
(2016) 02 BOM CK 0249
In the Bombay High Court
Case No : Writ Petition No. 8118 of 2015

Vaidya Mayur

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 25-02-2016

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2016) 02 BOM CK 0249

Hon'ble Judges : S.S. Shinde and P.R. Bora, JJ.

Bench : Division Bench

Advocate : Ajit B. Kadethankar, Advocate, for the Appellant; S.B. Yawalkar, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

P.R. Bora, J.—1. Heard. Rule. Rule made returnable and heard forthwith with the consent of the learned Counsel for the parties.

2. The petitioner has filed the present petition seeking directions against the respondents for regularization of his services on the post of Assistant Professor in the stream of Rognidan.

3. The petitioner has done his post graduation in Ayurved with specialization in Rognidan. The petitioner was, thus, eligible to be appointed on the post of Assistant Professor as per the norms laid down by the Central Council of Indian Medicine. At present the petitioner is serving in the Government Ayurved College, Osmanabad, as an Assistant Professor. Respondent No. 2 College is being run by the State Government.

4. As averred in the petition, since there was a ban on creation and filling of the post under the State Services, the Maharashtra Public Service Commission was not in function and the posts like Assistant Professors in the Government / Medical / Ayurvedic colleges were required to be filled in on ad hoc basis. A Government Resolution dated 30th of August, 2008, was issued by the State

Government for filling in the posts of Assistant Professors in Ayurved on ad hoc basis. The tenure of the service and mode of continuation of the selectees and also the selection process were described in the said Resolution. As stated in the said resolution, the Selection Committee was comprising of :

- (1) Director of Ayurved.
- (2) Dean of the concerned College.
- (3) Head of the concerned Department.
- (4) Representative of Backward Class Professor / Assistant Professor.
- (5) Chief Administrative Officer.

The detailed process for selection, including the allotment of different marks and about the reservation roster to be followed were also laid down in the said Resolution.

5. As further contended, in view of the aforesaid Government Resolution, the advertisement was issued and the applications were invited for the post of Assistant Professors. In pursuance of the said advertisement, the petitioner applied for the post of Assistant Professor in the stream of Rognidan. A general condition was laid down in the advertisement that, appointment shall end by efflux of time or on availability of M.P.S.C. candidate, whichever is earlier. After undergoing the selection process, the petitioner was selected and was appointed on the post of Assistant Professor in Rognidan stream.

6. It is the further contention of the petitioner that though his services used to be terminated by efflux of time, after a technical gap of short period, the petitioner used to be re-appointed for the further period and has thus been continued till date. In paragraph no. 7 of the petition, the petitioner has provided the particulars of the period during which he has worked, which are reproduced here-in-below:

7. The petitioner has further stated that, every time the approval was granted to his appointment by the Maharashtra Health University. The petitioner has placed on record copies of the experience certificate, appointment orders and copies of approvals granted by the Maharashtra Health University. It is the further contention of the petitioner that he had performed the academic and administrative work at par with the regular appointees. It is the further case of the petitioner that the services of the similarly situated Assistant Professors like the petitioners serving in the Government and Dental Colleges under the Medical Education and Drugs Department of State of Maharashtra have been regularized by absorption as a special case vide Government Resolutions dated 22.1.2009 and 4.5.2009 issued by the Medical Education and Drugs Department (respondent no. 1). It is the further contention of the petitioners that the services of Medical Health Officers appointed under the Public Health Department of the Government of Maharashtra have also been regularized by adopting

"Medical Officer in the Maharashtra Medical and Health Services Group-A (One Time Absorption of the Medical Officers Appointed On Ad-Hoc basis in Maharashtra) (Special) Rules 2009" passed by the Government of Maharashtra Public Health Department on 2nd of February, 2009.

8. It is the further contention of the petitioners that the petitioner and the similarly situated employees were constantly requesting the State Government for their absorption and / or regularization on the respective posts of Assistant Professors as was done in respect of the Medical Health Officers appointed under the Public Health Department by framing special Rules. It is the further contention of the petitioner that, considering the fact that the petitioner is discharging his duties since 31st of January, 2009, till date, with some technical breaks, and further that he has been selected by a duly constituted Selection Committee, his services need to be regularized on the post of Assistant Professor in the stream of Rognidan.

