
(2015) 05 BOM CK 0065
In the Bombay High Court
Case No : Writ Petition No. 9172 of 2013

Ramesh

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Citation : (2016) 1 MhLj 389

Hon'ble Judges : S.S. Shinde, J;P.R. Bora, J

Bench : Division Bench

Advocate : R.P. Bhumkar, for the Appellant; V.A. Shinde, AGP, Advocates for the Respondent

Final Decision : Disposed off

Judgement

S.S. Shinde, J.—Rule, returnable forthwith. With consent of the parties, taken up for final hearing.

2. Brief facts of the case are as under:

The petitioner was appointed in the office of the respondent No. 4 as Junior Clerk on 4th March, 1985. His service record is unblemished. He was promoted on the post of Store Keeper on 23rd April, 1998.

It is further case of the petitioner that the respondent State issued various Government Resolutions dated 1.11.1977, 28.11.1979, 17.5.1980 and 11.2.1992 and decided to give exemption from passing Divisional Examination for higher pay scale or promotion to those employees who were working as Government servant and who have completed 45 years of age. Accordingly, the rules were amended. The respondent issued circular providing for exemption for passing professional examination to the employees who have completed 45 years of age. It is further case of the petitioner that he completed 45 years of age and also 12 years service in the year, 2005 and, therefore, as per the Government Policy, higher pay scale was recommended to those employees, who completed 12 years of service. After considering the service record of the petitioner, respondent No. 4

issued order / letter dated 14th March, 2005 stating therein that the petitioner has completed 45 years of age on 8th November, 2004 and accordingly, the petitioner was exempted from passing of professional examination for the post of Store Keeper.

On 26.12.2011 the respondent No. 4 issued letter and intimated to the petitioner that it is compulsory for the petitioner to pass the professional examination and the order dated 14th March, 2005 granting exemption from passing the said examination is contrary to the rules and, therefore, the same has been cancelled.

3. Being aggrieved, the petitioner approached the Labour Court. However, complaint was withdrawn from the Labour Court since the said Court had no jurisdiction to entertain the prayer of the petitioner. Hence, the petitioner has filed the present writ petition for redressal of his grievance.

4. The learned Counsel for the petitioner submits that in pursuance to the impugned communication, the respondents have started recovery of the amount alleging that the excess amount is paid to the petitioner for 50 months. It is submitted that the respondent started deducting Rs.6,184/-per month. It is submitted that the respondent No. 4 granted exemption from passing the professional examination on the ground that the petitioner completed 45 years of age and, therefore, no any malafides or fraud can be attributed /alleged against the petitioner. The learned Counsel for the petitioner invited our attention to various Government Resolutions and documents placed on record and demonstrated that various departments of the government of Maharashtra including P.W.D., the General Administration Department and Irrigation Department have taken a policy decision to exempt the Government Employees from passing professional examination for the post of Store Keeper, if such employee is above 45 years of age.

5. Therefore, relying upon various judgments of the Supreme Court and in particular, the judgment in the case of Syed Abdul Qadir and Others Vs. State of Bihar and Others, (2009) 1 JT 385 : (2009) 1 SCALE 36 : (2009) 3 SCC 475 : (2009) 1 SCC(L&S) 744 : (2009) 3 SLJ 38 ;, the learned Counsel for the petitioner submits that the petition deserves to be allowed.

6. The learned Counsel for the respondent No. 2 to 5 submits that the petitioner is not a Government servant because the respondent is a statutory undertaking enacted under the provisions of MJP Act, 1976. The Counsel for the respondents submits that it is correct that the respondent follows all the MCSR and PWD Manual, which govern service of the respondent's employees. It is submitted that the petitioner was appointed as Junior Clerk on 4th March, 1985 and later on, on 22nd November, 1990 he was appointed as Assistant Store Keeper. It is submitted that the reliance placed by the petitioner on various Government Resolutions is not useful to the petitioner inasmuch as, those Government Resolutions are in respect of Departmental Examination and not in respect of the professional examination as prescribed under the PWD Manual. It is submitted

