
(2014) 05 BOM CK 0092
In the Bombay High Court
Case No : Writ Petition No. 7 of 2014

Anil Barmu Patil

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 07-05-2014

Acts Referred:

Constitution of India, 1950 — Article 14
Industrial Disputes Act, 1947 — Section 25J(1)

Citation : (2014) 5 ABR 533 : (2014) 4 ALLMR 791 : (2014) 7 BomCR 596 :
(2015) 144 FLR 276 : (2014) 3 LLN 635 : (2014) 6 MhLj 148

Hon'ble Judges : Z.A. Haq, J;F.M. Reis, J

Bench : Division Bench

Advocate : S.D. Lotlikar, Sr. Advocate and C. Padgaonkar, Advocate for the Appellant; Sagar Dhargalkar, Additional Government, Advocate for the Respondent

Final Decision : Allowed

Judgement

Z.A. Haq, J.—Heard.

Rule. Rule made returnable forthwith.

This Writ Petition and the other connected writ petitions raise the issue about the entitlement of the petitioner to join/continue on the post of "Labourer" Group "D" Non-Gazetted posts on Work-charged Establishment in the Public Works Department-P.W.D. of the State.

2. The relevant facts are:

An advertisement was published in the "Times of India" Goa Edition dated 11/2/2011 inviting applications for the posts of Labourer on Work-charged establishment of the Public Works Department of the Government of Goa. Forty posts of Labourers were advertised and the reservations were also shown. It was stated that the number of vacancies shown in the advertisement were tentative and likely to increase. It was further stated that the additional vacancies likely to

occur within the validity period of DSC will also be considered for filling up from amongst the candidates who applied in response to the advertisement and selected from the panel. It stated that the reservation of the vacancies in different categories in respect of the additional vacancies would be done as per the posts based reservation roster prescribed by the Government. Duly constituted Departmental Selection Committee conducted the interviews and prepared the Select List. The name of the petitioner appeared in the list of General category candidates at serial No. 30. The recommendation of the DSC were accepted by the Government and a memorandum dated 4/11/2011 was sent by the Deputy Director of Administration, P.W.D. to the petitioner requiring the petitioner to communicate his acceptance of the offer for the temporary post of Labourer Group "D" Non Gazetted on the establishment in the P.W.D. in the Pay Band of Rs. 4440-7440+Grade Pay of Rs. 1300. The Deputy Director of Administration, P.W.D sent communication dated 12/12/2011 to the Medical Superintendent Hospicio Hospital Margao requesting for medical examination of the petitioner along with some other candidates. The petitioner was medically examined on 27/12/2011 and the fitness certificate was given to the petitioner. The petitioner did not receive any further communication in the matter and therefore, he had sent a notice dated 6/5/2013 through his advocate to the Deputy Director of Administration, P.W.D. The Deputy Director of Administration, P.W.D. gave the reply dated 9/7/2013 and informed the petitioner that the offers of appointment which are issued cannot be given effect till the model code of Conduct was lifted. According to the petitioner, the petitioner was not permitted to join the service even after the model code of conduct was lifted and therefore he is constrained to approach this Court for the redressal of his grievance.

The substantial challenge as raised by the petitioner appears to be that the petitioner is being deprived of his legitimate claim of joining the service as there is a change in the Government of the State.

3. The respondent No. 2 has filed the reply and has opposed the claim of the petitioner on the following grounds:

(i) That 2523 candidates (1375 general and 1148 reserved) category were called for interview, out of which, 1423 candidates (749 general and 674 reserved category) appeared for the interview. The process of interviews continued for 32 days and every day it lasted for six hours 30 minutes and on an average a candidate appears to have been interviewed for 9 minutes only and this gave rise to an apprehension that the interviews were not held in fair and transparent manner.

(ii) The Joint Chief Electoral Officer by the communication dated 1/1/2012 had informed the respondent No. 2 to defer the process of appointment till the Model Code of Conduct for the general elections of Goa Legislative Assembly 2012 was lifted.

(iii) That out of total 100 marks, 60 marks were assessed for good physique and

10 marks were assigned for minimum qualification i.e. literate and all the candidates qualified for these 70 marks. Out of the remaining 30 marks, 15 marks were for oral. Thus, effectively 50% marks were given for oral interviews which is not permissible as per the law laid down by the Hon"ble Supreme Court of India.

