

(2016) 07 BOM CK 0095
In the Bombay High Court
Case No : Writ Petition No. 6690 of 2013

Shri. Pradeep Sakharam Mayekar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 19-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226, 309
Maharashtra Legislature Secretariat (Recruitment and Condition of Service) Rules,
1973 — Rule 4(a), 6(2)(b)

Citation : (2017) 3 ALLMR 212 : (2017) 1 BCR 101 : (2016) 5 MhLJ 766

Hon'ble Judges : Anoop V. Mohta and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Mr. S.B. Deshpande, Advocate, for the Petitioner; Mr. V.N. Sagare, AGP, for the Respondent No. 1; Mr. Nitin P. Deshpande, Advocate, for the Respondent Nos. 2 and 3; Mr. Satyajeet H. Joshi, Advocate, for the Respondent No. 5

Final Decision : Partly Allowed

Judgement

G.S. Kulkarni, J.—By this petition under Article 226 of the Constitution of India, the Petitioner who is working in the Secretariat of the Maharashtra Legislative Council on the post of "Section Officer" has inter alia prayed for a direction that the record and proceedings of the Promotional Committee of the Maharashtra Legislative Council whereby a decision to grant promotion to respondent Nos. 4 and 5 vide order dated 28 February 2012 to the post of "Under Secretary", be called for and same be quashed and set aside and for the further relief that the Respondents be directed to grant promotion to the Petitioner prior to respondent Nos. 4 and 5 assuming charge on their promotional post.

2. In nutshell, the facts are:

By an order dated 1 November 1990 the Petitioner under a direct selection was appointed on the post of Assistant. Thereafter, the Petitioner was promoted to the post of Section Officer on 25 June 2007. While in service the Petitioner

undertook the Bachelor of General Law course (for short "BGL") from the Annamalai University and passed the BGL examination in or about January, 2009. It is the case of the Petitioner that as he had completed three years as a Section Officer in June, 2010, he had become eligible for promotion to the post of "Under Secretary". The qualification for recruitment/appointment/promotion to the post of "Under Secretary" is provided in Rule 6 of the Maharashtra Legislature Secretariat (Recruitment and conditions of Service) Rules, 1973 (for short "1973 Rules"). The relevant Rule reads thus:

"6. Qualifications for recruitment - (1) Subject to the provisions of sub-rule (2), the qualifications for recruitment to any post or class of posts shall be those prescribed for the corresponding posts in the State Secretariat, subject to such adaptations and modifications as the Special Board may, from time to time by order specify. Where there is no corresponding post in the State Secretariat, the qualifications for recruitment shall be such as the Special Board may by order specify.

(2) for appointment to the post of the Secretary, a Joint Secretary, Deputy Secretary or Under Secretary, a candidate -

(a) where the appointment is by direct recruitment, must be a Bachelor of Laws of a recognised University, or a practising Advocate -

(i) sub rule (2)(a)(i) is omitted by Notification No.20315/C, dated 6th July 2004.

(ii) in the case of a Joint Secretary of at least ten years standing at the bar and not more than forty-two years of age if a candidate belongs to backward class, and thirty seven years of age in any other case on the date of appointment.

(iii) in the case of a Deputy Secretary, of at least eight years standing at the bar and not more than forty years of age if a candidate belongs to backward class, and thirty-five years of age in any other case, on the date of appointment;

(iv) in the case of an Under Secretary, of at least six years standing at the bar and not more than thirty-eight years of age if a candidate belongs to backward class, and thirty three years of age in any other case, on the date of appointment;

(Provided that where the appointment is by direct recruitment, the candidate shall be on probation for 2 years.)

(b) Where the appointment is by promotion, transfer or deputation must be a Bachelor of Laws of a recognised University or an Advocate, and

(b1) in the case of appointment of a Secretary, Joint Secretary, Deputy Secretary, or under Secretary by promotion, the selection shall be strictly on the basis of merit-cum-seniority.

(c) in all cases falling under clause (a), (b) or (b1), must be conversant with the practise and procedure of the Legislatures and have knowledge of constitutional

law."

(emphasis supplied)

The reliance of the Petitioner is on Rule 6(2)(b) and (b1)(supra) to contend that when the appointment is by promotion the required qualification is that of Bachelor of Laws of a recognised University and as the Petitioner possessed a BGL degree of recognised university namely Annamalai University, the Petitioner possessed requisite eligibility for promotion to the post of "Under Secretary". Further the Petitioner also qualified the criteria under clause (b1) supra as the Petitioner possessed merit as also seniority.

