selection Board Act, 1973 — Section 6, 9
Maharashtra Public Services Subordinate Selection Board (Exemption from Consultation) Rules, 1979 — Rule 3(1), 4

Citation : (1989) 3 BomCR 61 : (1989) MhLj 296

Hon'ble Judges : H.W. Dhabe, J;G.G. Loney, J

Bench : Division Bench

Advocate : P.T. Trivedi, for the Appellant; V.V. Naik, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

H.W. Dhabe, J.—The grievance of the petitioner in the instant writ petition is that he is illegally superseded by the respondents 2 to 13 in promotion to the post of Paltan Naik and other equivalent posts to which the aforesaid respondents were promoted by the order dated 22-6-1984.

2. Briefly, the facts are that by the order dated 3-2-1977, the petitioner was appointed as Havildar instructor by the respondents No.1 on purely temporary basis, pending availability of the candidates selected by the Maharashtra Public Services (Subordinate) Selection Board (for short,"MPSSB") or any of the candidates from the Surplus Cadre Cell available with the Collector or in the General Administration Department of the Mantralaya. It is his case that the respondents 2 to 13 were also appointed likewise on purely temporary basis, after he was appointed as per the aforesaid order dated 3-2-1977. Thus according to him, on the basis of the initial order of appointment the respondents 2 to 13 were junior to him. It is, however, clear that the petitioner as well as the respondents 2 to 13 were required to appear before the MPSSB and after their

selection by the MPSSB their appointments were regularised by the respondent No.1 by his order dated 29-5-1979 from the date of issue of the said order. It is mentioned by him in his order dated 29-5-1979 that the seniority of the appointees will be reckoned in accordance with their places in the merit list prepared by the MPSSB irrespective of their dates of initial appointment in the said post.

3. The respondent No. 1 thereafter by his order dated 22-6-1984, promoted the respondents 2 to 13 to the higher posts shown against their names on temporary basis until further orders. It appears that the above temporary promotions until further orders were made since no seniority list of Havildar Instructors as per the Rules was framed by the competent authority of the State. The petitioner as well as other persons like him and particularly Shri A.G. Pande, Havildar Instructor, had made representations about their seniority to the appropriate authority of the State Government. In reply to the representation made by Shri A. G. Pande, Havildar Instructor, the Accounts Officer, Home Guards, State of Maharashtra, informed the District Commandant, Home Guards, Nagpur by his letter dated 2-9-1983 that the question of seniority of Havildar Instructors is under consideration of the Government and that pending finalisation of such seniority list Shri Pande's name should be shown in the Attendance Register as per the initial date of his appointment to the post of Havildar Instructor. The petitioner was, however, informed about his representation against the aforesaid order of promotion dated 22-6-1984 by the Commandant General. Home Guards by this memo dated 27-2-1985 that his representation was rejected because the promotions as per the order dated 26-2-1984 were made according to the placement of the candidates concerned in the select list prepared by the MPSSB. Feeling aggrieved, the petitioner has preferred the instant writ petition in this Court claiming the relief that the order of promotion dated 22-6-1984 promoting the respondents 2 to 13 to the higher post as shown against their names should be quashed and the respondent No. 1 should be directed to give to the petitioner a suitable deemed date of promotion with all consequential benefits above the respondents 2 to 13.

4. The learned Counsel for the petitioner principally urged before us that despite the selection made by the MPSSB and the order of regular appointment passed by the respondent No.1 on 29-5-1979 his seniority has to be reckoned from the date of his initial appointment i.e. 3-2-1977 and not as per the places in the merit list prepared by the MPSSB. Incidentally, he has also urged that even applying the criteria of the places in the merit list prepared by the MPSSB for determining the seniority of the petitioner he is still entitled to be promoted because although the places of M/s. S.S. Mungalkar and G.D. Patil, i.e. the respondents 5 and 6, are much below him in the select list of MPSSB they are promoted to the higher posts as per the impugned order dated 22-6-1984. Both these contentions are controverted on behalf of the State and as regards the question of regularisation from the date of initial appointment it is urged that the said grievance of the petitioner cannot be entertained now because he had

appeared before the MPSSB and after his selection the order of regularisation was passed as far back as on 29-5-1979 in which it was clearly mentioned that the seniority of the appointees would be determined on the basis of their places in the merit list prepared by the MPSSB.

