

MAHARASHTRA ADMINISTRATIVE TRIBUNAL
NAGPUR BENCH NAGPUR
ORIGINAL APPLICATION No. 960/2018 (D.B.)

Sunil Pralhadrao Nikam,
Aged 50 years, Occ. Service,
Deputy Chief Executive Officer (EGS),
Office of the Divisional Commissioner,
Nagpur.

Applicant.

Versus

The State of Maharashtra,
through its Secretary,
Department of Rural Development & Water
Resources, Mantralaya, Mumbai-400 032.

Respondents.

Shri S.P. Palshikar, Advocate for the applicant.

Shri A.M. Ghogre, P.O. for respondent.

**Coram :- Shri Shree Bhagwan,
Vice-Chairman and
Shri Anand Karanjkar, Member (J).**

Date of Reserving for Judgment : 9th October, 2019.

Date of Pronouncement of Judgment : 19th November, 2019.

JUDGMENT

Per : Anand Karanjkar : Member (J).

(Delivered on this 19th day of November, 2019)

Heard Shri S.P. Palshikar, Id. counsel for the applicant
and Shri A.M. Ghogre, Id. P.O. for the respondent.

2. In this application, the applicant is claiming deemed date appointment along with consequential monetary benefits. It is claimed by the applicant that the order passed by the respondent no.1 on 29/6/2016 is illegal and bad in law. The undisputed facts are as under-

3. The applicant joined the service as Sales Tax Inspector in the year 1996. There was trap arranged by the ACB and as a result of the trap the applicant was booked for offence under Prevention of Corruption of Act and criminal case was filed against him. The applicant was suspended and suspension order was continued till 2002.

4. In the meantime i.e. 2000 advertised was published by the MPSC for filling the post of Deputy CEO/BDO, Class-I. The applicant applied for the post and he appeared in the examination and he was declared successful by the MPSC. In the year 2002 appointment orders were issued to all other selected candidates excluding the applicant, for the reason that criminal case was pending against him. The Special Court decided criminal case on 22/3/2007 and the applicant was acquitted. The respondent no.1 thereafter preferred appeal before the Hon'ble High Court, but it was dismissed. The respondent no.1 also filed Special Leave Petition (SLP) before the Hon'ble Supreme Court, but it was not entertained.

5. The respondent no.1 issued order dated 2/7/2008 and appointed the applicant in M.D.S. Group-I service on the post of Deputy CEO/BDS, Class-I. At the relevant time the applicant was on establishment of the Joint Commissioner, Sales Tax, Amravati. The Joint Commissioner Sales Tax, Amravati relived the applicant on 8/7/2008 and thereafter the applicant joined duty in M.D.S., Class-I service on 9/7/2008.

6. It is claimed by the applicant that seniority lists were published and in the seniority list, the seniority of the applicant was shown as 25/9/2002. It is contended that in December, 2014 the Department published a list of the Officers who were in zone of consideration for being promoted to selection grade post. The name of the applicant was not included in the list, therefore, representation dated 5/1/2015 (A-4) was made by the applicant. It is submitted that without considering the relevant legal provisions his representation was rejected by the respondent no.1 vide order dated 29/6/2019.

7. The O.A. No.351/2015 was already filed by the applicant and the representation was pending for consideration in the mean time, order dated 29/6/2019 was passed, but due to inadvertence the applicant did not amend the O.A.. The O.A. 351/2015 was decided by the M.A.T., Nagpur Bench on 7/7/2017 and the respondents were

directed to decide the representation dated 15/4/2015 (Annex-20) within a period of three months.

8. The respondent no.1 decided the representation vide Annex-6 and it was informed that as the applicant joined service on 9/7/2008 and he did not complete actual 8 years of service from the date of joining, therefore, the representation was rejected.

9. The learned counsel for the applicant submitted that the applicant was selected in the year 2001 and appointment order was issued on 2/7/2008 for which the applicant was not responsible. It is submitted that the department was at fault for not issuing appointment order, therefore, it was necessary for the respondents to grant deemed date of appointment to the applicant as provided under Rule-5(2) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 by exercising the powers under Rule-8 of the said rules. It is submitted that the inaction of the respondents not considering this fact and not giving deemed date to the applicant has caused material prejudice to the applicant and therefore this application is required to be allowed.

10. The respondent no.1 has filed reply at page no.241. So far as the facts are concerned there is no dispute. The application is mainly opposed on the ground that as the criminal case was pending against the applicant, therefore, it was not possible for the department

to issue appointment order and this was done as per the rules framed by the Government, therefore, it is not possible to hold that the department was at fault for not issuing the appointment order. It is submission of the learned P.O. that case of the applicant was referred to the Law and Judiciary Department and after examining the legal aspects decision was taken by the Law and Judiciary Department that as the applicant was in service of the Sales Tax Department till 8/7/2008, it was not possible to give him the deemed date as per the seniority fixed by the MPSC at the time of recruitment. It is submitted that the applicant was in service of the Sales Tax Department and one person cannot be on two distinct Government establishments and consequently the applicant was not entitled for the relief of deemed date as per the Rule-5 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982.

