
(2014) 04 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 1140 of 2012

Janardhan Yadeorao Navghare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Citation : (2014) 6 MhLj 80

Hon'ble Judges : P.R. Bora, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : A.A. Naik, Advocate for the Appellant; Rao, A.G.P. and Anand Parchure, Advocate for the Respondent

Judgement

B.P. Dharmadhikari, J.—Rule. Rule made returnable forthwith with consent. Looking to the nature of the controversy and the Judgments delivered earlier, we have heard the respective counsel finally. Learned Advocate Shri Naik appearing for the petitioner submits that the petitioner earlier shown as senior in the seniority list of Junior clerks has been shown as juniors to respondent Nos. 4 to 12 in seniority list as published on 24-1-2011 and rejecting objection of petitioner thereto on 31-12-2011. He contends that the appointment of the petitioner as Junior Clerk in 1984 was in accordance with the provisions of the Maharashtra Zilla Parishads District Service Post Recruitment Examination Rules, 1985 and as per Rule 4 stipulated therein, first examination was held in 1989. Period of 4 years to pass the examination was to expire in 1993. The petitioner cleared the necessary departmental examination conducted in 1992 as per result declared on 8-3-1993 i.e. within a period of four years as also within three chances. As such, the petitioner was confirmed prior to and became senior to respondent Nos. 4 to 12. He further contends that respondent Nos. 4 to 12 could not pass that departmental examination within stipulated chances as also period and as such, in view of the provisions of unamended Rule 5 they could not be confirmed in service till they passed the said examination and because of non obstante provision contained in said Rule 5(3), they ought to have been

terminated because of their failure to pass that examination. He contends that, in this situation, amendment dated 24-5-1999 to Rule 5 by substituting sub-rule (3) thereof cannot confer any additional right upon respondent Nos. 4 to 12. He points out that the amendment instead of termination provides for loss of seniority only. He contends that this loss of seniority also renders respondent Nos. 4 to 12 juniors to the petitioner. He has fairly invited our attention to the Judgment Dilip Haribhau Wakchaware Vs. Additional Commissioner, Nagpur Division and Others, at Nagpur and two latter views i.e. judgment at Dilip Haribhau Wakchaware Vs. Additional Commissioner, Nagpur Division and Others, delivered at Aurangabad and an unreported Judgment dated 26-8-2011 in Writ Petition No. 3688 of 2011 also delivered at Aurangabad. He states that the view taken at Aurangabad is inconsistent with the finding recorded at Nagpur on 5-10-2004. He also points out that Nagpur Judgment has not been looked into by the latter judgments delivered at Aurangabad and the last Judgment does not look into earlier two Judgments.

2. Learned Advocate Shri Parchure appearing for respondent Nos. 4 to 12 submits that 1999 amendment cannot operate retrospectively, therefore, there is no question of respondent Nos. 4 to 12 losing seniority or becoming juniors to the petitioner. He further contends that unamended provision in Rule 5 provides confirmation after and from the date of passing of examination and at the same time, it also contemplates termination. In this situation, the termination has been rightly found to be merely an enabling measure by the Division Bench dated 5-10-2004 at Nagpur. As respondent Nos. 4 to 12 have entered into the service before the petitioner and have also passed departmental examination, their seniority from the date of joining is rightly recognized and protected. He, therefore, prays for dismissal of the petition.

3. Learned Advocate Shri Zoting for respondent No. 3 employer supports and adopts the arguments of learned Adv. Shri Parchure. Learned AGP appearing for respondent No. 1 submits that the provisions of Rule 5 are very clear and need to be implemented.

4. After hearing the respective counsel, we find that the effect of 1999 amendment needs to be considered independently. First provisions of 1985 rules as framed (unamended) need appreciation uninfluenced by said amendment. Rule 4 gives the candidate like the petitioner and respondents Nos. 4 to 12 three chances and four years to pass the departmental examination. Rule 5 is about consequences of failure to pass said examination. Said rule as in force prior to amendment is reproduced below for consideration:--

"5. Consequences of failure to pass the Examination.--(1) A Parishad employee who fails to pass the Examination within the period and chances specified in Rule 4, shall not, until he passes the Examination or is exempt from passing the Examination under Rule 6,--

(a) be confirmed in the post which he is holding;

(b) be allowed to draw his next increment in the scale of the post which he is holding.

(2) Increments so withheld under paragraph (b) of sub-rule (1) shall become payable to a Parishad employee with effect from the date of which he passes the Examination and future increments shall occur as if no increment was withheld. The arrears of increment shall not be admissible for the period during which his increment was so withheld.

(3) Notwithstanding anything contained in sub-rule (1) or (2), a Parishad employee appointed to the post by nomination after the appointed date who fails to pass the Examination within the period and chances specified in Rule 4 shall be liable for termination of his services."

