

(2021) 07 BOM CK 0012
In the Bombay High Court
Case No : Writ Petition No. 2580 Of 2019

Shakil Mohamod Attar

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 29-07-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2021) 07 BOM CK 0012

Hon'ble Judges : Ujjal Bhuyan, J; Madhav J. Jamdar, J

Bench : Division Bench

Advocate : Dilip Bodake, Shraddha Pawar, Dr. Kirti R. Kulkarni

Final Decision : Dismissed

Judgement

Madhav J. Jamdar, J

1. Petitioner has sought following prayer in the above Writ Petition filed under Article 226 of the Constitution of India:-

(a) That a writ certiorari, writ of mandamus or any other appropriate writ, order or direction in the nature of certiorari or mandamus be issued calling

for the records of the Petitioners case and after examination the propriety and legality of the action of Respondents, they be ordered and directed to

make appointment of Petitioner.

2. We have heard Mr. Dilip Bodke, learned counsel for Petitioner and Dr. K. R. Kulkarni, learned AGP for Respondents.

3. Mr. Dilip Bodke, learned counsel for the Petitioner submitted that the Petitioner is a differently abled person and Civil Surgeon, Satara has certified

that the Petitioner suffers 49% of disability. Pursuant to advertisement dated 24 th December, 2011, Petitioner applied for the post of Health Worker

and although he is eligible he has not been appointed as Health Worker. He submitted that he applied for the post which was reserved for the category of handicapped person. Petitioner was issued hall ticket for the examination and he appeared for the said written examination but his result was not declared. He submitted that actions of the Respondents are contrary to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the 1995 Act") which was applicable at the relevant time. He submitted that the advertisement issued is contrary to the Government Resolution dated 27th December, 2009. The said Government Resolution prescribes the manner in which reservation for differently abled person is to be provided in various posts in Group "A" to Group "D" in the Health Department. He submitted that as per the said Government Resolution, the reservation is to be provided in direct recruitment. However, in the advertisement no reservation is provided for appointing Health Workers by direct recruitment. He submitted that as per the advertisement, the reservation is provided in recruitment to be done from temporary employees. Thus, he submitted that entire appointment procedure is illegal. He relied on the judgment of the Supreme Court in the case of State of Kerala & Ors. Vs. Leesamma Joseph reported in 2021 SCC Online SC 435.

4. On the other hand, Dr. K. R. Kulkarni, learned AGP appearing for the Respondents submitted that no reservation is provided in the advertisement for direct recruitment as the post for differently abled were already filled. She pointed out Petitioner's application submitted pursuant to the said advertisement dated 24 th December, 2011 and pointed out that the same specifically mentions as for the open category. She submitted that assuming that the Petitioner's application for recruitment was under the category of "temporary employees" (where one post is reserved for differently abled) then also the Petitioner is not eligible. She submitted that the Petitioner was not having required certificate namely "90 days Hangami Karmchari Certificate". She submitted that the advertisement is dated 24th December, 2011; appointments pursuant to the same were made in or about 2012 and therefore, the Writ Petition filed on 7th August, 2018 i.e. after a period of more than 6 years is after inordinate delay and thus the petition deserves to be dismissed.

5. We have perused the petition, Affidavit-in-Reply, Affidavit-in- Rejoinder and various annexures annexed to the petition as well as to the affidavits.

We have also considered the rival submissions.

6. At the outset, it is necessary to set out the factual position.

7. Health Department of Government of Maharashtra issued an advertisement dated 24th December, 2011 in respect of recruitment to the vacant

posts of Health Workers (Male) Group-C (State Level) on the establishment of Malaria Officer in Satara District. The applications were invited from

following two categories:-

(i) "40% from direct recruitment" (hereinafter referred to as "First Category"),

(ii) 50% from "temporary employees"(hereinafter referred to as "Second Category").

The advertisement shows that there were 8 vacant posts from First Category and 57 from Second Category. In First Category, 3 posts were reserved

for OBC category and 5 posts for open category. Out of 5 posts in open category one post was reserved for Ex- Servicemen. In the Second

Category, 12 posts were reserved for Scheduled Caste, 7 for Scheduled Tribe, 4 for De-notified Caste, 2 for OBC and 32 for open category. Out of

32 posts for open category, one was shown as reserved for category of handicapped person.

