

(2013) 11 BOM CK 0132

In the Bombay High Court

Case No : Writ Petitions No. 557 of 2006 and 364 of 2012

Prakash Nachinolkar (Dr.)

APPELLANT

Vs

State of Goa and Others

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2014) 2 BomCR 415

Hon'ble Judges : F.M. Reis, J;B.R. Gavai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Gavai B.R., J.—Both these petitions involve a common issue and, as such, have been directed to be heard together by this Court. The petitioners in both the petitions in fact challenge the promotion of the respondent No. 3 as Deputy Director of Health Services, Government of Goa. The facts are not much in dispute and are crystallized as under:

The petitioner in Writ Petition No. 557/2006, Dr. Prakash Nachinolkar came to be recommended by Goa Public Service Commission as Senior ENT Surgeon on 13th March, 1991. He was appointed on 30th April, 1991 and joined on 4th May, 1991. His services came to be confirmed on 3rd May, 1993.

Dr. Ruando E.J.J. De Sa, the petitioner in Writ Petition No. 364/2012 was recommended by the Goa Public Service Commission as Senior Anesthest on 14th December, 1990. He was appointed on 7th January, 1991 and joined on the same day. He came to be confirmed on 6th January, 1993.

2. Dr. Sanjiv Dalvi, respondent No. 3 was recommended by Goa Public Service Commission on 14th December, 1990. He was appointed on 29th April, 1991. He joined on 2nd July, 1991 and came to be confirmed on 1st July, 1993.

3. It is the contention of the petitioners that in the year 2000-01 two vacancies to the post of Medical Superintendent-cum-Deputy Director had fallen vacant. On

one of the posts, the respondent No. 3, Dr. Sanjiv Dalvi came to be appointed on ad hoc basis on 31st December, 2000. It is the contention of the petitioners that though the petitioners made several representations, they are unheard. Vide orders dated 24th October, 2005, Dr. Sanjiv Dalvi as well as Dr. Ruando E.J.J. De Sa came to be promoted in the said posts in the regular basis. Being aggrieved thereby, the petitioners have approached this Court.

4. Heard Shri V.J. Dixit, learned Senior Counsel appearing on behalf of the petitioners, Shri A.N.S. Nadkarni, learned Advocate General for respondent No. 1, Shri H.D. Naik, learned Counsel for respondent No. 2 and Shri Nitin Sardesai, learned Counsel for respondent No. 3.

5. Shri Dixit, the learned Senior Counsel submits that though the petitioners' appointment as well as entry in service as well as their confirmation is prior to that of respondent No. 3, Dr. Sanjiv Dalvi, illegally the promotion has been granted in favour of Dr. Sanjiv Dalvi, de hors the rules. The learned Senior Counsel therefore submits that petitions deserve to be allowed and petitioners deserve to be granted promotion to the post of Deputy Director putting them Senior to the respondent No. 3. The learned Senior Counsel relies on the judgment of the Apex Court in the case of Ajit Kumar Rath Vs. State of Orissa and Others, .

6. As against this, the learned Advocate General would submit that as per the relevant rules the seniority is to be determined on the basis of the date on which selection took place. It is submitted that a person who is selected in an earlier selection process is entitled to be placed senior to the person, who has been selected in the subsequent selection process irrespective of the date of appointment and joining. The learned Counsel further submits that in so far as Dr. Ruando E.J.J. De Sa is concerned though he was selected along with Dr. Sanjiv Dalvi in the selection process held in the year 2005, he has chosen to remain silent for a period of seven years and the petition deserves to be dismissed on laches alone. He submits that even while admitting the petition the Division Bench of this Court has kept the said issue open.

7. At the outset, we may state that all the parties agree that both the petitioners are now retired and at the time of their retirement, they had reached the highest pay scale available to them and even decision of the petition in their favour, would not have a bearing on the pensionary benefits or the terminal benefits as are available to them. It could thus be seen that the question that requires to be considered is purely of an academic issue. We could have also rejected the petition on this short ground. However, since the very short issue is involved and the petitions are pending for a considerable period, we propose to deal with the said issue.