that the petitioner was supposed to pass the professional examination within five years from the date of appointment on the post of Store Keeper, as per Rules made under the B and C Manual. It is pertinent to note that there is no provision in the PWD Manual as to the exemption from passing professional examination after completion of 45 years of age. It is submitted that it was noticed by the Superintending Engineer, Nanded in the year, 2011 that the petitioner was wrongly exempted from passing the professional examination for the post of Store Keeper on the ground of completion of 45 years of age and then the said authority correctly cancelled the wrongly issued exemption order dated 14th March, 2005 vide his order dated 26th December, 2011. It is submitted that the Government Resolution dated 31st July, 2013 relied upon by the petitioner is in respect of civil engineering assistants working in B and C Department and it is not applicable to the petitioner, who is working as store keeper. It is submitted that it is correct that B and C Department vide notification dated 21st July, 1982 framed the rules for professional examination for the post of Store Keepers working in that Department. Rule 6 thereof does provide for exemption from passing the professional examination on completion of 45 years of age. On the basis of this rule of B and C Deptt., the answering respondent made a reference to the Water Supply and Sanitation Department, which is the administrative department, requesting for exemption of the store keepers from passing professional examination on completion of 45 years of age. However, vide letter dated 5th October, 2012, the parent department informed that such exemption cannot be given to the store keepers working with the respondents unless specific rules are framed in that regard. It is submitted that the action of canceling the wrong order of exemption and order of recovery are perfectly legal and in consonance with the prevailing rules. Therefore, the writ petition may be dismissed.

7. The petitioner has also filed rejoinder to affidavit filed by respondents. Relying upon the averments in the rejoinder to affidavit, the learned Counsel for the petitioner submits that the respondents have followed the rules of PWD and MCSR. Therefore, the rules prescribed by the PWD are applicable to the petitioner also. As per the said rules, for the post of store keeper, there is provision of exemption for passing of the professional examination after completion of age of 45 years. It is submitted that the General Administration Department has also issued direction for exemption of passing the professional examination and therefore, the Government Resolution issued by the General Administration Department are binding on all the departments including PWD as per the Maharashtra Government Business Rules. It is submitted that the respondent has admitted in the affidavit-in-reply that B and C department vide notification dated 21st July, 1982 framed rules for professional examination for the post of store keeper and as per the said rules after completion of 45 years of age, exemption from passing of departmental examination is proper. It is submitted that in similar fact situation like in the present petition, the respondent State Government challenged the orders passed by the Maharashtra

Administrative Tribunal, bench at Aurangabad before the High Court by filing Writ Petition No. 6212 of 2011 with connected petitions and while deciding the said writ petition, the High Court observed that the directions of the General Administration Department are binding on all other departments of the State including PWD. It is submitted that the Principal Secretary of the Public Works Department has issued letter on 16th May, 1994 stating that as per the Government Resolution dated 1st November, 1997, whoever completed 45 years of age on or after the said date, will be exempted from passing of the professional examination and accordingly, exemption was granted to the petitioner by the respondent authority. The petitioner was exempted from passing the professional examination on 8.11.2004 and on 1st October, 2013 surprisingly, without any notice to the petitioner, the respondent authority has taken away the benefits granted to the petitioner and started recovery from his pensionary benefits.

8. We have given careful consideration to the submission of the learned Counsel for the petitioner, learned Counsel for the respondents No. 2 to 5 and the learned AGP appearing for State. With their able assistance, perused the entire material placed on record and also the judgment of the division Bench of this Court dated 10th December, 2013 in case of Naeem Ahmedkhan s/o Dilawarkhan vs The State of Maharashtra and others in Writ Petition No. 6700 of 2012 wherein, similar issue like in respect of exemption from passing professional examination and recovery of amount after retirement of the petitioner therein was involved. In the facts of that case, it appears that the petitioner was appointed as Assistant Store Keeper on 25th May, 1981 with the respondent and he was promoted as Store Keeper on 19th June, 1997. At the time of promotion of the petitioner, he had completed 45 years of age, and he was granted exemption from passing departmental examination for the post of Store Keeper in view of Government Resolution dated 1st November, 1977, and entry in that regard was taken in his service record, to the effect of granting exemption from passing professional examination.