8. As per the information supplied to the Petitioner by letter dated 30th March, 2016 of District Malaria Officer (Exh. P/Page 35 of Writ Petition),

total posts filled from the year 2006 to 2015 from the First Category are 32. Out of said 32 posts, 2 posts were filled in the year 2006 from the

category of handicapped person. Dr. Kulkarni has contended that therefore, there was no vacancy for the handicapped person in the posts to be filled

from First Category at the relevant time i.e. when the advertisement dated 24th December, 2011 was issued.

9. Pursuant to said advertisement dated 24th December, 2011, the Petitioner submitted application for recruitment on 5 th November, 2012. The

application submitted by the Petitioner mentions certain significant aspects. It has been mentioned that he belongs to the physically handicapped

category. He has applied for the post of Health Worker (40%) (i.e. First Category where reservation for physically handicapped category not shown

in the advertisement). It is specifically mentioned in the application that the Petitioner do not have "90 days Hangami Karmachari Certificate". It may be mentioned that for recruitment in the "Second Category" in which one seat was reserved for handicapped person such certificate was mandatory.

The said application was accompanied with an undertaking dated 5 th November, 2012 executed by the Petitioner. Clause No.2 of said undertaking is as follows:-

2. I fulfill the conditions as specified in the aforesaid Advertisement published by Public Health Department for the post of Satara District-Health

Worker (40%) and accordingly I have submitted my application for the post of Satara District- Health Worker (40%)."" (Emphasis Supplied)

10. Thus, perusal of the said advertisement dated 24th December, 2011 and the application dated 5th November, 2012 submitted by the Petitioner

clearly shows that the Petitioner had applied for the post of Health Worker (Male) from the category of "40% direct recruitment" i.e. First Category

and in the said category no post was reserved for physically handicapped person. The reservation was shown for the post from the category of 50%

from "Temporary Flogging Employees" i.e. Second Category. For the said Second Category certificate that person has worked for 90 days

temporarily was the mandatory requirement. Admittedly Petitioner do not have such certificate.

11. Mr. Dilip Bodke, the learned counsel appearing for the Petitioner has very heavily relied on G.R. dated 27 th February, 2009 wherein it is provided

that the reservation for the persons with disabilities shall be admissible for direct recruitment only. Thus, he.doc contended that the said advertisement

dated 24 th November, 2011 is issued in illegal manner and therefore, submitted that the entire recruitment process conducted pursuant to said

advertisement be quashed and set aside.

12. It is significant to note that the recruitment process was conducted pursuant to the advertisement dated 24 th December, 2011. The candidates

were selected by the District Malaria Officer, Satara in 2012. Therefore, challenging the entire recruitment process after a period of more than 6

years clearly shows that there is inordinate delay committed by the Petitioner in approaching this Court. The said advertisement is for total 64 posts

and candidates have been appointed in the respective posts in the year 2012.

The successful candidates appointed in the year 2012 in the recruitment process conducted pursuant to said public advertisement dated 24 th December, 2011 are not parties to the present writ petition. Thus, this is not a case where the exercise of discretionary jurisdiction under Article 226 of the Constitution of India is warranted.

13. That apart Petitioner has not challenged the advertisement dated 24th December, 2011. Collaterally submissions have been made questioning the advertisement. In the absence of specific challenge to the same, Court is not inclined to examine the legality and validity of the entire recruitment process, that too so belatedly and in the absence of the selected candidates.

14. It is very significant to note that the advertisement specifically mentions reservation of one post for person belonging to the handicapped category from 32 open category posts of ""temporary employees"" and the Petitioner has not applied in the said category. In fact, it is admitted position that he is not belonging to the category of ""temporary employees"". Petitioner has applied from the category of ""40% direct recruitment"" and as far as the said category is concerned, the advertisement do not show any reservation for the category of physically handicapped persons.