8. By now, it is well settled principle of law that the matters pertaining to service disputes between the parties are governed by the rules and regulations that govern the service conditions. In the present matter, the service conditions of the

parties are governed by the Goa Government (Seniority) Rules, 1967. For the consideration of the dispute in the present petitions, following rules would be relevant:

5. Direct recruits - Notwithstanding the provisions of Rule 4, the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment, on the recommendations of the Union Public Service Commission or other selection authority, persons appointed as a result of earlier selection being senior to those appointed as a result of a subsequent selection.

Provide that where persons recruited initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.

6. Promotees - (i) The relative seniority of persons promoted to the various grades shall be determined in the order of their selection for such promotion.

Provided that where persons promoted initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of promotion, seniority shall follow the order of confirmation and not the original order of merit.

(ii) Where promotions to a grade are made from more than one grade, the eligible persons shall be arranged in separate lists in the order of the relative seniority in their respective grades and the selecting authority shall select persons for promotion from each list upto the prescribed percentage, if any, and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade.

Explanation - Where promotions are made on the basis of selection by a selecting authority, the seniority of such promotees shall be in the order of merit in which they were recommended for such promotion by the authority. Where promotions are made on the basis of seniority subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior, such persons shall not, if he is subsequently found suitable and promoted, take seniority in the higher grade over a junior who had superseded him.

9. Undisputedly, both the petitioners as well as respondent No. 3 have been directly appointed as Senior Anesthetist, Senior ENT and Senior Surgeon, respectively. The perusal of Rule 5 which deals with direct recruits would clearly show that the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment, on the

recommendations of the Union Public Service Commission or other selection authority, persons appointed as a result of earlier selection being senior to those appointed as a result of a subsequent selection. From the perusal of the rules it is clear that a person who is appointed as a result of earlier selection process would be senior to those who have been appointed as a result of subsequent selection. On perusal of the facts of the petition, it is clear that Dr. Ruando E.J.J. De Sa and Dr. Sanjiv Dalvi were selected in an earlier selection process and their names were recommended by the Goa Public Service Commission on 14th December, 1999 whereas Dr. Prakash Nachinolkar was selected in the subsequent selection process and his name came to be recommended on 13th March, 1991. It is thus clear that though Dr. Prakash Nachinolkar has joined prior to Dr. Sanjiv Dalvi, in view of Dr. Sanjiv Dalvi's selection being done in a selection process which was earlier to the selection process in which Dr. Prakash Nachinolkar was selected, Dr. Sanjiv Dalvi would have to be placed senior above Dr. Prakash Nachinolkar. In that view of the matter, the petition of Dr. Prakash Nachinolkar deserves no merit.

10. In so far as Dr. Ruando E.J.J. De Sa is concerned, the Division Bench of this Court vide order dated 30th July, 2012 while admitting the petition has recorded the serious objections regarding maintainability of the petition on the ground of delay and laches and has observed thus:

6. The petitioner is Medical Superintendent-cum-Deputy Director, Asilo Hospital, Mapusa, Goa. He was appointed as Senior Consultant in Goa Government, on ad hoc basis on 19/5/1984. On recommendation by the Goa Public Service Commission (G.P.S.C.) made on 14/12/1990, he was appointed as Senior Consultant on regular basis on 7/1/1991. The petitioner alleges that the respondent No. 3 was recommended by G.P.S.C. for appointment as Senior Consultant on the same day i.e. 14/12/1990 and he joined Goa Government after quitting job of Maharashtra Government on 2/7/1991 as Senior Consultant on regular basis. Since the petitioner joined service on 19/5/1984, he is seven years senior to respondent No. 3. According to the petitioner, the merits/annual confidential reports of the Senior Consultants, including the petitioner and respondent No. 3 were the same but respondent No. 3 fraudulently provided false date of joining as 14/10/1990 for getting promotion, on 13/10/2000 as Medical Superintendent-cum-Dy. Director, Hospicio Hospital, on ad hoc basis and another false date of joining as 14/12/1990 for getting promotion order dated 24/10/2005, as Medical Superintendent-cum-Dy. Director, on regular basis. Thereafter, on the basis of the above earlier illegal promotion orders, the respondent No. 3 was promoted as Director of Health Services on ad hoc basis, by order dated 10/4/2012. The petitioner therefore claims that the promotions granted to the respondent No. 3 are bad in law, illegal, arbitrary and in violation of Articles 14 and 21 of Constitution of India and also in violation of D.P.C. guide lines. The petitioner has further alleged that the promotion order dated 24/10/2005 of respondent No. 3 was passed on tentative seniority list dated 12/8/1996 despite there being a final seniority list dated 10/10/2003, according