Perusal of the aforesaid provisions show that a candidate who does not pass examination within three chances and within four years is placed at a disadvantageous situation. He cannot be confirmed in the post which he is holding until he passes that examination or then is exempt from passing the examination under Rule 6. Rule 6 envisages attaining of an age of 45 years for grant of said exemption. It also stipulates that such an incumbent cannot be allowed to draw his next increment in the pay-scale of post which he has been holding. Sub-rule (2) of Rule 5 stipulates that said withholding continues till examination is cleared and increment becomes payable from the date on which he passes the examination and future increment can be released as if no increment was withheld. However, the arrears are not admissible for the period during which his increment was so withheld. Thus, withholding of increments is permanent but non-cumulative. Unamended sub-rule (3), in this situation, contemplates a termination from service of candidates recruited after appointed date i.e. 20-1-1986 and this clause opens with non obstante clause. If this sub-rule (3) is given full effect, it is apparent, that Rule 5(1)(a)(b) becomes redundant in case of new recruits. The Division Bench at Nagpur, in this situation, in *Dilip Haribhau Wakchaware vs. Additional Commissioner, Nagpur Division and others* (supra) has found said Rule 5(3) only an enabling provision, it has been held that the termination is not automatic.

5. However, the fact that the employee cannot be confirmed until he passes examination or then he loses permanently the benefits of increments for and during the period he takes in excess of four years or requires more chances than maximum allowed to clear the departmental examination was not required to be considered by the said Division Bench. The attention of said Bench was not drawn to the implications flowing therefrom viz. that if the increment and confirmation is permanently denied to an employee till he reaches the age of exemption, his juniors who pass such an examination within stipulated time or chances, cannot be treated as his juniors till then or indefinitely. Such senior cannot qualify for next promotion till he passes the examination. His junior, who has cleared the examination in given time/chances, is bound to steal a march upon him. If vacancies in next higher cadre become available, exercise of

promotion against the same cannot be postponed or then, juniors though promoted, cannot be pushed down because their erstwhile senior qualifies for confirmation or promotion long after them due to either late passing of examination or grant of exemption. Confirmation and restoration of such a senior to his original place in seniority list as per date of joining will introduce an element of uncertainty which cannot be allowed. It is therefore apparent, in this scheme of 1985 Rules, the original date of entry cannot be always recognized as date relevant for counting seniority for promotion. It remains a decisive date for those who pass within prescribed years or chances. Similarly, if such senior employee cannot be confirmed till he passes the examination, a candidate like the petitioner who passes examination in stipulated chances must gain advantage therefore and his confirmation is definitely bound to rank senior to such employees who take more chances or period. Otherwise, there is no point in putting ceiling on number of attempts or number of years. This position was also not pointed out to the said Division Bench. Petitioner Dilip in Dilip Haribhau Wakchaware vs. Additional Commissioner, Nagpur Division and others (supra) was appointed on 10-7-1990 much after the "appointed date". The dates on which respective respondents 4 to 9 therein were appointed do not find any mention or consideration in the text of report.

6. The amended provision which has come into force on 24-5-1999 needs to be appreciated in this background. The said amended provision reads as under:--

"(3) A Parishad employee who fails to pass the examination within the period and chances specified in Rule 4, shall lose the seniority in the cadre of his post to all those Parishad Employees in the said post who pass the examination before him and also to all those who are senior to such Parishad Employees, below whom he is placed, and who may pass the examination after him but within the period specified in Rule 4."

It reveals that the employees like the respondents 4 to 12 who pass the examination after prescribed chances and prescribed period, lose their seniority and their juniors who clear the examination within said chances/period become seniors to them. This was the position even under the old rules i.e. Rule 4 read with Rule 5. Only effect of this modification/amendment is that the employee recruited after appointed date can no longer be terminated only for the reason of his not passing the said departmental examination within stipulated time and stipulated chances. However, his confirmation which depended upon his passing of examination or then his entitlement to earn an increment which again was made dependant upon passing of such examination, remains unaltered. In that view of the matter, we find that 1999 amendment only improves the position in favour of the new recruits who otherwise were liable to be terminated because of non obstante clause in the shape of old Rule 5(3).

7. The Division Bench at Nagpur in Dilip Haribhau Wakchaware vs. Additional Commissioner, Nagpur Division and others was not required to consider the effect of Rule 5(1)(a)(b) read with rule (2). Moreover, date of entry into service

or its relevance was also not an issue raised before it. As such, it cannot be said that it takes a view which is inconsistent with the later two Judgments delivered at Aurangabad. Significance of date of entry into service or its relevance was also not an issue in unreported Judgment dated 26-8-2011 in Writ Petition No. 3688 of 2011 at Aurangabad. Observations in paragraphs 17, 18 and 19 of the other judgment at Aurangabad in case of Anil s/o. Manikrao Kulkarni vs. State of Maharashtra and others (supra) are in consonance with our findings.

8. We accordingly find that the place of the petitioner as senior to respondent Nos. 4 to 12 in seniority list earlier published on 24-1-2011 needs to be restored. Rejection of his objection by impugned order dated 31-12-2011 is, therefore, unsustainable. Writ Petition is, thus, allowed by making rule absolute by restoring the position of the petitioner in terms of the seniority list at Annexure-C dated 24-1-2011 in this petition. At this stage, learned Advocate Shri Parchure for respondent Nos. 4 to 12 seeks stay of this Judgment for a period of Ten weeks to enable respondent Nos. 4 to 12 to approach Hon. Apex Court. Request is being opposed by the learned counsel appearing for the petitioner. However, in the interest of justice, we stay this Judgment for a period of Ten weeks from today. Stay shall cease to operate automatically thereafter. No costs.