

(1985) 09 BOM CK 0046

In the Bombay High Court

Case No : O.S. Appeal No. 164 of 1979 in Miscellaneous Petition No. 561 of 1972
alongwith O.S. Appeal No. 202 of 1979 in Miscellaneous Petition No.
434 of 1971

Maharashtra Housing and Area Development Authority

APPELLANT

Vs

Mohan K. Gandhi

RESPONDENT

Date of Decision : 10-09-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309
Government of India Act, 1935 — Section 241

Citation : (1986) 88 BOMLR 50

Hon'ble Judges : K. Madhava Reddy, C.J;B. Lentin, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Madhava Reddy, C.J.—Appeal No. 164 of 1979 by the Maharashtra Housing and Area Development Authority is directed against the judgment of our learned brother Bharucha, J. in Miscellaneous Petition No. 561 of 1972 filed by the respondent.

2. The respondent was appointed on February 27, 1950 as a Junior Clerk in the Bombay Housing Board on a basic salary of Rs. 55/- per month in the scale of pay of Rs. 46-3-85-EB-4-105. He was promoted as a senior clerk on June 23, 1956 on a basic salary of Rs. 92/- per month in the scale of pay of Rs. 92-8-140. In April 1959 he, passed the Divisional Accountant's qualifying examination held by the Accountant General. He was selected and appointed as officiating Divisional Accountant on May 7, 1959 on a basic salary of Rs. 130/- per month in the scale of pay of Rs. 130-10-250-15-355. He actually took charge on May 11, 1959 (Exh. A). The Bombay Statutory Corporations (Regional Reorganisation) Act, 1960 which made provision for setting up two separate corporations for Maharashtra and Gujarat regions came into force from April 12, 1960. Under Clause (1) of Sub-section (2) of Section 3 of the Act provision is made for the transfer or re-employment of any of the employees of the existing corporation to

the newly constituted corporation on the terms and conditions which were not to be less favourable than those applicable to them while in the service of the existing Board. On April 28, 1960, the then Government of Bombay passed the Bombay Housing Board (Dissolution and Reconstruction) Order, 1960 (hereinafter referred to as "the 1960 Order") constituting the Maharashtra Housing Board and the Gujarat Housing Board. Clause 12 of that order made provision as follows:

All officers and servants of the existing Board shall be allocated between the Gujarat Housing Board and Maharashtra Housing Board in such manner as the State Government may determine;

Provided that the terms and conditions of such officers and servants shall not, until altered by an authority designated, be less favourable than those admissible to them while in the service of the existing Board.

By a resolution dated October 26, 1960 (hereinafter referred to as "1960 Resolution" or "1960 principles") the Maharashtra Housing Board decided to prepare a common seniority list of the staff of the entire organisation and laid down the principles and procedure for preparing such a list. On December 15, 1960 the Secretary, Maharashtra Housing Board, promulgated a provisional common seniority list of non-technical staff of the whole organization. In that list the Divisional Accountants (Qualified) are shown in Group "D", in which Senior Assistants, Senior Auditors, Head Clerk to the Assistant Housing Commissioner, Superintendents in the Estate Manager's office are also included. In that list of 12 persons the position existing as on April 2, 1959 is shown. The petitioner's name does not appear in Group "D". It appears at serial No. 67 in Group "G" which is of Senior Clerks, Senior Accounts Clerks, Senior Cashier, Assistant Cashier, Senior Rent Collector, Rent Collector and Colony Supervisor and his seniority is shown as No. 54. On January 12, 1961 the Secretary, Maharashtra Housing Board circulated a note detailing the procedure for fixation of common seniority. The petitioner was promoted on August 31, 1963 to officiate as Junior Superintendent on a trial basis on a basic salary of Rs. 370/- per month in the scale of pay of Rs. 370-20-490 (City). By order dated November 26, 1965 the petitioner was confirmed as Divisional Accountant with effect from November 1, 1963. By its Resolution No. 3009 dated July 30, 1966 the Maharashtra Housing Board specified new principles for determining seniority and for promotion. The Housing Commissioner circulated a provisional seniority list on February 24, 1969 in which the petitioner was shown at serial No. 45 in the cadre of Senior Assistants, Auditors, Circle Head Clerks, Superintendents in Estate Manager's office. This list was said to be based on the principles of seniority adopted by the Board in 1966. The principles of 1966 were annexed to the circular and objections, if any, to the said list, were invited from the staff. The divisional Accountants were wholly omitted in that seniority list. The petitioner made a representation dated March 10, 1969 against the omission of the cadre of Divisional Accountants in this seniority list. On April 24, 1969 the Housing Commissioner circulated a further seniority list of the cadres of the Estate