to which the respondent No. 3 was at Serial No. 8 whereas the petitioner was at Serial No. 2. He has further stated that the date of recommendation by G.P.S.C. is an irrelevant and extraneous consideration insofar as determination of seniority is concerned.

11. It is thus clear that Division Bench while admitting the petition, itself has kept the issue regarding maintainability open. The perusal of the petition reveals that no satisfactory explanation of whatsoever nature for approaching the Court for almost seven years after selection of the petitioner Dr. Ruando E.J.J. De Sa and Dr. Sanjiv Dalvi vide order dated 24th October, 2005, wherein Dr. Sanjiv Dalvi is shown to be senior to Dr. Ruando E.J.J. De Sa in the cadre of Medical Superintendent-cum-Deputy Director has been given in the petition. In that view of the matter, the petition could have been dismissed on the ground of laches alone. It would be appropriate to refer to the observations of the Apex Court in the case of Union of India (UOI) and Others Vs. Tarsem Singh, which reads thus:

5. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases 5 relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury.

But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

12. It can thus clearly be seen that Apex Court has held that if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation would be applied. As already discussed herein above the petitioner Dr. Ruando E.J.J. De Sa having accepted promotion in the year 2005, as Medical Superintendent-cum-Deputy Director, wherein he has been shown junior to Dr. Sanjiv Dalvi cannot be permitted to reopen the issue after a period of seven years. In any case, even the perusal of the Rule 6 would reveal that relative seniority of persons promoted to the various grades shall be determined in the order or their selection for such

promotion. Clause 2 of Rule 6 would show that where promotions to a grade are made from more than one grade, the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades and the selecting authority shall select persons for promotion from each list up to the prescribed percentage, if any, and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade. The explanation thereto subsequently provides that where promotions are made on the basis of selection by a selecting authority, the seniority of such promotees shall be in the order of merit in which they were recommended for such promotion by the authority. The respondents have placed on record the minutes of the Departmental Promotion Committee dated 7th October, 2005 consisting of the member of the Goa Public Service Commission who is the Chairman of the Committee, the Secretary of Health and Special Secretary Personnel as its members. The Departmental Promotion Committee in the said meeting has selected Dr. Sanjiv Dalvi to the post of Medical Superintendent-cum-Deputy Director against the vacancy arising in the year, 2000 and Dr. Ruando E.J.J. De Sa against the vacancy arising in the year, 2001. The DPC has therefore clearly placed Dr. Sanjiv Dalvi above Dr. Ruando E.J.J. De Sa in the said selection. The said selection of 2005 on the basis of which an order was issued by the respondent-State on 24th October, 2005 in which undisputedly Dr. Ruando E.J.J. De Sa is shown junior to the petitioner is sought to be challenged in the year 2012. It is pertinent to note that the Right to Information Act was incorporated and enacted by the State Legislature of Goa in the year 2002 i.e. much prior to the Right to Information Act, 2005. It is therefore difficult to accept the contention that the petitioner Dr. Sanjiv Dalvi could not have approached this Court on account of non-availability of the documents. In any case, on merits also, we find no merit in the contention raised by Dr. Ruando E.J.J. De Sa inasmuch as the Departmental Promotion Committee in the selection process has placed Dr. Sanjiv Dalvi above him. In the result, the petitions are found to be without merit and, as such, are dismissed. Rule stands discharged. However, in the facts and circumstances of the case, no orders as to costs.