5. In support of the contention that the seniority of the petitioner has to be reckoned from the date of his initial appointment, the learned Counsel for the petitioner has relied upon Rule 4 introduced by the Maharashtra Public Services (Subordinate) Selection Board (Exemption from Consultation) (Third Amendment) Rules, 1979 (for short, "Third Amendment Rules"), according to which the submission is that subject to the fulfilment of the conditions laid down in Rule 4, the appointment made by the competent authority before 31-12-1978 to any post under sub-clause (i) of Clause (1) of Rule 3 of the Maharashtra Public Services (Subordinate) Selection Board Exemption from Consultation Rules, 1976 (for short, "Exemption Rules" is fully exempt from the selection by the Selection Board.

5-A. In appreciating the above contention urged on behalf of the petitioner, it may be seen that these appointments are governed by the Maharashtra Public Services (Subordinate) Selection Board Act, 1973 in accordance with which the regular appointment to the post in question can be made only after the selection by the MPSSB thereunder. However, as provided in the aforesaid Exemption Rules framed in the exercise of the power conferred by section 9(1) read with the proviso to section 6 of the above Act, under certain circumstances as given in Rule 3 of the Exemption Rules the selection by the MPSSB is not necessary. For the purpose of the instant case it is necessary to see that as per Rule 3(1)(i) it is not necessary for the MPSSB to select the candidates for appointment to any post in subordinate services when the said appointment is made for a period not exceeding or not likely to exceed for a period of six months which provision, it is not in dispute, is later on amended by introducing a period of one year instead of six months by the Maharashtra Public Services (Subordinate) Selection Board (Exemption From Consultation) (Second Amendment) Rules, 1979. It is not in dispute, as it is admitted in para 2 of the return, that the appointment of the petitioner was made on purely temporary basis by the appointing authority, i.e. the respondent No. 1, as per the aforesaid provision of Rule 3(1)(i) of the Exemption Rules.

6. It is then necessary to see that it is in respect of the appointments made under the aforesaid Rule 3(1)(i) that the amendment is introduced by the Third Amendment Rules by inserting Rule 4 in the Exemption Rules. Rule 4 which is also extracted by the petitioner in para 2 of his petition provides that selection by the Selection Board for regular appointment to any post which has been filed by the appointing authority under the aforesaid Rule 3(1)(i) before 31-12-1978 by nomination would not be necessary if such an appointee satisfies the following conditions:---

i) who on the date of his initial appointment to the said post was within the age

limit and possessed the minimum qualifications prescribed therefor,

ii) whose appointment was made to the said post through the Employment Exchange in accordance with the rules in force,

iii) whose appointment was in conformity with the orders issued by the Government regarding reservation of posts for the members of the backward classes or of economically weaker sections, ex-servicemen, physically handicapped persons and the members of any other class of classes of persons specified in such orders, till such a post is held by the said person, and

iv) who is holding such post on the 15th December, 1979:

6-A. The material proviso to Rule 4 and its Explanation are then as follows:

"Provided that the Selection Board shall scrutinize such appointment and satisfy itself that the conditions specified in Clauses (i), (ii), (iii) and (iv) aforesaid are duly complied with.

Explanation.---For determining the initial appointment for the purpose of this rule, any technical break in service effected and any subsequent formal order of appointment made in respect of a person continued in such a post in order to comply with the requirement of any rules shall be ignored."

As per the above proviso to the said Rule 4 Selection Board has to scrutinise such appointments and satisfy itself that the conditions specified in Clauses (i) to (iv) referred to above are duly complied with by such an appointment. The Explanation to Rule 4 clarifies that for determining the initial appointment for the purpose of the said rule, any technical break in service effected and any subsequent formal order of appointment made in respect of a person continued in such post in order to comply with the requirement of any Rules has to be ignored. It is clear from the above Rule 4 that its intention is to regularise the appointment made without the selection by the Selection Board prior to 31-12-1978 if the conditions laid down in the said Rules are satisfied.