11. It is contention of the learned P.O. that though in some seniority lists it was mentioned that the date of appointment was 25/9/2002, but in the remarks column there was note that the applicant was appointed vide order dated 2/7/2008. The learned P.O. submitted that when earlier seniority list was prepared, consent of GAD or Law Department was not obtained and when this fact was brought to the notice, the situation was examined in the light of the Services Rules. It came to the notice of the Department that indeed

the applicant joined the service on 9/7/2008 and in December,2014 he had not actually completed 8 years service on the post and considering this aspect the correct seniority list was published. According to the respondents, the Rule-5 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 is not mandatory, but it is discretionary and considering the circumstance of the case decision was taken not to give deemed date of appointment to the applicant as 25/9/2002.

12. In view of this rival submissions, it is necessary to examine the Rules-4 and 5 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982. The Rule 4 (1) says that the seniority of a Government servant in any post, cadre or service shall ordinarily be determined on the length of his continuous service. Rule 4 (2) is exception to this normal rule. Sub rule 2 (a) says that inter-se seniority of direct recruits selected in one batch for appointment to any post, cadre or service shall be determined according to their ranks in the order of merit arranged by the Commission/ Selection Board, if the appointment is taken up by the person recruited within 30 days from the date of issue of the order of appointment or within such extended period as the competent authority may in its discretion allow.

13. After reading the Rule 4 (2) (a) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 it seems that if the

recruited candidate joins duty within 30 days from the issuance of the appointment order or within extended period, then it shall be obligatory to give him seniority as per the order of merit, arranged by the Commission. In the present case what happened is that when other candidates were appointed by the respondent no.1, the applicant could not be appointed due to pending criminal case. It is admitted position that this case was decided on 22/3/2007 and the applicant was acquitted the appeal was preferred before the Hon'ble High Court, it was dismissed, then SLP was filed before the Hon'ble Apex Court, but it was turned down. After dismissal of SLP the department i.e. the respondent no.1 issued the appointment order on 2/7/2008. Thereafter the applicant was relieved by the Joint Commissioner, Sales Tax Department, Amravati on 8/7/2008 and the applicant joined duty on 9/7/2008.

14. It is submission of the learned counsel for the applicant that the applicant was entitled for the relief under Rule 5 (2) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982. The Rule 5 (1) is exception to Rule 4 of the said rules, it says that on recommendation of the competent authority the Government may in accordance with the provisions contained in the following sub rules assign to a Government servant, a deemed date of appointment which may be different from the date of his actual appointment. Thus it

seems that the Rule 5 (1) has conferred power on the Government to assign a deemed date of appointment to the Government servant which may be other than the actual date of appointment.

15. The Rule 5 (2) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 is applicable to the direct recruits selected in one batch. This rule says that where the direct recruits selected in the same batch report for duty on different dates and actual dates on which they are appointed are not chronologically in conformity with their inter-se seniority as provided in Rule-4 (2) (a) then power can be exercised as provided in Rule 5 (1). It is contention of the applicant that his case is very much covered under Rule 5 (2) and in addition, under Rule-8 power is conferred on the Government to pass suitable order in the interest of justice. It is submitted that there was no fault of the applicant for not issuing the appointment order in year 2002.

16. After considering the arguments of both the sides, it seems that the respondent no.1 decided not to give a deemed date appointment to the applicant for the reason that the applicant was in service of the Sales Tax Department till 8/7/2008. It is attack of the respondents that one person cannot hold two posts simultaneously in two distinct departments of the Government, therefore, in this case it was not permissible to give relief to the applicant.

17. We have perused the order dated 29/6/2016 and 5/10/2017. It seems that the applicant made request to the Government to exercise power under Rule-8 of the said rules and assign him deemed date of appointment from 25/9/2002 along with monetary benefits. There was a request by the applicant that he be awarded selection grade w.e.f. 25/10/2013. The Law and Judiciary Department specifically observed that as the applicant was in service of Sales Tax Department till 8/7/2008 and as the applicant had not discharged 8 years regular service in the cadre of Dy. CEO/ BDO, Class-I, therefore, it was not permissible to give any relief to the applicant.

18. We have examined the Rule 4 (2) (a) and Rule 5 (1) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982. So far as the Rule 4 (2) (a) is concerned, in this rule language is used "shall be determined" this suggests that the rule 4 (2) (a) is mandatory. However, the language used in Rule 5 (1) is concerned, it seems that this rule is exception to Rule 4 and the language is used "on recommendation of the competent authority the Government may in accordance with the provisions contained in the following sub rules". Thus, it is clear that the Rule 5 (1) is discretionary and not mandatory. The language of Rule 5 (1) is not imperative, but it has conferred discretion of the Government to give deemed date of

appointment other than the actual date of appointment considering the facts and circumstances of the case.