Managers, Superintendents, Assistant Estate Managers and Senior Assistant (Legal). The petitioner submitted his representation to the Housing Commissioner on May 14, 1969. While the matter stood thus, the Housing Commissioner circulated the final common seniority list on October 28, 1970 purported to be based on modified principles (hereinafter referred to as "1970 principles"). In that common seniority list the petitioner was shown at serial No. 31 in the cadre of Senior Assistants, Auditors and Circle Head Clerks. In that list the date on which the petitioner was deemed to have held that post is recorded as March 10, 1969. The cadre of Divisional Accountants was not shown in this seniority list. Protesting against his inclusion in the cadre of Senior Assistants instead of the cadre of Divisional Accountants the petitioner's advocate issued a notice dated November 30, 1970 and a reminder on April 12, 1971. The petitioner seeks a writ of mandamus against the Maharashtra Housing Board and the Maharashtra Housing and Area Development Authority to withdraw and/or cancel the circulars dated February 24, 1969, April 24, 1969 and October 28, 1970 and the principles circulated with the said circulars and the seniority lists prepared thereunder, in so far as the petitioner is concerned and further for a direction to the respondents to place the petitioner's name in the seniority list of Superintendents showing his date of appointment as August 31, 1963. After the writ petition was filed, by order dated September 7, 1972 the petitioner was reverted from the post of Junior Superintendent to the post of Divisional Accountant. The learned Single Judge allowed the writ petition and made the rule absolute in terms of prayer (a) of the petition.

3. The petitioner, R.N. Mauskar, in Miscellaneous Petition No. 434 of 1971 is the appellant in Appeal No, 202 of 1979. He was appointed as a Junior Clerk in the office of the Executive Engineer of the Bombay Housing Board on October 17, 1949 on a basic salary of Rs. 55/- p.m. in the scale of pay of Rs. 46-3-85-EB-4-105 (Mofussil). In response to a circular issued by the Board calling for applications for appointment as Junior Auditors in the office of the Chief Accounts Officer, Bombay Housing Board, Bombay, the petitioner submitted an application and was ultimately selected for recruitment as Junior Auditor. He was appointed as such by an Order No. 3(W)272/BHB/A dated February 15, 1955 on a basic salary of Rs. 92/- p.m. in the scale of pay of Rs. 92-8-140(M). The said appointment was made with the approval of the Chairman of the Board against one of the additional posts of Junior Auditors sanctioned by the Board. He was later promoted as Assistant Estate Manager in 1960, while respondent Nos. 2 to 5 were respectively appointed as Junior Auditors on September 17, 1956, July 18, 1959, July 28, 1959, and February 1, 1960. Respondents Nos. 3 to 5 were working as Superintendents, and respondents Nos. 6 to 9 were directly appointed as Assistant Estate Managers in the year 1963-64, and on the date of filing of this writ petition, while respondent No. 6 was working as P.A. to the Assistant Housing Commissioner, respondents Nos. 7 to 9 were working as Assistant Estate Managers. The petitioner avers that according to 1960 principles the posts of Junior Assistants, Junior Auditors, First Clerks and Divisional Head