15. The Government Resolution dated 27th February, 2009 on which the Petitioner has heavily relied specifically provides that while making appointment by way of direct recruitment to the posts identified for the persons with disabilities in Group-A to Group-D in the State Government service, each department/office should maintain a 100 point separate register for each identified and direct recruitment post to implement the reservation for the persons with disabilities and should reserve the vacant posts that would come at Sr. No. 1, 34 and 67 therein for the persons with disabilities. The affidavit-in-reply of the Respondents as well as abovereferred information supplied to the Petitioner shows that in the said category of direct recruitment total 32 posts were filled from the year 2006 to 2015 and out of the same 2 posts from the physically handicapped category were filled in the year 2006.

16. Learned counsel of the Petitioner has relied on the judgment of Hon'ble Supreme Court in the State of Kerala and Others V/s. Leesamma Joseph (Supra), particularly paragraph 17 of the same. The said para 17 is reproduced hereinbelow:-

17. On examination of the aforesaid plea we find that that there is merit in what the learned Amicus Curiae contends and we are of the view that

really this issue is no more res integra in view of the judgment of this Court in Government of India & Anr. vs. Ravi Prakash Gupta & Anr. and Union

of India vs. National Federation of the Blind (supra) opining that reservation has to be computed with reference to total number of vacancies in the

cadre strength and no distinction can be made between the posts to be filled by direct recruitment and by promotion. Thus, total number of vacancies

in the cadre strength would include the vacancies to be filled in by nomination as well as by promotion. In fact, this was the view adopted by the

Bombay High Court discussed aforesaid in National Confederation for Development of Disabled and Anr. vs. Union of India and Ors. (supra) with

the challenge raised to the same in a SLP being rejected in Union of India vs. National Confederation for Development of Disabled & Anr. We may

note the observations in Rajeev Kumar Gupta and Others vs. Union of India and Others (supra) in paragraph 24 to the effect:

Once the post is identified, it must be reserved for PwD irrespective of the mode of recruitment adopted by the State for filling up of the said post

and a direction was issued to the Government to extend 3% reservation to PwD in all identified posts in Group A and Group ""irrespective of the mode

of filling up of such posts"".

17. The Hon'ble Supreme Court in the judgment in the matter between Union of India V/s. National Federation of the Blind and Others reported in

(2013) 10 Supreme Court Cases 772 held that the reservation policy stipulated in the said 1995 Act is vacancy based reservation. It has been held that

computation of reservation for persons with disabilities has to be done by computing 3% reservation (as provided in the 1995 Act) on total number of

vacancies in the cadre strength.

18. Thus while distinguishing between vertical reservation and horizontal reservation, Supreme Court held that horizontal reservation like reservations

for persons with disabilities is vacancy based and not post based. If that be so, prima-facie, the Government Resolution dated 27th February, 2009

earmarking 3 posts/roaster points in the cadre is not in conformity with what the Supreme Court has held. But there is no challenge to the said

Government Resolution. Instead Petitioner has placed heavy reliance on the

same!

19. In the present case as set out hereinabove the applications for recruitment to the post of Health Worker (Male) were called from two separate

categories- (i) 40% from direct recruitment and (ii) 50% from "Temporary Fogging Employees". Petitioner applied in the First Category where no post

was shown as reserved for the physically handicapped category. In any case, it will be unjust to examine the legality and validity of the selection and

appointment of the successful candidates who are not before this Court in the year 2021 in a writ petition filed in 2018 with the recruitment process

having been completed in the year 2012. Thus, we refrain ourselves from examining the aspect of legality of the recruitment process in detail.

20. It is significant to note that the Petitioner had also approached the Commissioner for Persons with Disabilities making grievance regarding the

impugned recruitment process by application dated 18th January, 2016. The said application was rejected by order dated 5th February, 2016 passed by

the Commissioner for Persons with Disabilities. It is also significant to note that the said order is not challenged in the present Writ Petition.

21. In any view of the matter, Petitioner has approached this Court after inordinate delay. There are grave delay and laches in approaching this Court.