9. As further averred in the petition, in 2010, the Maharashtra Public Service Commission issued advertisement to fill up the post of Assistant Professor on which the petitioner is serving. The petitioner had also applied for the said post, however, the petitioner was not even called for the interview and another candidate was appointed. However, the petitioner has also been continued considering availability of the posts. It is the matter of worry for the petitioner that the respondent authorities are attempting to fill up the posts of Assistant Professors through M.P.S.C. and, in view of the change in age criteria, the petitioner may not be now eligible to participate in the said selection process. The petitioner, therefore, desires that without disturbing the selection process being conducted by the M.P.S.C., he be absorbed on the post of Assistant Professor considering his past services and the fact that his selection is also through duly constituted Selection Committee.

10. It is the further contention of the petitioner that the Lecturers working under the Technical Education Department who were appointed on ad hoc basis as well as on contract basis had filed Writ Petition No. 2046/2010 (Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another), before the Nagpur Bench of this Court, seeking their absorption on regular basis and the High Court has directed the Government to regularize the services of the petitioner in the said petition. It is the further contention of the petitioner that the verdict of this Court in the aforesaid Writ Petition No. 2046/2010 was challenged by the State Government before the Hon'ble Supreme Court, however, the same has been turned down and the Honourable Apex Court thereby has confirmed the order passed by this Court in the said Writ Petition No. 2046/2010. It is the further contention of the petitioner that, after the decision in Writ Petition No. 2046/2010, few other writ petitions were filed and were allowed by this Court on the same reasons as recorded in the judgment delivered by this Court in Writ Petition No. 2046/2010. It is the further contention of the petitioners that in view of the orders passed by this Court in the said writ

petitions, the Government of Maharashtra has eventually issued a resolution thereby regularizing all the employees in Higher and Technical Department who had been working on ad hoc and contract basis for more than three years.

11. It is the further contention of the petitioner that, in view of the judgments of this Court, referred hereinabove, a right has been accrued in favour of the petitioner to be absorbed on the post of Assistant Professor on regular basis. It is the further contention of the petitioner that though the petitioner has submitted representation to the respondent authorities seeking his absorption, no decision has yet been taken on the said representation. On the contrary, the M.P.S.C. has issued an advertisement for filling up the post on which the petitioner is working. In the background of the aforesaid facts, the petitioner has prayed for regularization of his services on the post of Assistant Professor in the stream of Rognidan.

12. Notices were issued to the respondents in the present matter vide order passed by this Court on 5th of August, 2015. On 12th of August, 2015, this Court has passed an interim order in favour of the petitioner thereby restraining the respondents from relieving the petitioner from the service. By virtue of the interim order so passed, the petitioner has been continued in the services of the respondents.

13. Dr. Deepak Panditrao Savant, who is presently working as a Professor in the Government Ayurved College, Osmanabad, has filed affidavit in reply on behalf of respondent no. 2. Respondent no. 2 has contended that the last temporary appointment was issued in favour of the petitioner on 4.9.2014 for specific period wherein it is specifically mentioned that any demand of regularization of services will not be considered at all as the appointment is on temporary basis. It is the further contention of respondent no. 2 that the petitioner has accepted the said order with the conditions laid down in the said order and, as such, he is estopped from taking any exception to the appointment order and to seek the relief of absorption on the basis of such order. It is further contended that the posts of Assistant Professors in the Directorate of AYUSH, Maharashtra State, Mumbai, are to be filled up through M.P.S.C. and the procedure has been laid down for such selection. It is the further contention of respondent no. 2 that vide Government circular dated 25th August, 2005, the State Government has issued the policy, not to regularize the temporary appointments. It is further contended that all the vacancies of Assistant Professors are to be filled by nomination by MPSC only. It is further contended that if the request of the petitioner is accepted, that would result in backdoor entry of the petitioner which is impermissible in view of the judgment of the Hon'ble Apex Court in Secretary, State of Karnataka and Ors. Vs. Uma Devi and Ors. , (2006) 4 SCC 1. It is further contended that the judgment delivered by this Court in Writ Petition No. 2046/2010, dated 19th October, 2013, would not apply to the case of the petitioner since the facts are quite distinguishable of both the cases.