Clerks were grouped together and a common seniority list as on April 1, 1959 was drawn up. In that list, the petitioner was placed at serial No. 11, whereas respondent No. 2 was shown as serial No. 19. The names of respondents Nos. 3, 4 and 6 were; not even included in that list as they were not in the Board's service on April 1, 1959. That list was circulated to all the members of the staff to enable them to make representations, if any. As no objections were received the said list became final. All promotions made after April 1, 1959 were received and order No. 3 (Gen.) 151/1917 MHB-A of 1960 dated December 15, 1960 was issued by the Secretary of the Board promoting the petitioner and another to the gazetted post of Assistant Estate Manager on a basic pay of Rs, 220/- p.m. in the scale of pay of Rs. 220-15-400. That promotion was on a trial basis for a period of six months and on the distinct understanding that in case they are allowed to continue as such in the said post after the trial period, they would have no claim for promotion to the post of Junior Superintendent or Senior Superintendent. The petitioner was continued in that post even, after the trial period was over and necessary report was called for. The petitioner was thus holding the post of Assistant Estate Manager since December 17, 1960 and by the date of the filing of this petition had completed more than ten years" of continuous service in that post. Respondents Nos. 6, 7, and 8 and 9 were originally appointed as Assistant Estate Managers on March 1, 1963, March 2, 1963, March 16, 1963 and October 16, 1964 respectively in pursuance of an advertisement dated November 5, 1962, while the petitioner was appointed as Assistant Estate Manager on December 17, 1960 and was always treated as senior to respondents Nos. 6 to 9. In the year 1966-67 the petitioner was appointed as Estate Manager thrice in leave Vacancies while respondents Nos. 6 to 9 continued as Assistant Estate Managers. The Board by its resolution No. 3009 dated July 30, 1966 laid down certain new principles for regulating the seniority and promotion (hereinafter referred to as "1966 principles"). They directed that seniority should be fixed on the basis of total length of service. On February 24, 1969 the Housing Commissioner by his circulars prepared fresh tentative seniority lists purportedly based on the 1966 principles. In that list the petitioners" seniority was based on the date of his appointment as a Junior Clerk regardless of his appointment as Junior Auditor in 1955 and his selection and promotion as Assistant Estate Manager in 1960. The petitioner was shown as junior to respondents Nos. 2 to 9 although they had joined as Auditors or as Assistant Estate Managers, much later than the petitioner. The petitioner claims that the list is in breach of the principles of seniority adopted by the Board earlier. The petitioner accordingly submitted his representation against the injustice done to him but to no avail. The principles of 1966 were again modified by circular No. 14799 MHB-A dated October 28, 1970 (hereinafter referred to as ,"1970 principles") and a fresh seniority list allegedly based on the said principles was drawn up and circulated by the Housing Commissioner. In that seniority list, Superintendents and Assistant Estate Managers were grouped together but the petitioner's name was not shown in the cadre. Respondents Nos. 6, 7, 8 and 9 were shown in that list at serial Nos. 8, 9, 10 and J5 and respondent No. 2 was shown at serial No. 28.

The petitioner was shown in the seniority list of the cadre of Senior Assistants, Auditors and Circle Head Clerks at serial No. 25 whereas respondents Nos. 3 to 5 were shown at serial Nos. 1 to 3 respectively. The petitioner states that the seniority was so fixed obviously on the basis of his initial appointment as Junior Clerk totally disregarding his appointment as Junior Auditor in 1955 and his selection and promotion as Assistant Estate Manager in 1960. This petitioner was shown as holding Senior Assistant's post which in fact he never held. The petitioner was intimated that no representations in regard to the positions of the petitioner and others shown in the seniority list would be entertained. Hence the writ petition.

4. The respondents seek to oppose the writ petitions contending that with a view to remove certain anomalies and make available more avenues of promotion and fix the seniority as far as possible on an equitable basis 1970 principles were evolved superseding 1960 principles. Since there were no rules governing recruitment and promotion when the petitioners were appointed, when they "were sought to be absorbed on a permanent basis by merging and integrating various units for promotion, these principles were enunciated and are sought to be applied uniformly. In the process, while some of them may be affected in the matter of seniority, they are conferred the benefit of many more avenues of promotion, and taken as a whole, the scheme cannot be said to be arbitrary and violative of Articles 14 and 16 of the Constitution. No public servant or employee of the Maharashtra Housing and Area Development Authority can claim that the rules or the instructions governing their service in force on the date of their recruitment should remain unaltered. The competent authority has jurisdiction to frame rules even with retrospective effect and the 1970 principles which are sought to be given retrospective effect cannot, therefore, be said to be violative of any fundamental right guaranteed to the employees situated similarly to the petitioners.