3. The Petitioner accordingly made a representation dated 11 May 2011 submitting all the requisite details of his eligibility and that he being in the zone of consideration, his claim for promotion be considered by fixing seniority. However, no action was taken on his representation. The Petitioner, therefore, sent reminder letters dated 24 June 2011 and 19 January 2012 requesting respondent Nos. 1 to 3 to consider his case and promote him to the post of "Under Secretary". The Petitioner has contended that he was senior to respondent Nos. 4 and 5 as the position of the Petitioner in seniority list of Section Officer is at Sr.no.28 and whereas the seniority position of respondent Nos.4 and 5 was at Sr. Nos. 32 and 38 respectively. This position of seniority was consequent to the confirmation of the Petitioner as a Section Officer on 25 June 2007 and respondent Nos.4 and 5 being confirmed as Section Officer on 12 February 2009 and 30 July 2009 respectively that is two years after the Petitioner was confirmed. The Petitioner had excellent meritorious service record and therefore, it would have been appropriate for Respondent Nos.1 to 3 to promote the Petitioner.

4. However when the Petitioner's claim for promotion was pending, respondent No.1 by a Notification dated 24 February 2012 amended Rule 6(2)(b) so as to delete the words "Bachelor of Laws of recognised University or an Advocate" from the said rule and substituted the same by the following:

"a Law graduate having completed three years law curriculum from a recognised University after degree or completed five years of Law curriculum from a recognised University after Higher Secondary Certificate examination."

5. The Petitioner has contended that the action of amending the rule to change the eligibility criteria was illegal and/or an arbitrary exercise as the same had prejudicially affected the Petitioner. The Petitioner therefore submitted a representation/appeal to Respondent No.1 as the amendment of the said rule according to him adversely affected him and caused injustice as it had completely taken away the Petitioner's legitimate entitlement for promotion to the post of Under Secretary. Accordingly, the Petitioner in this petition had initially raised a challenge to the amendment of Rule 6(2)(b) in prayer clause (a), however, by amending the petition, the said prayer was deleted.

6. Respondent No. 1 immediately after the said amendment of the Rules, by a notification dated 24 February 2012 undertook a promotional exercise and strikingly within four days of the amendment being notified, respondent Nos. 1 to 3 issue orders dated 28 February 2012 promoting respondent Nos. 4 and 5 to the post of "Under Secretary". The Petitioner has assailed this promotion order with a further prayer that the Petitioner ought to have been promoted to the post of "Under Secretary" applying the criteria of merit-cum-seniority and on the basis of unamended Rules as he possesses degree of Bachelor of General Laws (BGL).

7. The learned Counsel for the Petitioner in support of the challenge as raised in the petition has made the following submissions:

(i) The Petitioner ought to have been considered for promotion on the basis of his qualification namely "Degree of Bachelor of General Laws" and applying the criteria on merit-cum-seniority, taking into consideration the unamended Rule 6(2)(b) and (b1).

(ii) The amended Rules ought not to be applied to the Petitioner as the Petitioner had become eligible to be promoted in the year 2010 which is much prior to the amending notification Rule 6(2)(b).

(iii) Indisputedly the Petitioner was about two years senior to respondent Nos. 4 and 5 and, therefore, the Petitioner's claim for promotion could not have been disregarded.

(iv) The impugned exercise of promotion to respondent Nos. 4 and 5 is arbitrary as the same is done in a hurried and arbitrary manner.

8. Respondent Nos. 2 and 3, the contesting Respondents have filed an affidavit of opposition of Mr. Nandlal G. Kale, Deputy Secretary (Law), Maharashtra Legislature Secretariat, inter alia stating that by virtue of the powers conferred under Article 187(3) of the Constitution of India, the Maharashtra Legislature Secretariat was empowered to make rules pertaining to service conditions of the employees of the Secretariat. Under these powers the 1973 Rules were notified. It is further stated that as Rule 6(2)(b) was interpreted to mean that a candidate holding a Bachelor degree of General Laws is also eligible for such post or in other words the person completing two years of law was considered to be eligible. The Maharashtra Legislature Secretariat thus thought it proper to exercise powers under Article 187(3) of the Constitution to amend Rule 6(2)(b) to substitute the earlier qualification so as to require qualification as a law graduate having completed three years law curriculum after degree from the recognised University or completed five years of law curriculum after Higher Secondary Certificate examination from recognised University as a proper qualification. It is contended that the promotional exercise as undertaken after the amendment had come into effect was as per the amended rules which were prevalent and that the contention of the Petitioner that he be considered for promotion on the basis of repealed Rules cannot be accepted. It is further contended that if the Petitioner completes three years of Law course, then, the

