

(2010) 06 BOM CK 0037
In the Bombay High Court
Case No : Writ Petition No. 729 of 1994

Madhusudan Chowdhari

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 07-06-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Maharashtra Zilla Parishads District Services (Recruitment) Rules, 1967 — Rule 5

Citation : (2011) 1 ALLMR 288 : (2011) 4 BomCR 745 : (2011) 2 MhLj 143

Hon'ble Judges : S.V. Gangapurwala, J; B.R. Gavai, J

Bench : Division Bench

Advocate : A.S. Deshpande, for the Appellant; V.D. Rakh, Assistant G.P. for Respondent Nos. 1 to 3 and S.R. Yadav, for the Respondent

Judgement

S.V. Gangapurwala, J.—The Petitioner seeks directions against the Respondent to promote the Petitioner as Divisional Accountant/Assistant Accounts Officer with effect from 22-3-1990 i.e. the date of passing of the Maharashtra Zilla Parishad, Finance Accounts Services Examination Class-III with all consequential benefits. The Petitioner by way of an amendment also seeks relief of quashing Rule 5 r.w. Appendix XI of the Maharashtra Zilla Parishad District Services (Recruitment) Rules, 1967 to the extent it does not provide for promotion/absorption in M.F.& A.S. Services Class III - Grade I other than the incumbents working in M.F. & A.S. Services Class- III -Grade-II.

2. Before adverting to the legal submission as is canvassed by the learned Counsel Shri A. S. Deshpande, for the Petitioner, it will be appropriate to have resume of the facts.

3. The Petitioner is a Zilla Parishad employee. The Petitioner contends that he is post graduate in commerce. He was appointed as a Senior Assistant (Accounts) in the Zilla Parishad, Jalna in the year 1982. The Petitioner applied to the Respondent No. 3 seeking permission to appear for the Maharashtra Finance & Accounts Service examination, held by Maharashtra Public Service Commission

and the Respondent No. 3 allowed the Petitioner to appear for the said examination. It is contention of the Petitioner that out of fifteen employees who were granted permission to appear for M.F.& A.S. Examination he was the solitary employee to pass the said examination on 7-10-1989. According to the Petitioner, in view of the fact that he has passed the examination he is eligible to be promoted as Divisional Accountant.

4. Shri A. S. Deshpande, learned Counsel for the Petitioner strenuously argued the matter and put-forth following propositions.

1) In the State Sector a Laboratory Assistant or a fresh Junior Clerk irrespective of their experience in the accounts section is held eligible to appear for M.F. and A.S. Exam, and consequently entitled for promotion as Divisional Accountant. Whereas, according to the Rules in Zilla Parishad sector i.e. Rule 5 r.w. Appendix XI(i) of the Maharashtra Zilla Parishad District Services (Recruitment) Rules, 1967, a Senior Assistant in accounts section itself like the Petitioner is not being considered for promotion, even after passing the M.F. and A.S. Examination conducted by the Maharashtra Public Service Commission. This disparity offends the principle of equality enshrined under Articles 14 and 16 of the Constitution of India.

2) There is no rational or object sought to be achieved by hostile discrimination amongst the State Sector employee and local sector employees working under the Zilla Parishads. According to him, both deserve to be given equal treatment and there can be no discrimination. There is no intelligible differentia in giving them discriminatory treatment.

3) The Deputy Accountants who have not passed qualifying examination i.e. M.F. and A.S. Exam were still promoted.

5. To substantiate and buttress his submissions, Shri A. S. Deshpande has relied on the judgment of Division Bench of this Court in case of:

1) Kazi Moinuddin Vs. The State of Maharashtra and Others, 2) Md. Ibrahim Md. Vazir and Anr. v. The State of Maharashtra and Ors. reported in 2002 (Supp.) Bom.C.R.. 864.

6. Before adverting to the various facets of the case it would be appropriate to reproduce the relevant rule sought to be assailed by the Petitioner.

Rule No. 5: Qualification and method of appointments.: (1) Subject to Sub-rule (2) the qualifications in respect of age, education, experience etc. required to be possessed by candidates for and method of appointment to the posts in the District Services and posts thereunder shall be as specified in Appendices (I to XIII)).

Provided that the upper age limits prescribed for appointment to the posts in the District Services under the relevant recruitment rules shall be relaxable by five years in respect of candidates belonging to Backward Classes.

(2)....