5. The learned single Judge allowed the Miscellaneous Petition No. 561 of 1972 of Gandhi in part and dismissed Miscellaneous Petition No. 434 of 1971 filed by Mauskar.

6. Arguments were addressed by the learned Counsel at length on the question whether 1960 principles should prevail over 1970 principles or 1970 principles should apply and whether the principles enunciated in 1960 or 1970 are violative of Articles 14 and 16 of the Constitution, mainly because of another writ petition raising these questions was also placed along with those matters. We, however, do not think it necessary to finally decide those questions for disposing of these two matters which turn on their own facts. The principles enunciated in 1960 or 1970 are not statutory. They are neither framed under the proviso to Article 309 of the Constitution or in exercise of the rule-making power vested under any Act. They are only administrative rules. All such rules would come into force on the day they are enforced, is declared by the Supreme Court in *S.B. Patwardhan and Another Vs. State of Maharashtra and Others*, , in respect of a notification which

gave some instructions:

...These instructions, unlike rules regulating recruitment and conditions of service framed under the proviso to Article 309 of the Constitution or Section 241(2)(i) of the Government of India Act, 1935, cannot have any retrospective effect.

The 1970 principles cannot, therefore, have any retrospective effect.

7. The 1970 principles cannot, therefore, be applied to the petitioners so as to take away the right, if any, they had acquired; nor can any order be passed thereunder so as to adversely affect their seniority retrospectively. We have, therefore, to consider whether prior to the promulgation of 1970 principles, the petitioner had acquired any right to a particular post or to any particular rank in that cadre of service.

8. From the narration of facts detailed above it is clear that the petitioner Mohan K. Gandhi was selected and appointed as officiating Divisional Accountant on May 7, 1959 and he had actually taken charge on May 11, 1959. After the 1960 Order was passed and two Boards viz. Maharashtra Housing Board and Gujarat Housing Board, were formed with effect from May 1, 1960, it was decided to prepare a common seniority list for the staff of the whole organisation and 1960 principles were enunciated. Basing on these principles a provisional common seniority list of non-technical staff of the entire organisation was prepared and circulated to all the concerned members of the staff. The petitioner Gandhi was promoted to officiate as Junior Superintendent in accordance with those principles. By an order dated November 26, 1965 the petitioner was confirmed as Divisional Accountant with effect from November 1, 1963. The Divisional Accountants' cadre was separated from other cadres. He was, therefore, entitled to be shown in the cadre of Divisional Accountants. Once the petitioner was confirmed as a Divisional Accountant with effect from November 1, 1963 he was all the more entitled to be shown in the list of Divisional Accountants in accordance with the date of his appointment to that post.

9. In AIR 1977 251 (SC) , the Supreme Court ruled (at p. 265):

Seniority, normally, is measured by length of continuous, officiating service - the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionality tests being satisfied.

There is no valid reason why in the absence of any valid statutory provision to the contrary this normal rule should be overlooked in these matters. As laid down by the Supreme Court in P.S. Mahal and Others Vs. Union of India (UOI) and Others, inter se seniority should be determined on the basis of length of continuous officiation in a particular grade. Even if the authority has the power to frame statutory rules retrospectively, if the rule framed is unreasonable, it can be set aside. Gandhi had acquired a right by virtue of 1960 principles also. Actually he was promoted from the post of Divisional Accountant on August 31, 1963 to