Petitioner would be eligible for the post of "Under Secretary" and can be considered for promotion. It is stated that in the Secretariat there are two separate cadres namely "Under Secretary" and "Under Secretary (Committee)" and they are having the same pay scale i.e. Rs.15,60039100 and grade pay of Rs.6600/-. It is stated that incumbents who are law graduates are eligible for the promotion to the post of "Under Secretary" and the incumbents who are not law graduates (three years law course after degree or five years law course after Higher Secondary Certificate examination) are considered to the post of promotion of "Under Secretary (Committee)". It is further stated that after February,2012 the promotions of Respondent Nos.4 and 5, during the period April,2013 and June,2013 five vacancies had occurred in the cadre of "Under Secretary". To fill up the said posts a proposal was prepared. In the said proposal, the Section Officers who were having requisite criteria as prescribed in the amended rules and having put up minimum three years of continuous service in the cadre of Section Officer, were included in the zone of consideration, even though they were junior to the Petitioner as the Petitioner was not having three years law degree. Accordingly, the proposal was submitted to the Departmental Promotional Committee comprising of Additional Secretary, Joint Secretary and the senior most Deputy Secretary on 29 April 2014. The said committee had recommended the names of five Section Officers to the post of Under Secretary by its report dated 24 July 2014. The board comprising of the Chairman, Legislative Council and the Speaker, Legislative Assembly also accorded its approval to the recommendations of the Departmental Promotional Committee and accordingly by notification dated 6 September 2014 five Section Officers were promoted to the post of Under Secretary. It is stated that one post of Under Secretary (Committee) was vacant from 1 January 2014 and another post became vacant on 6 September 2014 for which a degree in law was not a prerequisite. Therefore, as per the seniority, the Petitioner being the senior-most Section Officer, was held eligible for promotion to the post of "Under Secretary (Committee)" and after a proper promotional exercise being undertaken vide notification dated 6 September 2014 the Petitioner was granted promotion to the post of Under Secretary (Committee). The said post has same pay scale as of the post of "Under Secretary" and, therefore, there is no financial loss to the Petitioner.

9. The learned Counsel appearing for respondent Nos.2 and 3 in opposing the Petition has contended that the reliefs as sought by the Petitioner cannot be granted in view of clear position that the Petitioner was not eligible to be considered for promotion to the post of "Under Secretary" as the Petitioner did not possess the qualification of three years law degree or five years law degree as prescribed in Rule 6(2)(b) on the date on which the candidates were considered for promotion. He relies on the affidavit of Mr. Nandlal G. Kale filed on behalf of respondent No. 2 to oppose the Writ Petition.

10. Respondent No. 5 has appeared and filed an affidavit contesting the Writ Petition inter alia contending that his promotion to the post of "Under Secretary"

is legal and proper.

11. We have heard the learned Counsel for the parties as also we have perused the documents as placed on record and the Rules in question. The principal relief as prayed by the Petitioner is that the Petitioner shall be promoted to the post of "Under Secretary" with effect from 28 February 2012 and that the promotions granted to Respondent Nos.4 and 5 by notification dated 28 February 2012 be quashed and set aside. The foundation of the Petitioner's case which can be seen from the Petition is the Petitioner possessing a qualification of a degree of Bachelor of General Laws from Annamalai University as also he being senior to respondent Nos.4 and 5 and, therefore, respondent Nos. 1 to 3 ought to have applied the preamended Rule 6(2)(b) read with sub-rule (b1) to grant promotion to the Petitioner. This contention certainly cannot be accepted in view of the fact that vide notification dated 24 February 2012 the Rule in question came to be amended by respondent no.1 in exercise of power under Article 187(3) of the Constitution. Requirement under the amended rule was "a Law graduate having completed three years law curriculum from a recognised University after degree or completed five years of Law curriculum from a recognised University after Higher Secondary Certificate examination". There is no dispute that the promotional exercise was undertaken after the amendment was brought into effect and that the Petitioner was not eligible with regard to the qualification as amended Rule 6(2)(b) would provide. The Petitioner was accordingly not promoted, but respondent Nos.4 and 5 came to be promoted. Respondent Nos.2 and 3 cannot be faulted in applying the amended rules in undertaking the promotional exercise undertaken after the amended rules had come into force. Even otherwise the challenge to the amended rules has been given up by the Petitioner and consequently the Petitioner can have no objection to respondent Nos.1 to 3 applying the criteria under the amended Rules in considering respondent Nos.4 and 5 for promotion to the post of "Under Secretary". On this count the Writ Petition in regard to the claim of the Petitioner that the Petitioner ought to have been considered for promotion on the unamended criteria namely on the basis of Bachelor of General Laws degree ought to fail. If the promotions of respondent Nos.4 and 5 are granted in accordance with the prevalent rules and by applying proper criteria under 1973 Rules as amended, then, in that event the promotions cannot be interfered with.

12. The learned counsel for the Petitioner during the course of his submission contended that the respondent No.5 has been promoted when he had not completed the criteria of minimum three years of service as a Section Officer. As noted above the requirement of minimum three years continuous service is prescribed under Rule 4(a) which reads thus:

"4. Method of Recruitment ? Recruitment to a post or class of posts may be made by any one of the following methods, that is to say:

(a) by promotion of a person employed in the Legislature Secretariat (who have completed not less than 3 years of continuous service in the lower post in the

cadre in the Legislature Secretariat;)."