APPENDIX XI

Sr. No

Service & Cadre

Post

Qualifications for and methods of Appointments

1

District Service(Class III) (Accounts) Grade I

(i) Head Accountant

(ii) Divisional Accountant

Appointment shall be made by promotion of Deputy Accountants who have worked in District Service (Class-III) (Accounts), Grade II for a continuous period of not less than (three) years and have passed the Maharashtra Finance and Accounts Service, Class III Examination or any other equivalent examination : Provided that if there be no person who had passed the said examination, promotion may be made from amongst those who have passed the Deputy Accountant's or an equivalent examination on the condition that he shall be pass the said examination within two years from the date of his promotion or from the date (he is held eligible for appearing in the said examination) whichever is later, failing which he shall be liable to be reverted to the lower post.

The hierarchy in the Accounts branch in the Zilla Parishad is as under:

1) Junior Assistant -Class III

2) Senior Assistant - Class III Grade III

3) Junior Accounts Officer (Deputy Accountant) Class III.

4) Assistant Accounts Officer (Divisional Accounts) Class III Grade I.

7. We have considered the arguments of Shri A. S. Deshpande, and the judgments referred by him. On going through the judgments, referred by Shri A. S. Deshpande, we are of the view that, the same are of no assistance to Petitioner case. It is settled principle governing law of precedent that judgments cannot be read as Euclid theorem ,but will have to be read in the context in which they have been delivered. In the case of Kazi Moinuddin s/o Kazi Anwaruddin v. State of Maharashtra and Ors. referred by Shri A. S. Deshpande, this Court was called upon to interpret the memorandum of Government of Maharashtra dated 7-8-1974 governing the status of employees of Ex-Nizamiya State merged in State of Maharashtra. The Court was considering that Munshi examination passed by a person from Ex-Nizamiya University would be deemed

to be treated as trained teacher, in that context the said observation were made. The said memorandum applies, to employees of Zilla Parishad and Government alike, and the employees are equal and alike in similar situations. The second judgment referred by him i.e. Md. Ibrahim Md. Vazir and Anr. v. The State of Maharashtra and Ors. is on altogether different context. In said judgment the Rules for recruitment to Class II in M.F. & A.S. as amended by Government Resolution (Finance Department) No. DAT-1171/1153/71/XII, dated 25-3-1971 were subject-matter of concern. The revised recruitment rule which was impugned in the said judgment was as under.

Appointments shall be made by:

(a) Promotion of suitable persons from the Maharashtra Finance and Accounts Service, Class III;

(b) Selection of suitable persons from the District Services (Class III) (Accounts), Grade I of Zilla Parishads, who have completed three years continuous in that grade;

OR

(c) Nomination. Appointments by nomination shall be made on the result of competitive examination....

(2) As far as practicable, vacancies shall be find in by promotion, selection and nomination in the ratio r:l:5, the ratio being reviewed every three years.

Note: If vacancies available for particular method in accordance with the above ratio cannot be filled in by that method on any given occasion, they shall be carried forward and shall be filled in by that method when appointments are next made.

(3)....

(4)....

On the perusal of said Rule, it is manifest that recruitment to Class II in M.F. & A.S. was by three modes i.e. either by promotion, selection or nomination and while comparing the qualifications for appointment of these three channels i.e. Promotion, selection and nomination, the Court came to the conclusion that requirement of three years continuous service in that grade is arbitrary on the ground that Head Accountant or the Divisional Accountant of Zilla Parishad is seen to have already put in service of not less than three years, but even up to nine years shouldering responsibility of accounts work before taking charge. In the said case this Court was not called upon to decide the validity of Maharashtra Zilla Parishad Services (Recruitment) Rules with which we are concerned nor was required to decide the validity of rules qua, the Rules governing employees of Government sector. The said judgment was altogether on different premise and as such is not helpful to the Petitioner.

8. The arguments of Shri A. S. Deshpande, the learned Counsel that the Rules are discriminatory and violative, the Zilla Parishad employees are equal and should be treated alike as the employees of the State Government, does not hold water, for the simple reason that the terms of employment are governed by the different set of Rules governing their employment. It is the settled position of law that promotion to a higher post cannot be claimed as a right, it can be earned only on fulfilment of conditions prescribed in relevant Rules, before a person claims promotion prevailing Rules must be followed. Useful reference can be had to the judgment of Apex Court in case of Haryana State Electricity Board and Another Vs. Gulshan Lal and Others, wherein it has been held that:

Promotion to a higher post cannot be claimed as a matter of right. Before a person claims promotion, subject of course to just exceptions, the prevailing rules must be followed. If the employee concerned while working in a particular grade does not acquire experience of working therein, he cannot be promoted to the next higher grade although experience in the immediately below post forms part of an essential qualification. A person, thus, who is ineligible to hold the post cannot be directed to be promoted thereto only on the ground of the so-called equality doctrine or otherwise.