In this background, we may mention the manner in which delay has been explained by the Petitioner in the petition. The relevant paragraph 14

regarding delay is reproduced hereinbelow:

14. The Petitioner is approaching this Hon'ble Court as expeditiously as possible and without loss of any time. There is no delay in filing in Petition.

21.1 The explanation for delay in approaching this Court is as vague as possible. This aspect is very important as the impugned recruitment process

took place in the year 2011-2012.

22. Hon'ble Supreme Court in the case of Shankara Cooperative Housing Society Limited V/s. M. Prabhakar and Others reported in (2011) 5

Supreme Court Cases 607 regarding delay and laches has discussed the effect of delay and laches while exercising jurisdiction under Article 226 of

the Constitution of India in the following manner:-

Re : Delay and Laches :

46. Delay and laches is one of the factors that requires to be borne in mind by the High Courts when they exercise their discretionary power under

Article 226 of the Constitution of India. In an appropriate case, the High Court may refuse to invoke its extraordinary powers if there is such

negligence or omission on the part of the applicant to assert his rights taken in conjunction with the lapse of time and other circumstances.

47. The Privy Council in *Lindsay Petroleum Company Vs. Prosper Armstrong Hurd etc*; (1874) 5 PC 221 at page 229, which was approved by this

Court in *Moon Mills Ltd. Vs. Industrial Courts* AIR 1967 SC 1450 and *Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor*

Service has stated :(*Lindsay Petroleum Co. case*, R pp. 239-40) ""Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical

doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded

as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a

situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and

delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of

course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two

circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect

either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

48. In *Amrit Lal Berry Vs. CCE* (1975) 4 SCC 714, this Court took the view that ""if a petitioner has been so remiss or negligent as to approach the

Court for relief after an inordinate and unexplained delay, he certainly jeopardises his claims as it may become inequitable, with circumstances altered

by lapse of time and other facts, to enforce, a fundamental right to the detriment of similar claims of innocent third persons.

50. In *Shiv Dass Vs. Union of India* this Court opined that (SCC p.277, para 8) ""8.....The High Court does not ordinarily permit a belated resort to the

extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new Sonali injustices, and if writ jurisdiction

is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was

pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

51. In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhinandiwala and others this court held:(SCC p. 174, para 26) "" 26. It is well settled and needs no restatement at our hands that under Article 226 of the Constitution, the jurisdiction of a High Court to issue appropriate writs particularly a writ of Mandamus is highly discretionary. The relief cannot be claimed as of right. One of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a Writ is an adequate ground for refusing a Writ. The principle is that courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum.

53. Reliance is also placed on the observations made by this Court in M/s Dehri Rohtas Light Railway Company Ltd. Vs. District Board, Bhojpur, wherein it is observed: (SCC pp. 602- 03, para 13) ""13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches.

54. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are:

(1) There is no inviolable rule of law that whenever there is a delay, the court

must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2) The principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners.

(3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5) That representations would not be adequate explanation to take care of the delay." (Emphasis Supplied)

23. The prayer clause in Writ Petition is very vague. In the prayer clause challenge is to the legality of the action of the Respondents without any elaboration and further prayer that Respondents be directed to make the appointment of the Petitioner. Thus, the Petitioner has not challenged the legality and validity of the advertisement dated 24th December, 2011. Petitioner has also not challenged the legality of Government Resolution dated 27 th February, 2009, besides also not challenged the order of Sonali Commissioner for Persons with Disabilities dated 18 th January, 2016. The document annexed to the petition shows that Petitioner from time to time obtained information under Right to Information Act and last such information was obtained by the Petitioner on 30 th March, 2016. The said order of the Commissioner for Persons with Disabilities is dated 18th January, 2016. Even if this is taken into considerations then also there is inordinate delay in filing the petition on 7th August, 2018. Thus, there is inordinate delay in filing the Writ Petition and the delay has not been explained at all. Apart from that, the affected persons are not made parties to the petition. Therefore, at this distant point of time we are not inclined to interfere in

the matter.

24. Thus, taking an overall view of the matter, we are of the opinion that this is not a fit case for exercising the writ jurisdiction of this Court. Thus, the writ petition is dismissed however, with no order as to costs.