

MAHARASHTRA ADMINISTRATIVE TRIBUNAL,

NAGPUR BENCH, NAGPUR

ORIGINAL APPLICATION NO.134/2013.

(S.B.)

Bhalchandra Jagannath Tidke,
Aged about 53 years, Occ-Service,
R/o Quarter No. C 4/2, Irrigation Colony,
Wainganga Nagar, Ajni, Nagpur-440 003.

**(DECEASED
ORIGINAL APPLICANT)**

1. Sandhya wd/o Bhalchandra Tidke,
Aged about 46 years,
Occ- Household,
R/o Plot No.336, Chitnis Nagar,
Ramna Maroti Nagar, Nagpur.-09.
2. Shraddha d/o Bhalchandra Tidke,
Aged about 25 years,
Occ-Education,
R/o Plot No.336, Chitnis Nagar,
Ramna Maroti Nagar, Nagpur.-09.
3. Chinar s/o Bhalchandra Tidke,
Aged about 22 years,
Occ-Education,
R/o Plot No.336, Chitnis Nagar,
Ramna Maroti Nagar, Nagpur.-09.

Applicants.

All are legal heirs of the original applicant.

-Versus-

1. The State of Maharashtra,
Through its Secretary,
Department of Water Resources,
Mantralaya, Mumbai-32.
2. The Superintending Engineer,
Irrigation Project, Investigation Circle,
Sinchan Seva Bhavan, Civil Lines,
Nagpur.

Respondents.

Shri Shri M.V. Joshi, Advocate holding for Shri P.S. Wathore,
the learned counsel for the applicants.
Shri M.I. Khan, the Ld. P.O. for the respondent No.1.
Shri P.V. Thakre, the learned counsel for respondent No.2.

**Coram:- Shri J.D. Kulkarni,
Vice-Chairman (J).**

JUDGMENT

(Delivered on this 3rd day of January 2018).

Heard Shri M.V. Joshi, Advocate holding for Shri P.S. Wathore, the learned counsel for the applicants and Shri M.I. Khan, the learned P.O. for the respondent No.1 and Shri P.V. Thakre, the learned counsel for respondent No.2.

2. The original applicant in this O.A the Civil Engineering Assistant and had challenged the impugned order dated 11.1.2013 issued by respondent No.2 i.e. the Superintending Engineer, Irrigation Project, Investigation Circle, Nagpur whereby exemption granted to the applicant from appearing in professional / qualifying examination for the post of Junior Engineer has been cancelled. Not only the exemption is cancelled, but the respondent No.2 has directed recovery of the amount paid to the applicant in view of such exemption granted from appearing in the examination.

3. The original applicant was granted exemption vide order dated 11.4.2012 on completion of the age of 45 years.

4. The learned counsel for the applicants submits that in the similar circumstances, this Tribunal has delivered a judgment in **O.A. No. 138/2013 in case of Ashok Kawaduji Awachat ..Vs..State of Maharashtra and one another on 11.4.2017** and recovery was quashed. The applicants have prayed that the impugned order dated 11.1.2013 issued by respondent No.2 be quashed and set aside and the applicants be granted all service benefits and recovery of amount shall not be allowed.

5. Respondent Nos. 1 and 2 have filed reply affidavit and resisted the claim. It is stated that as per the Recruitment Rules, for the post of Junior Engineer (Civil), Group-B (Non-Gazetted), passing of examination is must. Respondent Nos. 1 and 2 have stated in para Nos. 5 to 8 of the reply affidavit as under:-

5. It is pertinent to note here that, the recruitment rules for the post of Junior Engineer (Civil), Group-B (Non-Gazetted) were published by notification dated 1.1.1998. The said rules were framed and issued under the powers exercised as per proviso to Article 309 of the Constitution of India. As per Rule 3 of these rules, appointment to the post of Junior Engineer (Civil), Group-B (Non-Gazetted) in the

P.W.D. and the Irrigation Department (now known as Water Resources Department) shall be made either-

- (a) by promotion of a suitable person on the basis of seniority subject to fitness from amongst the persons holding the post of Civil Engineering Assistant, who have passed the qualifying examination for the post of Junior Engineer conducted by Engineering Staff College, Nasik having not less than three years regular service in that post or;
- (b) by nomination from amongst candidates who-
 - (i) are not more than 30 years of age,
 - (ii) possess a three years diploma in Civil Engineering recognized by Govt. or any other qualification recognized as equivalent thereto.