The petitioner has filed rejoinder to the affidavit in reply filed by respondent no.

2 taking exception to the contentions raised in the said affidavit in reply.

14. Heard Shri Kadethankar, learned Counsel appearing for the petitioner and Shri S.B. Yawalkar, learned A.G.P. for respondents. Perused the document filed on record. It is not in dispute that the petitioner is holding the required qualification for appointment on the post of Assistant Professor. It is further not in dispute that the petitioner has been continuously working on the post of Assistant Professor since 31.1.2009 with some technical breaks. It is further not in dispute that from the year 2009 onwards respondents have issued about fifteen written appointment orders appointing the petitioner on the post of Assistant Professor on temporary basis. It is further not in dispute that the selection of the petitioner was made by the duly constituted Selection Committee after having followed the selection process as laid down in the Government Resolution dated 30th of August, 2008.

15. The petitioner is claiming regularization of his services on the post of Assistant Professor in the stream of Rognidan within the services of the respondent authorities on the strength of the directions issued by the learned Division Bench of this Court in the case of Sachin Ambadas Dawale and Others V/ s. The State of Maharashtra and another, reported in , 2014(2) Mh.L.J. 36. As has been argued by the learned Counsel appearing for the petitioner though aforesaid petition was pertaining to the absorption / regularization of the services of Lecturers in different Departments of the Government Polytechnics in the State of Maharashtra, the observations made and the conclusion recorded by the Division Bench of this Court in the said judgment cannot be restricted only to the Government polytechnics in the State and are liable to be extended to all similarly situated employees irrespective of the Department of the State wherein they are serving. On perusal of the aforesaid judgment, we find force in the submission so made on behalf of the petitioner.

16. The issue involved in the aforesaid case was whether the appointments of the petitioners / employees in the said petition can be said to be backdoor entry in the Government employment when the said employees were selected by a duly constituted Selection Committee and were holding the required qualification for the said post merely because they were not selected by the M.P.S.C.

17. During the course of the argument in the said matter, petitioner brought to the notice of the Division Bench that the Government of Maharashtra vide its communication dated 29th of March, 2008, had informed the Director of Education that the Teaching posts which fall within the purview of the M.P.S.C. have been taken out from the purview of the M.P.S.C. and were to be filled only on the basis of interviews. It was further brought to the notice of the Division Bench that in view of the directions so issued, the services of (i) Shikshan Sevaks working in the private schools appointed on contractual basis (ii) Gram Sevaks appointed on contractual basis (iii) 3761 employees appointed in various Departments and, Mantralaya, who were not selected through the process of Selection Board (iv) Lecturers working in Government Medical Colleges and

Government Dental Colleges, who were appointed on contractual basis (v) the Assistant Engineers, Class II in the Maharashtra Engineering Services, were regularized by the Government of Maharashtra.

As against it, it was the contention of the Government before the learned Division Bench that the employees who are appointed on contractual basis and who have accepted employment with full knowledge that they cannot claim regularization or permanency, were not entitled for claiming any relief. The reliance was placed by the State Government on the judgment in the case of Secretary, State of Karnataka and others Vs. Umadevi (, AIR 2006 SC 1806) to urge that as per the law laid down by the Apex Court in the said judgment, it was not possible for the State to confer regularization or permanency on the petitioners as the appointments of the petitioners were not according to the Rules and not through the M.P.S.C.

18. The argument so advanced on behalf of the State was rejected by the learned Division Bench. The learned Division Bench has observed that the judgment in the case of Umadevi (Supra), would not be applicable in the facts of the said case since the petitioners in the said case were working on the sanctioned posts and that they were selected by resorting to the due selection process and by the duly constituted Selection Committee, and further that, as the State has extracted the work from the said petitioners for years together. The learned Division Bench has further observed that, the petitioners cannot be deprived of the right of regular employment when their entry can neither be termed as illegal nor back-door.

