(2001) 08 BOM CK 0034

In the Bombay High Court

Case No : Writ Petition No. 1598 of 1988

Md. Ibrahim and Another APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 03-08-2001

Acts Referred:

Maharashtra Finance and Account Service Class II Recruitment Rules, 1971 — Rule 2
Maharashtra Zilla Parishads District Services (Recruitment) Rules, 1967 — Rule 1

Citation : (2002) 1 ALLMR 860 : (2002) 3 MhLj 824

Hon'ble Judges : N.V. Dabholkar, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : P.R. Deshmukh and S.P. Deshmukh, for the Appellant; P.M. Shinde, AGP for Respondent Nos. 1 to 3, for the Respondent

Final Decision : Partly Allowed

Judgement

N.V. Dabholkar, J.—By a writ petition under Article 226 of the Constitution of India, the petition challenges the Constitutional validity of revised recruitment rules in respect of Maharashtra Finance and Accounts Service Class II brought into force with effect from 25-3-1971.

2. Petitioner No. 1 joined service as a Clerk with the erstwhile State of Hyderabad in the office of the Block Development Officer at Kalamnuri Dist. Parbhani, His services were allotted to Zilla Parishad in the year 1962, initially on temporary basis. In 1971, he was absorbed in the cadre of District Services of Zilla Parishad as Junior Assistant Class III and later on promoted as Senior Assistant (Accounts) Grade III. In the year 1975, he was again promoted as Deputy Accountant Grade II and lastly in the year 1984, as Head Accountant Grade I in the office of Zilla Parishad, Parbhani. Petitioner No. 1 at present is a member of District Services Class III (Accounts) Grade I.

As per Maharashtra Zilla Parishads District Services (Recruitment) Rules, 1967, "District Service" means District Technical Services (Class III), a District Service (Class III) or a District Service (Class IV) of a Zilla Parishad constituted u/s

239(b) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961. The District Services Class III (Accounts) consists of three cadres, Grades I, II and III.

The eligibility and qualifications for the appointment in the District Services Class III (Accounts) Grades I, II and III are laid down in Appendix XI to Maharashtra Zilla Parishad District Services (Recruitment) Rules 1967 (hence-forth referred to as Zilla Parishad Recruitment Rules).

Sr. No. Service & Cadre Poste Qualification for and methods of appointment

1. District Service (Class III) (Accounts) Grade I. 1) Head Accounts

2) Divisional Accounts Appointment shall be made by promotion of Deputy Accounts 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. (Note : There is no appointment by nomination).

2. District Service (Class III) (Accounts) Grade II. Deputy Accountants 1. Appointment shall be made either - (a) by promotion of Junior Assistants, Stores Assistants or Storekeepers who have passed the Accounts Clerk Examination that may be prescribed in that behalf or an equivalent examination; (and have completed continuous service of not less than three years in that post).

OR

(b) by nomination of candidates who..... (Note : In this cadre, appointments to the extent of 50% can be done by nomination).

3. District Service (Class III) (Accounts) Grade III. Senior Assistant (Accounts) 1. Appointment shall be made either - (a) by promotion of Junior Assistants, Stores Assistants or Storekeepers who have passed the Accounts Clerk Examination that may be prescribed in that behalf or an equivalent examination; (and have completed continuous service of not less than three years in that post,

OR

(b) by nomination of candidates who..... (Note : In this cadre, appointments to the extent of 50% can be done by nomination).

3. District Service (Class III) (Accounts) Grade III. Senior Assistant (Accounts) 1. Appointment shall be made either? (a) by promotion of Junior assistants, Stores Assistants or Storekeepers who have passed the Accounts Clerk Examination that may be prescribed in that behalf or an equivalent examination; (and have completed continuous service of not less than three years in that post,

OR

(b) by nomination of candidates who..... (Note : In this cadre, appointments to the extent of 50% can be done by nomination).

The Maharashtra Finance and Accounts Services Examination Class III was held by Maharashtra Public Service Commission and employees of Zilla Parishads in accounts branch were allowed to appear for the said examination. It is claimed that by virtue of Government resolution dated 25-6-1986, the Deputy Accountant in the District Service Class III (Accounts) Grade II has now become eligible to appear for the Maharashtra Finance and Accounts Service Class III Examination.