The copy of recruitment rules for the post of Junior Engineer (Civil), Group-B (Non-Gazetted) post published by notification dated 1.1.1998 is enclosed here as Exh. R-2 D.

6. From above recruitment rules, it is clear that the professional examination of Junior Engineer is qualifying examination for that post and Civil Engineering Assistants who have not passed the said examination cannot get the promotion to the said post. Also, as all criterion of promotion are applied to Time Bound Promotion Scheme or Assured Career Progression Scheme, the Civil Engineering Assistant has to pass the above mentioned examination to get

the benefit of above scheme. It is submitted that the applicant appeared in the professional examination for the post of Junior Engineer of the year 2002 from Chandrapur centre and he failed in the said examination.

7. It is submitted that the applicant who was erroneously granted exemption from passing the professional examination after crossing of 45 years of age by order dated 11.4.2012 from respondent No.2, without considering the instructions given by the respondent No.1 (Department of Water Resources) vide its circulars dated 6.11.2000 and 23.2.2005, was required to cancel the same and accordingly respondent No.2, by his order dated 11.1.2013 impugned in the present application cancelled the erroneous order dated 11.4.2012.

8. It is submitted that the judgment given by the Hon^{ble} High Court of Judicature at Bombay in W.P. No. 6329 of 1997 (Shri Mukund Pandurang Vartak V/s Executive Engineer, Sangli and others) and the order issued by this Tribunal in O.A. No. 472/2011 (Kawadu Nilkanth Kamble V/s State of Maharashtra and others) may kindly be perused at Exh. R-2E.

Both the Hon^{ble} High Courts have dismissed the above mentioned Petition / O.A. with observation that the petitioner / applicant in those particular petition / O.A. could be promoted to the post of Junior Engineer, provided he had passed the Professional Examination of Junior Engineer.+

6. I have perused the Recruitment Rules for the post of Junior Engineer (Civil), Group-B (Non-Gazetted) in Public Works Department and Irrigation Department of Govt. of Maharashtra Rules of 1998. These rules are published as per proviso to Article 309 of the Constitution of India. Rule 3 (a) clearly states that the appointment to the post of Junior Engineer (Civil), Group-B (Non-Gazetted) shall be made either by promotion of a suitable person on the basis of seniority subject to fitness from amongst the persons holding the post of Civil Engineering Assistant who have passed the qualifying examination for the post of Junior Engineer conducted by Engineering Staff College, Nasik having not less than three years regular service in that post. Passing of qualifying examination is, therefore, must. This aspect has been dealt by the Hon'ble High Court at Bombay in **W.P. No. 6229/1997 in case of Mukund Pandurang Vartak V/s Executive Engineer, Sangli and others.** The said judgment was delivered on 18.6.2009 and the Hon'ble High Court has stated that since the petitioner has not passed professional examination and even if exemption was granted to him from appearing in departmental examination, even then he could not be promoted because of not having passed professional examination.

7. Similar view has also been taken by this Tribunal in O.A. No. 138/2013 in case of **Ashok Kawaduji Awachat ..Vs..State of Maharashtra and one another on 11.4.2017.** In the said O.A., the order revoking grant of exemption granted to the applicant from passing qualifying examination for the post of Junior Engineer, was held legal.