We find that while making appointment of the petitioner on the post of Assistant Professor, may be for a fixed period, and on ad hoc basis, the selection process has been duly followed. As stated earlier, a proper advertisement was issued before making such appointment and the selection of the petitioner was made by the duly constituted Selection Committee. The petitioner was, admittedly, holding the required qualification for such appointment. The record further reveals that first such appointment was issued in favour of the petitioner on 31st January, 2009, and thereafter his services were continued for considerably long period thereafter. The material on record shows that in the period between 31st January, 2009 to 1.9.2015, total 15 appointment orders were issued in favour of the petitioner with some technical breaks. It is further not the case of the respondents that the petitioner was not performing his duties properly, efficiently and to their satisfaction. The material on record further reveals that in the period between 2009 to 2014, no advertisement was issued for filling in the post through M.P.S.C.

19. Similar argument, as was advanced on behalf of the State before the learned Division Bench at Nagpur, in the case of Sachin Ambadas Dawale (cited supra), has also been advanced in the present case. In the present case also the learned A.G.P. has heavily relied upon the judgment of the Hon"ble Apex Court in Uma Devi's case (cited supra).

In the matter of Sachin Ambadas Dawale (cited supra), the learned Division Bench at Nagpur has elaborately dealt with the ratio laid down in Uma Devi's case, and in which circumstances the same is to be applied. In paragraph No. 14 of the said judgment, the learned Division Bench has observed thus:

" It could be clearly seen that the issue before the Apex Court in case of Secretary, State of Karnataka & Ors. V/s. Umadevi & Ors. (supra) was pertaining to the appointments which were made clandestinely and without advertisement and the persons were appointed without following due selection process. The facts of the present case are totally different. In the present case the petitioners have been appointed after the posts were advertised, they were selected in a selection process by Committee of Experts duly constituted as per the said Government Resolution. In that view of the matter, the law laid down by the Apex Court in the case of Secretary, State of Karnataka & Ors. V/s. Umadevi & Ors. (supra) would not be applicable to the facts of the present case. "

The observations made in paragraph nos. 16 and 17 are also relevant for deciding the controversy raised in the present issue, which are thus:

"16. In our view the submissions made on behalf of the respondents relying on the judgment in the case of Secretary, State of Karnataka & Ors. V/s. Umadevi & Ors. (supra) would not be applicable in the facts of the present case. It is undisputed that the posts, in which the petitioners are working, are sanctioned posts. As discussed earlier, the Government of Maharashtra had issued the resolution dated 2nd August, 2003 by which the Selection Committee came to be constituted for the selection of the candidates. The respondents have not disputed that though the petitioners were initially appointed for a fixed term, they are continued in service. It is not disputed that the leave facility is made available by the resolution dated 18th February, 2006 to such employees. The respondents have stated in their affidavit that the monthly pay to these employees has been increased. It is not disputed that the petitioners are having the qualifications required for the posts in which they are working. The respondents have not disputed that the appointments for the teaching posts are taken out of the purview of the MPSC as informed by the communication dated 29th March, 2008.

17. The submission on behalf of the respondents relying on the judgment of Secretary, State of Karnataka & Ors. V/s. Umadevi & Ors.(supra) cannot be accepted in the facts of the present case. In above case, the Hon"ble Supreme Court has observed in paragraph 3 of the judgment that the States have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission "or otherwise as per the rules adopted" and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. The Hon"ble Supreme Court has observed that Courts should desist from

issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. In the present case though the petitioners are not selected through MPSC, it is undisputed that the petitioners are selected after the procedure for selection is followed and through the duly constituted Selection Committee as constituted by the Government of Maharashtra. The advertisement was issued before the petitioners were selected and all interested candidates had applied for the posts for which the petitioners are selected. Thus, it cannot be said that the petitioners have got the employment through back door entry. It cannot be said that the candidates qualified for the posts were deprived of the opportunity to compete for the selection for the posts in which the petitioners are working.