7. The question, therefore is whether the petitioner satisfies the conditions laid down in Rule 4 so that even without selection by the MPSSB his initial appointment under the order dated 3-2-1977 as Havildar Instructor can itself be treated as regular appointment with effect from date of the said order. It is the case of the petitioner that he satisfies all the requirements of the aforesaid Rule 4. It is not in dispute that the appointment of the petitioner without selection by the MPSSB is made prior to 31-12-1978. As regards the question of the minimum age limit and the possession of the minimum qualification prescribed for the post of the Havildar Instructor on the date of the initial appointment, or the question of his appointment being made through the Employment Exchange or as regards the question whether it was in a reserved post, as contemplated by Clauses (i) to (iii) in Rule 4, although it is urged on behalf of the petitioner, that these conditions are complied with by the petitioner, no documents or any other material is placed on record by the respondent No.1 to show that the petitioner

has not complied with any of above conditions in Rule 4. It is also not in dispute that as required by Clause (iv) of Rule 4 the petitioner was holding the post of Havildar Instructor on 15-12-1979, i.e. the date on which the Third Amendment Rules were promulgated. There is thus no serious dispute about the compliance with the conditions of Rule 4 by the petitioner. It is, therefore, clear that since the petitioner satisfied the requirements of Rule 4, his appointment in the post of Havildar Instructor needs to be treated as regular appointment, from the date of his initial appointment, i.e. 3-2-1977, as the necessity of his selection by the MPSSB is dispensed within Rule 4 referred to above.

8. The learned Counsel for the respondent No. 1 has, however, urged before us that the petitioner was already sent for selection by the MPSSB and was appointed pursuant to his selection as a regular appointee as per the order dated 25-9-1979. The submission, therefore, is that the Third Amendment Rules are not applicable in his case. The above submission made on behalf of the respondent No. 1 cannot be accepted in the light of the aforesaid Rule 4 itself. In the first place, Rule 4 is applicable to the appointments made prior to 31-12-1978 which shows that it operates upon the appointments made prior to the commencement of the said Rules. The submission made by the learned Counsel for the respondent No. 1, however, stands concluded against him in view of the Explanation to Rule 4. According to the said Explanation, any subsequent formal order of appointment made in respect of a person continued in such a post in order to comply with the requirement of the Rules has to be ignored. It would thus show that even though the petitioner was sent for selection by the MPSSB and was actually selected and appointed as per the requirement of the normal rules for regular appointment the said formal order of his appointment dated 29-5-1979 has to be ignored as per the Explanation to Rule 4. The intention in thus ignoring the formal order of appointment is clear that the regularization of appointees whose appointments are prior to 31-12-1978 has to be from the date of their initial appointment if they satisfied the requisite conditions of Rule 4 so that they get their seniority from their dates of initial appointment. The above submission made on behalf of the respondent No. 1 that Rule 4 is not applicable to the petitioner because he is subsequently appointed pursuant to his selection by the MPSSB is, therefore, rejected.

8-A. It is thus clear that in view of Rule 4 the petitioner has to be treated as a regular appointee since the date of his initial appointment pursuant to the order dated 3-2-1977. The above conclusion to a certain extent is supported by the letter of the Accounts Officer, Home Guards dated 2-9-1973 addressed to the District Commandant, Home Guards, Nagpur, in which it is stated that " pending finalization of the seniority list the name of Shri Panda, another Havildar Instructor like the petitioner, should be shown in the attendance register as per his initial appointment to the post of Havildar Instructor.

9. Once it is held that the seniority of the petitioner has to be reckoned from the date of his initial appointment it is clear from the schedule incorporated as

Annexure-4 to the writ petition by the petitioner that as per the date of his appointment he is senior to the respondents 4 to 13 whose dates of appointment are given at serial numbers 4 to 13 in the schedule. He cannot straightway claim seniority over the respondents 2 to 3 because their dates of appointment are the same as that of the petitioner. Their inter se seniority will have to be determined by the respondent No. 1 in the light of the relevant criteria for determination of seniority of such persons appointed on the same day.