8. From the discussion in foregoing paras, it will be clear that the applicant has not passed the qualifying examination to be eligible for the post of Junior Engineer (Civil), Group-B (Non-Gazetted) and, therefore, exemption was wrongly granted to the applicant vide order dated 11.4.2012 from appearing in qualifying examination. The said exemption has been rightly revoked by the department vide impugned order.

9. It seems that there were conflicting circulars as regards grant of exemption from passing qualifying examination which was mandatory for the post of Junior Engineer (Civil), Group-B (Non-Gazetted). However, the applicant is not responsible for such exemption. Similar aspect has been considered by this Tribunal in O.A. No. 138/2013 and in para Nos. 8 to 10, this Tribunal has observed as under:-

8. The plain reading of the aforesaid rule clearly shows that for holding the post of Junior Engineer (Civil) Group-B it is necessary that the Civil Engineering Assistant shall pass the qualifying examination for the post of Junior Engineer conducted by the Engineering Staff College, Nashik. Even if for argument it is accepted that the order of exemption from such examination was issued by the respondent department still that order is against the rules which are framed under Article 309 of the Constitution of India and, therefore, such order will not entitle the applicant for exemption from such examination and merely because the applicant has been exempted, he cannot be appointed to the post of Junior Engineer (Civil) Group-B unless he clears the qualifying examination. The impugned order dated 11/01/2013 so far as it relates to cancellation of exemption is concerned, therefore cannot be questioned.

9. The learned P.O. has relied on the Judgment delivered by Honble High Court of Bombay in **W.P.No.6329/1997 Shri Mukund Pandurang Varkat Vs. Executive Engineer, Sangli & Ors. delivered on 18th June,2009.** In the said Judgment similar point has been considered by the Honble High Court and the Honble High Court has observed as under :-

Counter affidavit has been filed in which the respondents have stated that the resolution to which reference has been made by the petitioner allows the government to grant exemption from passing department examination to those who have completed age of 45 years but this resolution would not apply in case of the petitioner because the examination which needed to be passed by the petitioner had to be passed and the respondents had no power to grant any exemption. It is further submitted that the departmental examination referred to in the resolution dated 1st November,1977 and

professional examination referred in resolution dated 16th September, 1964 are dealing with two different situations and cannot be mixed with one another. It is further stated that the petitioner was appointed as a Civil Engineering Assistant which falls in the category of Technical Assistant and as per Government Resolution, the petitioner could be promoted to the post of Junior Engineer provided he had passed the professional examination. Since the petitioner had not passed the professional examination and even if exemption was granted to him from appearing in departmental examination, even then, he could not be promoted because of not having passed the professional examination. For these reasons, we do not find merit in the petition. Petition is accordingly dismissed”.

10. The learned counsel for the applicant submits that vide impugned order dated 11/01/2013 the respondent had directed recovered of the amount already paid to the applicant and the same is against law. He placed the reliance on the Judgment delivered by the Honble Apex Court in the case AIR 2015 SC, 696 in the case of **State of Punjab Vs. Rafiq Masih (White Washer)** etc. In the said case the Honble Apex Court in para 12 has observed as under :-

“(12) It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from the employees belonging to Class-III and Class-IV service (or Group ‘C’ and*

Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

10. In view of the aforesaid directions of the Hon'ble Apex Court, benefit given to the applicant because of exemption, however, cannot be recovered. Hence, the following order:-

ORDER

- (i) The O.A. is partly allowed.
- (ii) The impugned order revoking exemption granted to the applicant from passing qualifying

examination for the post of Junior Engineer (Civil), Group-B (Non-Gazetted) is held legal.

- (iii) The respondents, however, are directed not to recover arrears if paid in view of order of exemption granted to the applicant. In view thereof, direction regarding recovery of amount due to time bound promotional scale granted to the applicant in view of exemption from passing qualifying exemption, in the impugned order dated 11.1.2013 is quashed.
- (iv) No order as to costs.

Dt. 3.1.2018.

(J.D.Kulkarni)
Vice-Chairman(J)

pdg