9. In the case of Naeem Ahmedkhan s/o Dilawarkhan (supra), the Division Bench has adverted to the submission of respondent No. 2 therein in para 7 of the judgment. The Division Bench further in para 8 of the judgment, considered the exemption granted to the petitioner therein from passing professional examination on attaining age of 45 years, and in para 9 it is observed that, it is apparent that the superior officers of petitioner were themselves under wrong impression, and granted exemptions when the concerned rules did not provide for exemption at 45 years of age. It is further observed that it was not fault of the petitioner, and he received the benefit in view of the office order dated 29th November, 1997 passed by Superintending Engineer. There is no material to show that petitioner made any misrepresentation or committed any fraud for getting such benefits. In para 10 of the said judgment, the Division Bench made reference to various reported cases on the subject. In paragraphs 10, 11, 12, 13 and 14 reference is made to the exposition of the Supreme Court in case of Syed

Abdul Qadir and ors. (supra) and the case of Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others, (2007) 207 ELT 3 : (2006) 9 JT 125 : (2006) 10 SCALE 206 : (2006) 11 SCC 709 : (2007) 1 SCC(L&S) 529 : (2006) 7 SCR 58 Supp : (2007) 2 SLJ 8 : (2008) 11 STR 305 ; and this Court appreciated the facts in the said writ petition in the light of those expositions and observed that the record shows that, the Superintending Engineer of the respondent No. 2 in the said petition, superior officers of the employees like the petitioner relying on Government Resolution dated 1st November, 1977, gave exemption to the petitioner. Petitioner was granted higher pay-scale on 1st October, 1994, even before he was actually promoted on 19th June, 1997. Petitioner was under impression that exemption can be granted. He received the payment by virtue of his promotion on granting exemption from passing professional examination. It is observed that, there is nothing to show that the petitioner knew that he was not entitled to the benefit. Respondent No. 2 woke up only after the High Court questioned the contradictory stands which were being taken, and then only issued circular dated 24th January, 2013. Therefore, it would be inappropriate and against equity that recoveries should be made of the increments alleged to have been wrongly granted to the petitioner with effect from 1st October, 2000, when he has already superannuated on 31st October, 2009. Had the respondent No. 2 insisted with the petitioner in time, that he must pass the professional examination or face stoppage of increments even after crossing the age of 45 years, the petitioner would have had option to make efforts to pass the examination or face the consequences. It is not proper that after retirement such objections are raised.

10. In para 15, the Division Bench has made reference to the case of Purshottam Lal Das and Others Vs. The State of Bihar and Others, (2006) 12 JT 581 : (2006) 10 SCALE 89 : (2006) 11 SCC 492 : (2007) 1 SCC(L&S) 508 : (2006) 7 SCR 51 Supp : (2007) 2 SLJ 68 ;, and in para 16 held that, in the facts and circumstances of the matter, the act of the respondents trying to make recoveries from petitioner of benefits due to grant of increments because of professional examination has not been passed, cannot be maintained and impugned orders passed in that regard were quashed and set aside. However, it is observed that no arrears or other financial benefits should be granted in respect of grant of such increments and the respondents would be at liberty to fix the pension of the petitioner ignoring the increments wrongly granted for not having passed the professional examination. However, it was observed that arrears may not be recovered now as petitioner has already retired.

11. Upon considering the issue involved in the present case and the issue raised in the case of Naeem Ahmedkhan s/o Dilawarkhan (supra) is one and the same. In that case also the very respondent was party and petitioner was an employee of the Maharashtra Jeevan Pradhikaran like in the present case. It is not the case of the respondents that, the petitioner has played any fraud or by way of misrepresentation, tried to get undue advantage, and received an amount which was not admissible. The respondents employer granted exemption from passing

the professional examination way back in the year, 2004 and accordingly, petitioner was promoted.

12. In that view of the matter, keeping in view the exposition of the Bombay High Court Bench at Aurangabad in case of Naeem Ahmedkhan s/o 16 Dilawarkhan (supra), in the facts and circumstances of the present matter, we find that the act of the respondents No. 2 to 5 in trying to make recovery of promotional benefits from the petitioner on the ground that the petitioner did not pass professional examination, cannot be maintained and in this regard, the impugned orders are quashed and set aside. The arrears, as mentioned above, should not be recovered from the petitioner, in the peculiar facts of this case since it is stated by the petitioner in para 11 of the petition that, he is suffering from heart ailment and he is under financial crisis.

Save and except recovery not to be effected from the petitioner of the excess amount paid, the respondents would be at liberty to take appropriate steps in respect of increments, other benefits or post retirement benefits.

Rule made absolute in above terms with no order as to costs. Petition stands disposed of.