officiate as Junior Superintendent on a trial basis. On account of any revision in the principles of preparing common seniority list or merger or integration of different cadres, the right which the petitioner acquired earlier could not be affected. By a circular dated February 24, 1969 the Housing Commissioner circulated a provisional seniority list said to be based on the principles of seniority adopted by the Board in 1966. It is argued by Mr. Paranjpe, learned Counsel for the Maharashtra Housing and Area Development Authority, that these 1966 principles were enunciated to remove certain anomalies noticed in the implementation of 1960 principles. It may be stated that 1960 principles postulated the date of entry into the cadre as the basis for computing seniority in that particular cadre, in this seniority list the petitioner's name was not shown. In fact, the entire cadre of Divisional Accountants was omitted in that seniority list. On April 24, 1969 a further seniority list in the cadres of .Estate Managers, Superintendents, Assistant Estate Managers and Senior Assistants (Legal) was prepared, Although the petitioner was officiating on that date as a Junior Superintendent, his name was not included in that list. The petitioner, therefore, submitted his representation to the Housing Commissioner pointing out the omission and stating that his name be included in the cadre of Divisional Accountants giving him appropriate seniority taking into account the first date of his appointment to the post of Divisional Accountant as Ma)" 7, 1959. In the meanwhile, the Housing Commissioner circulated a final common seniority list purportedly based on 1970 principles in which the petitioner's name was shown at serial No. 31 in the cadre of Senior Assistants, Auditors and Circle Head Clerks and the date of entry into that cadre as March 10, 1969. It is surprising that he should have been shown in that list in the cadre of Senior Assistants, Auditors and Circle Head Clerks when he did not hold any of these posts on March 10, 1969. He represented that he has been continuously officiating as Junior Superintendent with effect from August 31, 1963 in a clear vacancy and therefore he was entitled to reckon his seniority from that date and no other Assistant Estate Manager could be placed above him in that :list. The principles enunciated and circulated along with the circular of the Housing Commissioner on February 24, 1969 and the seniority lists of April 24, 1969 and October 28, 1970 cannot apply to him. The final common seniority list sent along with the circular dated October 28, 1970 is based on modified principles of 1970. In that list the position in the cadre of Head Clerks based on the deemed dates of promotion is indicated. In that list the petitioner is assigned rank at serial No. 31. The date from which he is deemed to have held that post was given as March 10, 1969 although in fact on that date he was working as Junior Superintendent and even earlier as Divisional Accountant from May 7, 1959- He could not have been shown as Senior Assistant which post he never held. Since he was promoted only on a trial basis for a period of six months as a Junior Superintendent on August 31, 1963 he could not be deemed to have become a member of that cadre of service. He was however confirmed in the post of Divisional Accountant from November 1. 1963. His seniority in that cadre therefore ought to have been determined according to the length of service in that cadre from November 1,

1963. Having been confirmed as Divisional Accountant he would be deemed to belong to that cadre of service and his seniority has to be reckoned from the date he entered that cadre. The order dated August 22, 1963 promoting him as Junior Superintendent had specifically stated that that promotion was subject to the finalisation of the common seniority. Further, it was only on a trial basis for a period of six months. Therefore, he could not acquire any right to the post of Junior Superintendent. But, he did acquire such a right in respect of the post of Divisional Accountant with effect from, the date of his confirmation. Any modification of the 1960 principles either in 1966 or 1970 cannot affect his right to the said post. We are not concerned in this appeal regarding future promotion. In this view of the matter, we do not propose to go into the several other questions raised with regard to the validity of the 1970 principles and how far they supersede 1960 principles and affect the employees of the Maharashtra Housing and Area Development Authority in general and leave them to be agitated and decided in appropriate writ petition raising these questions.

10. The learned Single Judge, while allowing the writ petition made the rule absolute in terms of prayer (a) of the petition. Basing on the seniority list circulated on October 28, 1970, the petitioner, who was officiating as Junior Superintendent was reverted on September 7, 1972 i.e. about fifteen days after the filing of the writ petition. He was again promoted on October 1, 1975 deeming him to be at serial No. 45 in the order of seniority. The petitioner sought an amendment of the writ petition to quash the order of reversion dated September 7, 1972 and also to treat the petitioner as Superintendent with all his pay and allowances as if the said order was not passed. That relief was not granted by the learned Single Judge. The petitioner has, therefore, filed cross-objections. In the view we have taken above, on the question of his seniority in the cadre of Divisional Accountants, the reversion of the petitioner could have been ordered only if the post of Junior Superintendent was not available; he could not have been reverted from the post of Junior Superintendent and another person junior to him in the cadre of Divisional Accountants promoted to that post. Any such reversion would be arbitrary and violative of all principles of fair-play and justice; it would violate the fundamental rights guaranteed to the petitioner under Article 14 of the Constitution. It is not the case of the Authority that the petitioner was reverted because he was found unsuitable for the post. That reversion was effected only because according to them as per 1970 principles he was considered junior. He was continuously officiating in the post of Junior Superintendent ever since August 31, 1963 and was continuing as such when the writ petition was filed. If only the respondents had realised that the petitioner was entitled to reckon his seniority in the cadre of Divisional Accountants from the date of his first appointment to the post in that cadre which he held continuously and in which post he was also confirmed and he ought to have been shown in the list of Divisional Accountants and could not be shown in the list of Senior Assistants as has been done, he would not have been reverted from the post of Junior Superintendent. In fact, even basing on the