In case of Union Public Service Commission V/s. Girish Jayanti Lal Vaghela and Others reported in , 2006 (2) SCALE 115 the Hon"ble Supreme Court has laid down as follows :-

"Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment" or "appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution (See B.S. Minhas Vs. Indian Statistical Institute and others , AIR 1984 SC 363)."

The said judgment is considered by the Hon"ble Supreme Court in case of Secretary, State of Karnataka & Ors. V/s. Umadevi & Ors. (supra). "

20. Considering the facts of the present case, we find that the observations made as above by the learned Division Bench at Nagpur would squarely apply to the case of the petitioner also. It cannot be said that the petitioner has been appointed arbitrarily or haphazardly or clandestinely without issuing

advertisement and without giving an opportunity to all the eligible candidates to participate in the selection process. The material on record clearly shows that an advertisement was issued inviting applications from the eligible candidates and in the open selection process, the petitioner was selected and subsequently appointed on the post of Assistant Professor. It is also not the case of the respondents that any illegality took place during the selection process. It is further not in dispute that after his selection, the petitioner has been working for the period of about seven years. Admittedly, during the entire aforesaid period, the appointments, which were made, were made only through the process by which the petitioner was selected. It is not the case that during the said period the M.P.S.C. was also conducting the selection process simultaneously. It, therefore, cannot be said that the petitioner had choice to participate in the selection process through the M.P.S.C. as well as through the Committees constituted under the concerned Government Resolution.

In the above circumstances, as observed by the learned Division Bench in the case of Sachin Ambadas Dawale and Others (*supra*), since the State Government has not held the selection process for years together through the M.P.S.C., the petitioner has become over aged now and would not be in a position to participate in the selection process through the M.P.S.C. As such, the contention raised by the respondents in their affidavit in reply that, the petitioner has opportunity to get selected through the proper process of M.P.S.C., cannot be accepted. As averred by the petitioner in the affidavit in rejoinder, after selecting one candidate from open category through M.P.S.C., following the advertisement of 2013, still, there is one vacancy from the open category. From the documents filed on record by the petitioner it is revealed that the respondents are intending to fill up the said post, again, on temporary basis and an advertisement has been, therefore, issued inviting applications for temporary appointment on the said post.

Considering the facts as aforesaid, we see no reason as to why the petitioner, who is otherwise eligible, and qualified for the post of Assistant Professor, and who has been selected by a duly constituted Selection Committee appointed by the Government of Maharashtra, and who has been appointed on the sanctioned post after issuance of advertisement, and following the regular procedure of selection, shall not be absorbed permanently on the said post on which he is presently working.

21. It is brought to our notice that the learned Division Bench of this Court in bunch of Writ Petitions (WP No. 3849/2014 and others), decided on 24th of February, 2015, has directed regularization of the petitioners in the said writ petitions relying on the earlier judgment of the Division Bench of this Court in the case of Sachin Ambadas Dawale and Others (*cited supra*). Moreover, when the State Government has regularized the services of Shikshan Sevaks, Gram Sevaks, Lecturers in Government Medical and Dental Colleges, the Assistant Engineers, Class II, taking out the said appointments out of the purview of the

M.P.S.C., the case of the petitioner also deserves to be considered on the same line. For the reasons stated above, we are inclined to allow the present writ petition.

22. Hence, the following order:

ORDER

- a) Writ petition is allowed.
- b) Respondents are directed to regularize the services of the petitioner and absorb him on the post of Assistant Professor in the stream of Rognidan.
- c) The petitioner shall be entitled for the regular salary for the post of Assistant Professor in the stream of Rognidan w.e.f. 1st of March, 2016. The petitioner, however, would not be entitled to claim monetary benefits in respect of his past services rendered by him inspite of his regularization. The petitioner shall be entitled for continuity in services for all purposes except the monetary benefits.
- d) Rule is made absolute in above terms. No order as to costs.