

(1998) 12 BOM CK 0051
In the Bombay High Court
Case No : Writ Petition No. 81 of 1987

Vithal Ramchandra Biradar and another	APPELLANT
Vs	
Shri P.G. Patil and others	RESPONDENT

Date of Decision : 08-12-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Section 5
Maharashtra Universities Act, 1994 — Section 59
Marathwada University Act, 1974 — Section 42

Citation : (1999) 3 ALLMR 62 : (1999) 4 BomCR 176 : (2000) 85 FLR 377 :
(1999) 2 MhLj 973

Hon'ble Judges : S.B. Mhase, J

Bench : Single Bench

Advocate : N.H. Patil, for the Appellant; V.G. Sakolkar and Suresh Kulkarni, for the Respondent

Judgement

S.B. Mhase, J.—This petition is directed against the judgment and order passed by the College tribunal for Nagpur, Amravati and Marathwada Universities on 29-7-1986 in Appeal No. M-6/ 1986. The respondent No. 3 herein was appointed as a Library Assistant on 28-6-1971 and his claim for promotion was not considered by the respondent No. 2 management, when according to the respondent No. 3 he was entitled for the said promotion in the year 1979. It is his contention that other persons have been promoted to the post of Senior Clerk when the respondent No. 3 was validly entitled for the said promotion. Rest of the grievances made in the appeal were not within the jurisdiction of the tribunal. However, the dispute in between the respondent No. 3 and respondent No. 2 management was in respect of the jurisdiction of the tribunal, namely, the respondent No. 2 management was contending that the grievance in respect of the supersession or denial of promotion cannot be considered by the tribunal while exercising the powers u/s 42-B of the Marathwada University Act, 1974 (section 59 of the Maharashtra Universities Act, 1994). The question, therefore,

was considered by the tribunal and the tribunal held that as per the decision of the Supreme Court it is within the jurisdiction of the tribunal to enquire whether the norms of promotions are followed and the promotion of individual was justified and to that extent this part of reference is not invalid. It is further observed that it is within the jurisdiction of the tribunal to demolish a bad order or direct reconsideration of the order in correct principles and thus, the tribunal ultimately came to the conclusion that it had a jurisdiction and decided the matter.

2. Mr. N.H. Patil, who appears for the petitioners has raised two grounds; first as a result of the impugned order the promotions of the petitioners have been set aside by the tribunal and the tribunal has directed the management to consider the case of superseded employees for promotions except the petitioners. Thus, as a result of this order, the right of the petitioners to promotion has been completely taken away by the tribunal and they are also removed from the consideration zone and such order has been passed by the tribunal without the petitioners being party to the proceeding and without offering any opportunity of hearing. Thus, the principles of audi alteram partem have been completely flouted is in short the submission.

3. The second point which is raised by the learned Counsel is that the tribunal has a jurisdiction in the matter of termination of a service and a reduction in rank. However, in the present matter, it is submitted that supersession is not a reduction in rank and, therefore, the tribunal had no jurisdiction to entertain the appeal and decide a question of seniority and promotion, as has-been done by the tribunal.

4. Mr. Sakolkar; appearing for respondents No. 1 and 2 supports the contentions raised by the petitioners.

5. Mr. Kulkarni, who appears for the respondent No. 3 has stated that the tribunal has jurisdiction to consider the cases where the promotion has not been given and it is submitted that denial of a promotion is a reduction in rank and, thereby, the tribunal gets a jurisdiction. So far as the right of hearing of the petitioners is concerned, he submitted that the management was party before the tribunal and the management has tried to justify the actions of the management. It is pointed out that the promotions given to the petitioners were proper and legal and the said act being done by the management and even though the effect may be on the petitioners, the petitioners were properly represented through the management so as to ventilate their grievance and, therefore, the tribunal was justified in not making them party and hearing them on merit.