In fact, on reference to Government resolution dated 25-6-1986 (Exhibit A to the petition), it appears that the Government was pleased to sanction a scheme as per Annexure A to the said Government resolution for holding Maharashtra Finance and Accounts Service Class III examination and allowing Zilla Parishad employees to appear for the same. Although resolution opens by indicating that purpose was to consider allowing Zilla Parishad employees to appear for MF and AS Class III examination, on reference to Annexure A, the examination under the scheme is named as "Maharashtra Zilla Parishad, Finance and Accounts Service Class III Examination". As per Clause 3 of the scheme, incumbent holding the post of Deputy Accountant in the District Services (Class III) (Accounts) Grade II, having passed examination of Deputy Accountants conducted by Rural Development Department or Maharashtra Accounts Clerk''s Examination conducted by Directorate of Accounts and Treasuries, Bombay, or its equivalent examination are eligible to appear for this examination. Another resolution dated 19-12-1988 was issued by Rural Development Department recognising Maharashtra Zilla Parishad Finance and Accounts Service Class III examination as examination equivalent to Maharashtra Finance and Accounts Services Class III Examination.

3. In the year 1965, Government accepted in principle the establishment of a Directorate of Accounts and Treasuries under the Finance Department and the reconstitute on of the supervisory cadres in the accounts offices subordinate to the Finance Department, under new Maharashtra Account Service. It was resolved to constitute a new accounts service to be known as the Maharashtra Finance and Accounts Service (State and Subordinate), to be kept under the administrative control of Finance Department. The decision was taken in view of the fact that there were several isolated posts (gazetted and non-gazetted) dealing with accounts matters, under the administrative control of various Government departments other than the Finance Department. The incumbents of most of those posts being isolated and not included in any particular cadre were at disadvantage in respect of promotion. In the absence of a common cadre and requisite degree of interchangeability and unity in the scales of pay for posts requiring similar qualifications and duties, Government offices were experiencing a severe shortage of personnel qualified in accounts work.

The scheme was published by resolution of Government in the Finance Department No. DAT-1064/584-C/XII dated 1-2-1965. The Scheme created posts of State service consisting of super time scale posts, Class I (Senior), Class I (Junior), Class II and Class HI posts for newly constituted and unified accounts services. The post in question is "Maharashtra Finance and Accounts Services Class II" which was put in the pay scale of Rs. 300-715 vide above referred resolution. The details of the posts included in each class of service and respective recruitment rules were provided in Annexures A, B, C, D and E to the said resolution.

4. Annexure D provided the recruitment rule for the posts included in the Maharashtra Finance and Accounts Service Class II. The rule at its inception vide Government resolution dated 1-2-1965 read as under :--"Appointment to the posts shall be made either :--

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

(b) by nomination:

Recruitment to the posts by nomination shall be made on the basis of a competitive examination and viva-voce and personality test......."

By second clause, ratio for appointment by promotion and nomination was prescribed as 50 : 50. Nominees were required to be on probation for a period of two years and candidates from both the sources were required to pass departmental examination and examination in Hindi and Marathi according to prescribed rules.

These rules for recruitment to Class II in MF and A Service were amended by Government resolution (Finance Department) No. DAT-1171/1153/71/XII dated 25-3-1971 which is being impugned by present writ petition. The revised recruitment rule reads as follows :--

"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 Service (Class III) (Accounts), Grade I of Zilla Parishads, who have completed three years'' continuous service 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 tilled in by promotion, selection and nomination in the ratio 4:1:5, 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)....."

It may be stated here itself that the portion blown up in bold above is under challenge by present writ petition. The petitioners have taken an exception to imposition of condition of three years service in the cadre, i.e. of three years service in Grade I of Class III (Accounts) of District Services and are also aggrieved by proportion 4:1 for employees from Accounts Services of District Services.

5. On reference to the Maharashtra Zilla Parishads District Services (Appointment to Class II Services or the General State Service of the State Government) Rules, 1974 and more particularly Rule 3 of the said "Rules, it is evident that employees of Zilla Parishads can be appointed to any Class II service or the general State Service of the State Government, where the recruitment rules for such service provide eligibility in favour of employees of Zilla Parishads. In this set of rules, there is no provision providing avenue for Zilla Parishad Class III employees to enter Class II Services.

Writ Petition No. 1596/1988 filed by present petitioners was dealt by this Court and dismissed vide judgment dated 28-6-2001. In the said petition, petitioners had questioned Constitutional validity of Rule 6 of the Maharashtra Development Service (Constitution, Classification and Recruitment) Rules, 1973, on the ground that similarly placed employees were treated differently. The Governor of Maharashtra was pleased to constitute Maharashtra Development Service and in exercise of the powers conferred by Proviso to Article 309 of the Constitution, the Maharashtra Development Service (Constitution, Classification and Recruitment) Rules, 1973, were framed. Rule 6 of the said Rules provided for appointments to the posts of Class II Sub-clauses (b) to (g) provided avenue for District Technical Service (Class III) Agriculture, Animal Husbandry, Education-Non-teaching, as also District Services (Class III) Ministerial, Executive and Village Extension and Statistics. Such an opening for appointment to Class II Development Service by selection was not provided to District Services (Class III) (Accounts) and, therefore Rule 6 of Maharashtra Development Service Rules, 1973 was challenged.