(iv) That the appointment of the petitioner was in temporary post on Work-charged establishment and the petitioner has no right to enforce any right for seeking relief from this Court.

4. According to the learned Senior Counsel appearing for the petitioner, the only apparent reason for depriving the petitioner of his legitimate claim seems to be the change in the Government after the General Elections to Goa Legislative Assembly. The submission made on behalf of the petitioner is that the posts were advertised on 11/2/2011 and the selection of the petitioner is after following the proper procedure by duly constituted departmental Selection Committee and the petitioner was/is qualified and eligible for the post and therefore he is entitled to join the duties pursuant to his selection. It is submitted on behalf of the petitioner that the imposition of the Model Code of Conduct w.e.f. 24/12/2011 cannot frustrate the selection of the petitioner which is much prior to the imposition of the model code of conduct. According to the petitioner, the medical examination of the petitioner has been held on 27/12/2011 i.e. after the model code of conduct had become effective but that does not make the selection of the petitioner illegal as the medical examination is not part of the selection process but is only a mechanism to find out the medical fitness of the selected candidate. It is submitted that the respondents had issued communication dated 12/12/2011 for the medical examination of the petitioner and nine other candidates but the medical examination is conducted by the hospital authorities on 27/12/2011. According to the petitioner, the delay on the part of the hospital authorities to conduct the medical examination cannot be attributed to the petitioner and other candidates and cannot affect the entitlement of the petitioner and the other candidates to join the posts for which they were selected.

5. Mr. S. Dhargalkar, the learned Additional Government Advocate has submitted that the facts on the record show that 2523 candidates were called for the interviews, out of which 1423 candidates appeared for the interviews which were conducted for 32 days. According to the respondents, one candidate on an average was interviewed for 9 minutes only and this created suspicion regarding the selection process and gives rise to apprehension that the interviews were not held in a fair and transparent manner. It is further submitted that the petitioner and the other candidates who were selected pursuant to the advertisement dated 11/2/2011, were not permitted to join their duties as they had not joined the duty till the model code of conduct was made applicable and as per the communication from the Joint Chief Electoral Officer they could not have been permitted to join the duties after the imposition of the model code of conduct. It is further submitted by the learned Additional Government Advocate that the

petitioner and other candidates were selected for filling the temporary vacancies that were available with the P.W.D. at the relevant time and the petitioner has no right to claim a permanent post. It is submitted that total 100 marks were assigned, out of which 60 marks were for good physique and 10 marks for minimum qualification i.e. literacy of the candidates and almost every candidate got this 70 marks. It is submitted that out of the remaining 30 marks, 15 marks were assigned for oral and it amounted to 50% marks for oral interviews, which is not permissible as per the law laid down by the Hon''ble Supreme Court of India. According to the respondents, the Departmental Selection Committee has made a farce of the interviews and has committed gross illegality which cannot be condoned and the petitioner and other candidates cannot be given any benefit.

6. We have heard the learned Advocates for the respective parties and have examined the record with their assistance.

It is not in dispute that the petitioner is selected after the proper selection process had been undertaken. It is not in dispute that the petitioner is selected by the duly constituted Departmental Selection Committee. There is no dispute that the petitioner is qualified and eligible for the post for which the petitioner is making the claim. It is undisputed that the petitioner was not permitted to join the duty only on the ground that the model code of conduct had come into force. The respondents have subsequently come out with a defence before this Court on an Affidavit filed by respondent No. 2 that there is an apprehension of illegality in the selection process. The reasons which are now being supplemented for not permitting the petitioner to join the duties pursuant to his selection are not borne out from the record. The reply which was given by the Dy. Director of Administration, P.W.D. on 9/7/2013 to the notice which was issued by the Advocate of the petitioner shows that the reason for not permitting the petitioner to join the duty was that the model code of conduct had come into force. The respondents have not produced before this Court any other document or material to show that a conscious decision was taken by the Government that the petitioner and the candidates selected along with him cannot be permitted to join the duties because of the reasons as are being canvassed before this Court. The Hon''ble Supreme Court in the case of Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others, has considered the law on the subject.