(emphasis supplied)

On a query being made to the learned Counsel for respondent Nos.2 and 3 as to whether the contention on behalf of the Petitioner is correct that the respondent No.5 had not complied the requirement as amended in Rule 4(a) of minimum three years continuous service in the lower post, the learned Counsel has fairly stated that respondent No.5 had not completed three years of continuous service as Section Officer on the day he was promoted on 28 February 2012 and there was deficit of three months of service. He submits that the deficit of three months service was waived in promoting respondent No.5. When we made a further query as to under what powers the requirement of Rule 4(a) came to be waived, the learned Counsel for respondent Nos.2 and 3 was unable to point out any such power conferred under the Regulations so as to waive the requirement of Rule 4(a). If this be the position, then, as a Constitution Court as also considering the facts of the case, we cannot shut our eyes to this irregularity if it be so, more particularly when the petitioner has challenged the promotional orders dated 28 February 2012 issued in favour of respondent No.5. Undoubtedly the appointment/promotion is to a post in public service governed by rules and regulations. The promotion of respondent No.5 vide order dated 28 February 2012 on this count would be required to be held to be illegal as being contrary to Rule 4(a) (supra). However as the respondent No.5 is working on the said post since February, 2012, it would be open to respondent Nos.2 and 3 to undertake a correctional exercise if so permissible under rules and in accordance with law.

13. Though in view of the amended Rules, we have come to a conclusion that the Petitioner is not entitled on account of his qualification to be promoted to the post of "Under Secretary" with effect from 28 February 2012, however, we are not satisfied, of the manner in which the hurried promotional exercise was undertaken by respondent Nos.2 and 3. It is clear that within four days of issuance of amended notification, respondent Nos.4 and 5 came to be promoted to the post of "Under Secretary". The affidavit of respondent Nos.2 and 3 is completely silent on the specific allegations which are made by the Petitioner in undertaking such a hurried promotional exercise. The affidavit is completely silent on any of the procedure adopted at the hands of respondent Nos.2 and 3 namely notification of the vacancies, a list of the section officers in the zone of consideration, appointment of the members of the promotion committee, assessment of the record of the eligible candidates to be placed before the committee, communication of the same through proper channel to be considered by the committee, order notifying the date of meeting of the committee, the minutes of the meeting of the committee, the decision on the recommendation of the committee etc. These are the requirements of the normal promotional process undertaken in a public body or in respect of Government service. The affidavit is completely silent on any of these requirements which are essential to show a transparent, fair and reasonable promotional exercise which would be

expected from respondent Nos.2 and 3. Also no documents pertaining to the aforesaid requirements are placed on record on behalf of respondent Nos.2 and 3. On the contrary it can very well be seen on the respondent No.2's own showing that the promotional exercise undertaken by respondent Nos.2 and 3 in April,2014 to fill up the vacancies in the cadre of Under Secretary had taken almost six months i.e. from April,2014 to September,2014 where many of the steps as necessary to be taken and noted by us are undertaken by respondent Nos.2 and 3. Be that as it may, as the promotional exercise is undertaken in 2012 and the promotees are already working on the promotional post, we do not wish to go into these issues, except to record our extreme displeasure in the manner in which the promotional exercise was undertaken to promote respondent Nos.4 and 5. In this context we may refer to a recent decision of the Supreme Court in "State of Punjab and Anr v. Brijeshwar Singh Chahal and Anr." (2016)6 SCC 1 in which the Supreme Court has held that the Government and so also all public bodies are trustees of the power vested in them. Discharge of the trust reposed in them in the best possible manner is their primary duty. It is held that the power to engage, employ or recruit servants, agents advisors and representatives must like any other power be exercised in a fair, reasonable, nondiscriminatory and objective manner. It is held that the duty to act in a fair, reasonable, nondiscriminatory and objective manner is a facet of the Rule of Law in a constitutional democracy like ours. The action that is arbitrary has no place in a polity governed by Rule of Law apart from being offensive to the equality clause guaranteed under Article 14 of the Constitution of India.

14. In view of the above discussion, the relief as prayed by the Petitioner that respondent Nos.2 and 3 be directed to grant promotion to the Petitioner to the post of "Under Secretary" with effect from 28 February 2012 cannot be entertained and stands rejected. The Petition is partly allowed to the extent that the promotion of respondent No.5 by notification dated 28 February 2012 is declared as illegal being in breach Rule 4(a) of the 1973 Rules, however, it would be open to Respondent Nos. 2 and 3 to undertake an exercise to regularise the same if so permissible under the Rules and in accordance with law.

15. The Writ Petition is disposed of in view of the aforesaid terms. No order as to costs.