This Court has dismissed the said writ petition in view of the fact that employees of the District Services (Class III) (Accounts) Grade I are provided promotional channel in the Maharashtra Finance and Accounts Service (Class II) by virtue of Government resolution dated 25-3-1971.

6. Coming back to the challenge, petitioners feel that Zilla Parishad employees who have passed the requisite examination are required to put in atleast three years service in Grade I of District Services (Class III) (Accounts).

This is in spite of the fact that Head Accountant or Divisional Accountant reaches that post only after passing requisite examination and after having put in three years service as Deputy Accountant. As compared to this, employees of MF and A Service Class III can be promoted without putting in equal number of years of service in Class III, if he has passed the MF and AS Class III examination. Thus, employees of Zilla Parishad are subjected to discrimination without any rational basis. The condition of three years'' service attached to Zilla Parishad employees, according to petitioners, therefore, violates the principles of equality guaranteed by Articles 14 and 16 of the Constitution of India.

Petitioners have gone to the extent of claiming that qualification and requirement for passing of examination are same, both in respect of Grade I and Grade II employees of Zilla Parishad and, therefore, Deputy Accountant (Grade II) from Zilla Parishad, who has passed MF and AS Class III examination, also should be held eligible to be selected and promoted to the post of Class II in MF and A Services.

According to petitioners, the object being to make available best talent and efficient elements from different sources, the discrimination is not justified even on the doctrine of reasonable classification. The ratio fixed is also not based on any principle, reasonable classification and is, thus, arbitrary.

7. In order to judge whether condition of three years'' continuous service in that grade prescribed for District Service (Class III) (Accounts) Grade I employees, for getting selected to Class II MF and A Service is justifiable or discriminatory, it is necessary to examine and compare the channels, through which the employees of Zilla Parishad and employees of MF and A Service can reach the position of Class II in MF and A Services.

While considering this comparison, three aspects will have to be taken into consideration. The eligibility criteria such as educational qualification at the stage of entry into service, further achievements/improvements in the qualification by being required to pass departmental examinations, number of year''s service compulsorily required to be and generally put in by the employees from two sources.

It was weakly tried to be argued by learned AGP that so far as employees of MF and A Services are concerned, rise to Class II is a promotion, whereas for employees of Zilla Parishad, it is selection and, therefore, the two cannot be considered for comparison. The argument is required to be mentioned and rejected. It must be taken into account that, while constituting unified State Level accounts service by Government, the object behind the same was to bring all the individuals working in isolated posts saddled with duties of accounts works under common control of Finance Department and at the same time to provide a channel for promotion to these Government employees working in isolated posts, which they otherwise did not have. Even while constituting Maharashtra Development Service and framing Maharashtra Development Service Rules, 1973, consciously the accounts branch of District Services is excluded. Considering both these aspects together, although the word used in Sub-clause (b) of Rule 1 is "selection", the same is very much synonymous to "promotion". This is also because employees from both these categories i.e. MF and A Service Class III as also District Service Class III, while contesting for appointment to MF and A Service Class II are already in the services either of Government or local self-Government authority and performing the duties related to accounts.

8. So far as Zilla Parishad employees and more particularly the employees in the District Services (Class III) (Accounts) are concerned, they enter in the Zilla Parishad service as Junior Assistants/Store Assistants or Store Keepers and only after passing examination of Accounts Clerk, they can be posted on the lowest ladder of District Service Class III (Accounts) Grade III as Senior Assistant (Accounts). We are not considering the candidates who may enter directly as Senior Assistants by nomination after obtaining a degree of recognized University, more particularly in commerce faculty with accountancy and audit. But it cannot be ignored that even these persons graduated in the commerce faculty also traverse the same path as the departmental promotees from the cadres of Junior Assistants, etc. having entered the cadre of Senior Assistant (Accounts) on promotion by only passing Accounts Clerks'' Examination.