Conditions of service of the employees of the Appellants are governed by the statutory rules. Violation thereof is impermissible in law. Whereas the Appellants are bound by the doctrine of equality as envisaged under Article 14 of the Constitution of India, it is also well settled that unequals cannot be treated as equals.

9. Two employees in different sectors governed by different sets of recruitment rules cannot be treated as alike. The employees of State Sector are governed by the different set of Rules than that of the employees of Zilla Parishad. The employees of both the Sectors, cannot be treated to be in similar situation and alike, as such cannot be treated in same class. They cannot be treated equals. As such according to us question of discrimination and violations of Article 14 of the Constitution does not arise.

10. In the present case, a prescribed channel is laid down. The Petitioner is claiming promotion from the post next below the feeder post, and the same is impermissible in law. The Petitioner would not get legal right to claim such promotion. The Apex Court in the Case of Mangi Lal Vs. State of Rajasthan, has held that "for filling posts by way of promotion their itself exist a channel. In absence of any channel promotion cannot be effected." In our case, the Petitioner is working on the post of Senior Assistant (Accounts) which is the post below the rank of Deputy Accountant i.e. feeder post. The said judgment of the Apex Court squarely applies to the present case, as such unless and until the Petitioner holds the post of Junior Accounts Officer (Deputy Accountant) class-III Grade II and that too continuously at least for period of three years Petitioner cannot be considered for the post of Divisional Accountant.

11. The next contention of Shri A. S. Deshpande, that the persons who had not passed the qualifying examination were promoted to the post of Divisional Accountant in supersession of his claim is illegal, is bereft of any merit.

12. The reading of the Appendix-XI makes it abundantly clear that for being qualified for promotion to the post of Divisional Accountant/Accounts Officer Class III, Grade I, a person has to be a Deputy Accountant Class-III Grade II, for a continuous period of not less than three years and pass the M.F. and A.S. Class-III examination or equivalent examination. However, the proviso to the said Rule referred to in Appendix XI makes it clear that even those Deputy Accountants, who have not passed the qualifying examination but who have worked in District Services (Class III) (Accounts) Grade II for continuous period of three years are entitled for promotion subject to a condition that they pass the qualifying examination within a period of two years. The proviso will have to be read in the context with the main Rule. The said proviso supplements the main rule. According to well established canons of interpretation "proviso to a particular provision of a Statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso." as such, the arguments of the learned Counsel for the Petitioner that the Deputy Accountants who have not passed the qualifying examinations are illegally promoted is not tenable.

13. We had asked Shri A. S. Deshpande, learned Counsel for the Petitioner as to whether any person not holding post of Deputy Accountant and not having three years experience is promoted to the post of Divisional Accountant, he fairly conceded that no such candidate has been promoted who is not holding the post of Deputy Accountant and has not worked for three years. In view of the aforesaid premise the Petitioner does not have any case on merits.

14. Apart from the fact that the Petitioner on merits does not have any case, there is another facet to the case. The Petitioner claims that persons who have not passed M.F. and A.S. Examination have been promoted in supersession of his claim, merely on the count that those persons were holding the post of Deputy Accountant and have worked continuously for three years or more. When the Petitioner comes with the case that other persons have been promoted in supersession of his right then law requires that those persons ought to be joined as parties. The Petitioner has not joined those persons as parties. The Apex Court in the case of Surinder Shukla Vs. Union of India (UOI) and Others, has held that if the validity of promotions are to be challenged, then the selected candidates must be impleaded as parties, in their absence the writ petition cannot be effectively adjudicated. In the present case, also the persons who are allegedly promoted in supersession of the Petitioner's claim and who would be adversely affected by the orders that would be passed by this Court are not made parties. On this count also the claim of the Petitioner cannot be considered.

15. In view of the aforesaid premise, the petition being sans merit is dismissed. However, there shall be no order as to costs.