The Hon''ble Supreme Court in paragraphs 28 and 29 of the above mentioned Judgment has examined the earlier judgments as follows:

"...28. Submissions of Mr. Chaudhary to the effect that the circumstances pointed out in the counter-affidavit filed in WPMP No. 27633 of 2003 should be held to be substitute for the reasons which the State must be held to have arrived at a decision, cannot be countenanced. When an order is passed by a statutory authority, the same must be supported either on the reasons stated therein or the grounds available therefor in the record. A statutory authority cannot be permitted to support its order relying on or on the basis of the statements made in the affidavit de''hors the order or for that matter de''hors the records.

29. In Commissioner of Police, Bombay Vs. Gordhandas Bhanji, it is stated:

"...We are clear that orders, publicly made in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind: or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

7. After considering the submissions made on behalf of the respective parties and after examining the material on the record, we are of the view that the only reason for the "U" turn on the part of the respondents in the matter is the change of the Government of the State.

The Hon"ble Supreme Court in the case of Asha Kaul (Mrs) and Another Vs. State of Jammu and Kashmir and Others, in para 8 has recorded as follows:

"8. It is true that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment State of Haryana v. Subhash Chandra Marwaha; IMS. Jain v. State of Haryana State of Kerala v A Lakshmikutty but that is only one aspect of the matter. The other aspect is the obligation of the government to act fairly. The whole exercise cannot be reduced to a farce. Having sent a requisition/request to the commission to select a particular number of candidates for a particular category, in pursuance of which the commission issues a notification, holds a written test, conducts interviews, prepares a select list and then communicates to the government - the government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any government can adopt such a stand with any justification today. This aspect has been dealt with by a Constitution Bench of this Court in Shankarsan Dash v. Union of India when the earlier decisions of this Court are also noted. The following observations of the court are apposite: It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies- has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima

Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

8. The Hon"ble Supreme Court in the Judgment given in the case of State of Karnataka and Another Vs. All India Manufacturers Organization and Others, has recorded as follows in para 63:

63. The High Court also found, justifiably in our view, that the writ petitioners had been sponsored by the State Government to put forward its changed stand in the garb of a Public Interest Litigation. In the opinion of the High Court (vide Paragraph 29):

"The court cannot allow its process to be abused by politicians and others to delay the implementation of a public project which is in larger public interest nor can the court allow anyone to gain a political objective. These legislators who have not been successful in achieving their objective on the floor of the Assembly have now chosen this forum to achieve their political objective which cannot be allowed."

In the case of R.S. Mittal Vs. Union of India (UOI), the Hon"ble Supreme Court has held as follows:

"10....It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law."

In the case of Food Corporation of India and Others Vs. Bhanu Lodh and Others, the Hon"ble Supreme Court has laid down as follows:

"14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference judicial view.

47. It is, therefore, evident that whereas the selectee as such has no legal right, the superior court in exercise of its judicial review would not ordinarily direct

issuance of any writ in absence of any pleading and proof of mala fide or arbitrariness on its part. Each case, therefore, must be considered on its own merit."

In the case in State of Haryana Vs. State of Punjab and Another, the Hon''ble Supreme Court has observed as follows:

"In the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duly-bound to continue and carry on the unfinished job rather than putting a stop to the same."

The Division Bench of this Court in the Judgment given in the case of Shri Umesh K. Naik and others in Writ Petitions No. 78, 79, 91 and 505 of 2013 to which one of us (F.M. Reis, J) is a party, has considered similar issue. In paragraph 38 of the above mentioned judgment, the Division Bench has concluded as follows:

"Further, merely because the Code of Conduct comes into effect and penultimate or the ultimate stage of the selection process is left incomplete before such date, the entire selection process cannot stand vitiated as observed in the case of Jitender Kumar (supra). Similarly, taking further from the aforesaid judgment, same irregularity may not render itself singularly to revocation, several irregularities smacking of indiscriminate haste and illegal procedure to achieve the ends, would certainly be depreciable and consequently such appointments may be nullified."

In view of this, we are of the view that the arbitrary and unreasonable approach of the respondents in depriving the petitioner and other candidates, selected along with him pursuant to the advertisement dated 11/2/2011 is unsustainable in law.