A Senior Assistant in Grade III becomes eligible for promotion as Deputy Accountant Grade II only after passing Deputy Accountant''s examination or equivalent examination and having completed continuous service of not less than three years in the post of Senior Assistant (Accounts). Further Deputy Accountants Grade II are eligible to be promoted as Head Accountants/Divisional Accountants Grade I only after passing MF and AS Class III or equivalent examination and compulsorily having put in continuous service of not less than three years'' as Deputy Accountant.

To put in mathematically, a Zilla Parishad employee passes following examination and accrues experience as under before he can be considered for promotion to MF and A Service Class II post and by virtue of revised Recruitment Rules of 1971.

To come in District Service Class III (Accounts) Grade III as senior Assistant (Accounts)

1. Commerce Graduation (Direct Recruit) Nil

OR

Junior Assistant/Store Assistant/Store Keeper having passed Accounts Clerk''s Examination or equivalent examination. Atleast 3 years service.

To come to the cadre of District Service (Class III) (Accounts) Grade II i.e Deputy Accountant''s post:

2. Post Graduation (Direct Recruit) Nil.

OR

Assistant (Accounts) and passing Deputy Accounts examination or equivalent examination. Continuous service not less than three years as Senior Assistant.

To come to District Service (Class III) (Accounts) Accountants/Divisional Accountants :

3. Deputy Accountants having passed MF and A service Class III examination or equivalent examination. Having worked in District Service (Class III) (Accounts Grade II for continuous period of not less than three years.

Thus, a person before he can assume the charge as Head Accountant/Divisional Accountant, which is a feeder post to MF and A Service Class II, he is required to pass Accounts Clerk''s Examination, Deputy Accountant''s Examination and MF and A Service Class III examination (three examinations) and put in 9 years service in the lower cadres or in case of graduates and post graduates, they appear for 3 and 2 examinations and put in 6 & 3 years experience respectively before entering the office of Head Accountant/Divisional Accountant.

By virtue of rule under challenge, a person to be considered under Sub-Clause (2) is required to put in further three years service as Head Accountant or Divisional Accountant before he can be considered eligible for selection (promotion) to MF and A Service Class II posts.

9. In order to calculate the journey of the employees of MF and A Services, we are required to refer to Annexures D and E to Government resolution dated 1-2-1965. Annexure E provides recruitment rule for the posts included in the MF and A Service Class III. The said rule reads as follows :--

"(1) Appointment to the post shall be made by the Director of Accounts and Treasuries and Joint Secretary to Government, Finance Department, Bombay, either:--

(a) by promotion of persons who have passed the MF and AS Class III examination or are exempted from passing it and who are brought on the select list of persons fit for promotion to Maharashtra Finance and Accounts Service Class III; OR

(b) by nomination from among candidates who-

(i) (regarding age limits);

(ii) held a Bachelor''s degree in atleast second class in Arts, Science, Commerce or Law of a recognized University."

If a direct nominee covered by Clause (b) above is taken into consideration, a graduate who may pass MF and A Class III Examination would become eligible for being promoted to Class II, by virtue of 1971 Rules with minimal period of service/experience, but for Rule 6(a) prescribed for the said examinations in Annexure G of Government resolution dated 1-2-1965. This rule prescribes requirement of three years'' continuous service in the upper division or any other equivalent post before a person can be eligible to appear for the examination.

So far as departmental promotee is concerned, he may also be in a position to appear for MF and A Service Class III examination on completion of three years service, while working in Class III of MF and A Service and having passed that examination and put in three years service, shall be in a position to compete for promotion to a Class II post of MF and A service.

10. Learned AGP tried to gain ground by referring to Rule 6(a) regarding the examination which requires a person to put in not less than three years'' continuous service in the upper division before he can appear for MF and A Service Class III examination. It was argued by learned AGP that, probably (?) this period of three years, which the employees of MF and A Services put in while shouldering the responsibilities regarding accounts work before appearing for MF and A Class III Examination, tried to be made up by adding requirement of three years service condition for Zilla Parishad employees to seek selection/promotion to Class II posts.

Eventually answer to this contention is provided by Rule 6(b). For the person serving in other Government department, in order to be eligible for appearing to MF and AS Class III examination, he is required to put in not less than 5 year''s service.

So far as Zilla Parishad employees are concerned, it must be taken into consideration that only channel for appointment as Head Accountant/Divisional Accountant is by promotion. Mode of nomination is not available to this Grade I post and, therefore, a person merely having passed MF and AS Class III examination can not occupy the seat of Head Accountant/Divisional Accountant, so as to make him eligible to compete for Class II post of MF and A Service, without any experience of accounts work. He goes through a schedule which requires him to shoulder the responsibility of accounts work atleast for three years as Deputy Accountant and then only he can assume charge of Head Accountant.