10. Turning now to the promotions made by the respondent No. 1 as per the impugned order dated 22-6-1984, it is not in dispute that the criteria for promotion is seniority-cum-merit. In reckoning seniority, it is not in dispute, that the seniority is reckoned by the respondent No. 1 as per the places of the incumbents in the merit list prepared by the MPSSB, the said places being shown in the order dated 29-5-1979 of regular appointment of various persons as Havildar Instructor including the petitioner and the respondents 2 to 13. As we have pointed out above, the seniority of the petitioner cannot be reckoned on the basis of his place in the merit list prepared by the MPSSB in view of the provisions of Rule 4 of the Exemption Rules referred to above. As regards the respondents 2 to 13 we have no material before us to find out whether they satisfy the requirements of the aforesaid Rule 4 and hence are entitled to get seniority from the dates of their initial appointment. The said question has, therefore, to be considered by the respondent No. 1 in the light of the provisions of Rule 4. However, even assuming that they are entitled to the benefit of Rule 4, as shown by the petitioner in his schedule annexed as Annexure 4 to the petition, the petitioner is senior to the respondents 4 to 13 on the basis of their initial dates of appointment also. The petitioner was, therefore, eligible for being considered for promotion to the higher post when the respondent No. 1 promoted the respondents 2 to 13 to the higher posts by his order dated 22-6-1984 since he satisfied the criteria of seniority for promotion.

11. It is, however, urged on behalf of the respondent No. 1 that the Departmental Promotion Committee (for short "DPC") did not recommend the petitioner for promotion to the higher post as his record was not found to be above average. It is however, well-settled that when the criteria is of seniority-cum-merit unless it is found that the petitioner was unfit, he could not have been superseded in promotion when he was senior at least to the respondents No. 4 to 13. The remark "not found above average" would not show that he was unfit to discharge the duties of the post of promotion). It is thus clear that the test of seniority-cum-merit is not properly made applicable by the respondent No. 1 while making promotions as per his impugned order dated 22-6-1984.

12. Moreover, as rightly pointed out by the learned Counsel for the petitioner, this consideration by the DPC is in January 1987, which is much after the order of promotion was issued on 22-6-1984. It is not in dispute that when the order of promotion was issued on 22-6-1984, the case of the petitioner was not considered at all by the respondent No. 1 or the DPC of the respondent No. 1. It

is thus clear that the promotion made by the respondent No. 1 from the post of Havildar Instructor to the higher post are illegal and suffer from non-consideration of the legitimate claim of the petitioner. It may also be seen that even the criteria of places in the merit list of the MPSSB for reckoning seniority is also not applied properly by the respondent No. 1 because although the place of the petitioner in the merit list is at serial No. 25, by superseding him the respondents 5 and 6 are promoted to the higher post although their places in the merit list of the MPSSB are at serial numbers 44 and 43, respectively.

13. It is, however, neither necessary nor just to strike down the order of promotion dated 22-6-1984 in respect of the promotions of the respondents 2 to 13. After considering the question of promotion of the petitioner, if it is found that he has to be promoted on the basis of the criteria of "seniority-cum-merit" in the light of the observations in this judgement, he can be given a deemed date of promotion on 22-6-1984 by creating, if necessary, the supernumerary post for him till he can be accommodated in a clear vacant post, and can be granted all consequential benefits from the said date. As already pointed out, the question of seniority amongst the petitioner, the respondents 2 and 3, who are appointed on the same day, will have to be decided by the respondent No. 1 or any other competent authority in the right of the relevant criteria for determination of seniority in the case of the persons appointed on the same day.

In the result, the instant writ petition is allowed. The respondent No. 1 is directed to determine the question of seniority amongst the petitioner, the respondent No. 2 and the respondent No. 3 as they are appointed on the same day. He is also directed to consider the claim of the petitioner for promotion to the next higher post from the post of Havildar instructor by counting his seniority from the date of his initial appointment i.e. 9-2-1977, in the light of the observations made by us in this judgement. He is further directed to consider the claim of promotion of the petitioner as on the same date on which the respondents 2 to 13 were promoted by his order dated 22-6-1984. On consideration of the claim of the petitioner as on 22-6-1984, if he is entitled to be promoted, he should be promoted with effect from 22-6-1984 by creating, necessary, a supernumerary post for him till he can be accommodated in a clear vacant post, and he should be given all consequential benefits with effect from that date. The respondent No. 1 is directed to comply with the above directions within six months from the date of this judgement. No costs.