seniority list prepared on the basis of 1970 principles, the petitioner was once again promoted on October 1, 1975 as Junior Superintendent. From that it is clear that there was nothing against the petitioner warranting his reversion. It is thus clear that but for the respondents' own erroneous determination of the petitioner's seniority in the cadre of Divisional Accountants, he would not have been reverted at all. His reversion from the post of Junior Superintendent must also be quashed. Any promotion made adversely affecting the petitioner pending the writ petition shall have no effect so far as the petitioner is concerned. In fact, promotions were allowed to be made by this Court subject to the result of the writ petition. The petitioner's seniority in the cadre of Junior Superintendent shall therefore be reckoned accordingly ignoring such promotions and he shall be promoted accordingly. The petitioner would also be entitled to all consequential benefits.

11. In the result, the appeal preferred by the Maharashtra Housing and Area Development Authority (Appeal No. 164 of 1979) fails and is accordingly dismissed with costs and the petitioner's cross-objections are accordingly allowed but in the circumstances we make no order as to costs.

12. On the same parity of reasoning, the appeal preferred by the appellant (Appeal No. 202 of 1979) R.N. Mauskar must be allowed. The appellant prays that in the seniority list of Assistant Estate Managers the date of entry for the purpose of seniority in that cadre be shown as December 17, 1960 and that one including respondents Nos. 6 to 9 recruited to the post of Assistant Estate Manager later should be placed above him and that he may be granted due promotion with full pay and allowances and that the order of reversion dated September 7, 1972 be quashed so far as it affects him and that he may be treated as Assistant Estate Manager from the date of his continuous appointment ignoring the reversion and that he may be granted all consequential benefits of pay and allowances. The learned Single Judge rejected his claim in toto.

13. Appellant Mauskar was Junior Auditor in the office of the Executive Engineer, Bombay Housing Board. By an order dated December 15, 1960 he was promoted as officiating Assistant Estate Manager in the office of the Estate Manager (West), Bombay in the unit of the Assistant Housing Commissioner (Estate Manager), Bombay. This was done in accordance with 1960 principles. His appointment was no doubt on a trial basis for a period of six months and on the distinct understanding, that in case he is allowed to continue as such after the trial period he will have no claim for promotion for the non-gazetted post of Junior Superintendent and Senior Superintendent. It was not stated therein that his seniority in the cadre of Assistant Estate Managers will not be counted on the basis of his continuous officiation in that post from the date of his first appointment to that post. In fact he has been continuing in that post without a break. He was sought to be reverted on September 7, 1972 only in view of 1970 principles. His appointment and continuance cannot be deemed to be fortuitous. On April 24, 1973 he was in fact promoted as Assistant Estate Manager once

again. As held in P.S. Mahal's case (Supra), even if he was appointed by way of promotion on an officiating basis, since he was qualified to be promoted and continued for a long period in a clear vacancy he must be treated as substantive appointee and he cannot be reverted. Though the petitioner claimed that he was directly appointed as a Junior Auditor, seniority would have to be counted from the date he was first appointed in the cadre of the Junior Auditor and in the cadre of Assistant Estate Manager from the date he was promoted and appointed to a post in that cadre. Any subsequent alteration of the principles of preparation of the seniority list based on those principles cannot affect his vested right. His seniority shall be reckoned as indicated above. The seniority list prepared to the contrary so far as the appellant is concerned is therefore quashed. His reversion also must be consequently quashed. The appellant will be entitled to all consequential benefits. Further promotion shall be considered reckoning his seniority as above. The appeal is accordingly allowed and the rule is made absolute in terms of prayer (b), (b-1). and (b-2) of the petition. In the circumstances we make no order as to costs.

14. The orders issued herein shall be implemented within four months from today.