6. Admittedly, this is a case wherein at the time of considering the employees of the respondents No. 1 and 2 for promotion to the post of Senior Clerk, the respondent No. 3 was not considered by the respondents No. 1 and 2 to be entitled or eligible for promotion of the Senior Clerk and, therefore, the

petitioners were promoted. This fact itself points out that it is not a case that the respondent No. 3 was holding the post of Senior Clerk already and from that post the respondent No. 3 has been reduced or has been demoted to the lower post and thereby the reduction in rank has been effected by the management. It is only at the time of granting a promotion the said promotion has not been offered by the management. The promotions are effected on the basis of seniority-cum-merit and, therefore, when a person comes in the consideration zone for the purposes of promotion, the management has to consider the seniority and the merit and in such a circumstances, it is just possible that the junior meritorious man may be promoted instead of a senior non meritorious man (relatively). However, in such a process the post which the person is holding to whom the promotion has been denied is not affected and thereby there is no reduction in rank. In short the supersession of a person at the time of promotion cannot be considered to be reduction in rank even though a person may have a grievance in respect of the supersession. When it is not a reduction in rank, that act of the management or that cause of action will not give the jurisdiction to the tribunal to entertain the appeal u/s 42-B of the old Act and/or section 59 of the new Act. In the result, I find that the tribunal had no jurisdiction to entertain the appeal filed by the respondent No. 3. As there is a reference in the judgment of the tribunal that there is a Apex Court judgment, which gives a jurisdiction in such situations, to the tribunal, I specifically asked Mr. Kulkarni and members of the Bar as to whether there is such a judgment of the Apex Court and Mr. Kulkarni submitted that he has not come across with such judgment and, therefore, the observations made by the tribunal making reference to the Apex Court judgment having a jurisdiction to the tribunal in such a situation is vague. In fact, it requires to be observed that the tribunal or any courts shall not make reference to the Apex Court observations without quoting the relevant case which it followed, otherwise one is at loss as to the case which is referred to by the concerned authority. However, as it is admitted that there is no such case, the issue of reduction in rank as above has been considered by the tribunal and it is held that the supersession cannot be equated to the reduction in rank. In the result the submission made by Mr. N.H. Patil that the tribunal has no jurisdiction when there is no supersession is hereby accepted.

7. Secondly, it is well settled principle of law that when any person is going to be affected or is likely to be affected as a result of the judgment of the Court and if the said person is not party to the said proceeding, the Court has to direct the concerned party to make them a party. In spite of the grievance made by the management respondents No. 1 and 2 that those persons are necessary parties to the appeal, neither the respondent No. 3 nor the tribunal bothered to add them party, and above all what is pertinent to be noted is that in the final order not only the promotions of the petitioners were set aside but the tribunal also directed that while considering the case of promotion, they should not be considered. Thus, in absence of hearing given to the petitioners, their claim has been finally negated by the tribunal for the purposes of promotion, which is

absolutely against the settled principles of law and, therefore, the said submission is also accepted.

8. Under these circumstances, the only result follows that the order passed by the tribunal has to be set aside. However, at the same time, it is necessary to consider as to what is the appropriate remedy for the respondent No. 3, because admittedly his grievance in respect of supersession is required to be adjudicated by some forum which is legally entitled to consider the said question. The learned Counsel submitted that under these circumstances, the petition under Article 226 or to file an appropriate suit in the Civil Court will be an appropriate remedy. This Court, at this stage, do not want to enter into what is exactly proper remedy for the petitioners, because that question will have to be considered by the respondent No. 3 as to which remedy he has to prefer and the petitioners and respondents No. 1 and 2 oppose for the said remedy. However, at this stage it is necessary to observe that the respondent No. 3 is entitled to approach for the redressal of the grievance which he has led to the College tribunal in respect of the supersession by approaching an appropriate forum. This Court only observes that if he approaches the said form, the time consumed in these proceedings shall be considered for the purposes of condonation of delay as the time wasted in bona fide prosecuting the remedy. Mr. Kulkarni submitted today affidavit stating that the petitioner No. 1 has left the job in 1981 and has joined as a Lecturer. However, as a result of this fact, there may be a post for promotion available to the respondent No. 3, whether the said post is to be offered or not is the choice of the respondents. However as the fact is placed before this Court, it is noted. The petition therefore, is partly allowed. The order passed by the College tribunal dated 29-7-1986 is hereby set aside. Rule made absolute in the above terms. No order as to cost in the facts and circumstances of the case.

9. Petition partly allowed.