9. The learned Additional Government Advocate has relied on the Judgment given in the case of Jitendra Kumar and Others Vs. State of Haryana and Another, and has submitted that there was a reasonable apprehension in the mind of the Government and the authorities that the selection process is not conducted in a fair and transparent manner. In support of his submission he relied on paragraphs 63, 64 and 65 of the above mentioned judgment. The facts of the case of Jitendra Kumar (supra) are different from the facts of the present case. In the case of Jitendra Kumar an inquiry by the State Vigilance Bureau was ordered. In the present case, admittedly, the State Government has not ordered any inquiry to brush aside the alleged apprehension of unfairness in the selection process.

10. Several petitions have come before this Court challenging the selection for various other posts in various departments of the Government of Goa. At the time of hearing of some of the petitions it is noticed that the Government of Goa has ordered an inquiry through Vigilance Bureau and in some cases even the

inquiry reports have been shown to the Court. The failure on the part of the Government to order an inquiry in the present matter and the fact that no document or material is placed by the Government on the record to substantiate its contention about the alleged apprehension regarding any fairness in the selection process shows that the defence as raised by the respondents is without any basis.

11. The learned Additional Government Advocate has submitted that the post for which the petitioner is making a claim is on the Work-charged Establishment of the P.W.D. and the appointment order of the petitioner shows that the appointment of the petitioner is temporary and therefore, the petitioner has no right to claim the post. The learned Additional Government Advocate has relied on the judgment given in the case of Jaswant Singh and Others Vs. Union of India (UOI) and Others, To substantiate his contentions, he has relied on para 28 of the above mentioned judgment. In this judgment, the Hon'ble Supreme Court in para 40 to 45 has laid down as follows:

40. Before parting with the cases of these petitioners, we would like to record the assurance given by the learned Solicitor General on behalf of the Government of India that while retrenching the petitioners, the "last come, first go" rule will be applied inter se amongst the petitioners and further, that if and when any direct recruitments are made to the posts under the Bhakra Beas Management Board, preference in those appointments will be given to the petitioners, if they are retrenched.

41. We will now proceed to deal with Writ Petitions Nos. 4505, 4536 and 4658 of 1978 in which the petitioners are all work-charged employees.

42. A work-charged establishment broadly means an establishment of which the expenses, including the wages and allowances of the staff, are chargeable to "works". The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the works.

43. The entire strength of labour employed for the purpose of the Beas Project was work-charged. The work-charged employees are engaged on a temporary basis and their appointments are made for the execution of a specified work. From the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed. They do not get any relief under the Payment of Gratuity Act nor do they receive any retrenchment benefits or any benefits under the Employees State Insurance Schemes.

44. But though the work-charged employees are denied these benefits, they are industrial workers and are entitled to the benefits of the provisions contained in the Industrial Disputes Act. Their rights flow from that special enactment under which even contracts of employment are open to adjustment and modification. The work-charged employees, therefore, are in a better position than temporary

servants like the other petitioners who are liable to be thrown out of employment without any kind of compensatory benefits.

45. The record of Writ Petition No. 4505 of 1978 shows that offers of alternative employment were made to the work-charged employees and many of them have accepted those offers. The rule of "last come, first go" has also been consistently adopted while retrenching the work-charged employees. In fact the work-charged employees possess a unique right as industrial employees since, by reason of Section 25J(1) of the Industrial Disputes Act, the provisions of Chapter V-A, "Layoff and Retrenchment", have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made under the Industrial Employment (Standing Orders) Act, 1946.

12. The petitioner has been selected after following the due procedure and the petitioner having been given the appointment order, it cannot be said that the petitioner has no right to seek indulgence of this Court in the extraordinary writ jurisdiction for enforcing his legal right pursuant to the memorandum dated 4/11/2011 which admittedly stands and has not been cancelled or revoked.

13. In the result, the petition is allowed. Rule is made absolute in terms of the prayer made in writ petition, which reads as:

For a writ of mandamus, or any other writ, direction or order in the nature of mandamus, commanding/directing the respondents to forthwith issue an order of Appointment in favour of the petitioner to the post of "Labourer", Group "D" Non-Gazetted, on Work charged Establishment in the Public Works Department, in the Pay Band of Rs. 4400-7440 + Grade Pay of Rs. 1300.

In the circumstances, the parties to bear their own costs.