The argument of learned AGP that employees of MF and A Services shoulder the responsibility of accounts work for three years before appearing for the qualifying examination making them eligible for promotion to Class II posts, which the employees of Zilla Parishad ought to compensate by three years experience as prescribed by the rule under challenge, is, therefore, not sustainable.

On comparison of the channels, the employees from two sources travel before being eligible for being considered to Class II Posts of MF and A Services, it can be said that the Rule of 1971 to the extent it requires the employees of Zilla Parishad to put in three years continuous service in Grade I is certainly without any basis and, therefore, can be said to be arbitrary. On the contrary, the Head Accountant or Divisional Accountant of Zilla Parishad can be seen to have already put in service of not less than three years but even upto 9 years, shouldering the responsibility of accounts work before taking charge as such. The rule, therefore, must be said to be discriminatory and violative of Article 14 to that extent.

10-A. Return filed by Deputy Director of Accounts'' and Treasuries for respondents makes no reference to the plea of the petitioners as against the ratio prescribed. Neither it challenges contention of the petitioners that the ratio is unjust and arbitrary nor it explains the reasons for fixing such ratio. Saying that the rules are not framed by Governor in exercise of powers under Article 309 of the Constitution, the file in the matter is not placed before this Court. As a result, this Court does not have benefit to know and examine the philosophy behind the promotion for promotion from MF and A Services, selection from District Services (Class III) (Accounts) Grade III and appointments by nomination and, therefore, it is difficult to approve the same.

The only plus point in favour of Rule (2) prescribing the proportion is that the said ratio is flexible in the sense that ratio is to be reviewed every three years. There is also no evidence on record that since its inception in 1971, the ratio is reviewed after every three years and appropriately changed for justifiable reasons. Unreasonableness of the proportion can be judged to some extent from the fact that out of 10 posts, 5 are to be filled in by nomination, 4 will be available to Class III employees of MF and A Services, as against this District Services (Class III) (Accounts) Grade I employees all over the State will compete for only one post.

Instead of totally striking down Rule (2) we are inclined to direct that the respondents should undertake the exercise of reviewing the ratio, and make it practical, realistic and based on sound justification. It should eliminate the chances of denial of reasonable and fair opportunity to any of the categories.

11. It is confessed on behalf of respondents that rules are not framed by His Excellency the Governor in exercise of powers under Article 309 of the Constitution. On reference to Government resolution No. DAT-1064/584-C/XII dated 1-2-1965 and DAT-1064/584-C/65/XII dated 25-3-1971, it can be seen that these are issued by Secretary and Under-Secretary to the Government of Maharashtra in Finance and Accounts Department. Both resolutions do not refer to any statutory or Constitutional provision, empowering the administration either to constitute unified State level accounts service and frame the rules governing Recruitment/Service conditions etc. It is felt that it would be advisable for the administration to seek sanction of appropriate Constitutional and/or statutory authority and codify the whole scheme under appropriate powers of such authority.

12. It is also prayed that District Services (Class III) (Accounts) Grade II i.e. Deputy Accountants may also be declared to be eligible for promotion to MF and A Services Class II, if the individual has passed MF and AS Class HI examination or equivalent. Apart from the fact that such an amendment will treat two unequals equally, we are not in favour of taking up the task of legislation unto

ourselves and hence such a prayer is not being entertained.

13. Petitioner No. 2 after getting impleaded, has agitated that Zilla Parishad employees are not appointed even as per the ratio under challenge, vacancies are filled in by promoting persons who have not passed the requisite examination, 29, 19 and 23 persons are promoted on 25-10-1990; 31-7-1992 and 13-11-1997 respectively. He has also added that he is not promoted/ selected although eligible. He has prayed for promoting him and stay to the selection/promotion dated 13-11-1997. Unfortunately the contentions are raised without adequate details and without impleading those who would be affected in case of directions are issued as prayed by him. In fact, paras 6 to 15 of his additional affidavit constitutes an independent litigation. In the circumstances above, we are not inclined to entertain the same, in the womb of present petition.

14. For the reasons discussed above, we partly allow the writ petition. Part of Rule (1) in Government Resolution Finance Department No. DAT-1064/584-C/65/ XII dated 25-3-1971 i.e. terminal clause "..... who have completed 3 years continuous service in that grade" being discriminatory is struck down.

So far as Rule (2), the respondents are directed to undertake review and refix the ratio based on sound reasons and justification, at an early date and in any case within three months from today.

Rule is made absolute accordingly.