19. Now material question was arises, whether this discretion is judiciously exercised by the respondent no.1 or not. It is settled legal position that whenever discretion is conferred on any authority that authority is bound to exercise that discretion judiciously and not in the arbitrary manner. In the present case it seems that the applicant was trapped in ACB case, he was prosecuted by the ACB, the trial was pending, this was reason for not issuing appointment order to the applicant in year 2002 for which Government cannot be blamed. Thereafter the respondent no.1 issued appointment order on 2/7/2008 consequently the applicant was relieved by the Joint Commissioner, Salex Tax Department, Amravati on 8/7/2008 and he resumed duty on 9/7/2008. It is material to note that the applicant was in service of the Sales Tax Department till 8/7/2008 and till then he has withdrawn the salary and allowances admissible to the post from the Sale Tax Department. As the applicant was in service till 8/7/2008 and he has received all the benefits of that service then it is not possible to grant the monetary benefits to the applicant for the same period. Similarly as the applicant was performing duty as the Sales Tax Inspector till 2/7/2008 it is not permissible to consider that service as the service in the cadre of Dy. CEO/BDO, Class-I in M.D.S.. The dues of both the

departments were totally different. The learned P.O. has invited our attention to the Notification issued by the Government dated 25/10/2011. Vide this Notification the Rules were brought in force to promote the Dy. CEO/ BDO class I in MDS to selection grade cadre. The rule 4 deals with appointment to the post of selection grade Dy. CEO etc. and the eligibility for the promotion was Dy. CEO, M.D.S. service Group-A/ BDO, Class-I who have rendered a regular service of not less than 8 years in that post. It is contention of the applicant that he was entitled for the promotion as Dy. CEO, Selection Grade, but fact remains that in 2014 the applicant had not completed 8 years regular service on the post. It is submission of the applicant that he be awarded deemed date as 25/9/2002 the date on which his batch mates were appointed. In our opinion this argument is attractive, but there is a fallacy in this argument that it will give entitlement to the applicant to claim promotion as selection grade Dy. CEO or equivalent post without fulfilling requirements i.e. 8 years of regular service. When the service rules says that for giving promotion the particular length of service is a material requirement, then it is not empty formality; therefore, unless a person who is claiming promotion has discharged a length of service as fixed by the Government in the rules, he cannot be considered for the post.

20. Secondly we have already discussed that it is claim of the applicant that he is entitled for the salary of the post w.e.f. 25/9/2002. We have already discussed that the applicant joined the duty on 9/7/2008 and till 8/7/2008 the applicant was Sales Tax Inspector. It is rightly discussed by the Law Department that one person cannot hold two posts at a same time in two departments of the Government. In this regard, we would like to point out that some what similar situation was examined by the Hon'ble Apex Court in case of **Girish Kumar Vs. State of Maharashtra & Ors.2019 (6) SCC 647.** In this case before the Hon'ble Apex Court the appellant was appointed as Senior Assistant on 26/6/2001, he was promoted to the post of Office Superintendent by the order dated 12/10/2007, however w.e.f. 7/10/2005. The respondent no.3 in the case was appointed as Junior Assistant in the year 1994, he was placed under suspension in 1999, the suspension was revoked in the year 2001 and the respondent no.3 was exonerated in the departmental inquiry in the year 2006. The respondent no.3 was promoted as Sr. Assistant on 1/7/2006. However as he was exonerated in departmental inquiry, he was granted deemed date promotion w.e.f. 6/11/1999 on the post of Sr. Assistant. Thereafter the respondent no.3 was promoted as Office Superintendent on 22/10/2007. The office of the Divisional Commissioner granted deemed date to the respondent no.3 as

7/10/2005. The grant of deemed date was challenged. It was contention before the Hon'ble Apex Court that the respondent no.3 did not complete the continuous service. In para-9 of the Judgment the Hon'ble Apex Court has observed as under –

“9. In the present case, the High Court has considered Rule 5 of the Seniority Rules, 1982 and has not at all considered the Recruitment Rules, 1967. Respondent no.3 might have been granted the deemed date of promotion to the post of Office Superintendent with effect from 07.10.2005. However, he was actually promoted as Office Superintendent on 22.10.2007. Therefore, in fact, he has rendered service as Office Superintendent only from 22.10.2007. As per Appendix IX to the Recruitment rules, 1967, the eligibility for appointment to the promotional post of Section Officer requires three years continuous service. The language used in Appendix IX is unambiguous, simple and plain. Therefore, on a fair reading of Appendix IX of the Recruitment Rules, 1967, to become eligible for the promotional post of Section Officer, a person ought to have rendered continuous service of not less than three years. “Continuous service” might have been defined under the Seniority Rules, 1982. However, the same shall be for the purpose of seniority and the Seniority Rules only. Therefore, if any employee is granted the deemed date of promotion, his seniority shall be considered accordingly from the deemed date of promotion. However, that shall be only for the purpose of inter se seniority only and the same shall not be applicable while considering the eligibility criteria under the Recruitment Rules. In the Recruitment Rules, “continuous service” is not defined. Therefore, one has to consider the ordinary dictionary meaning of “continuous” which means “uninterrupted or unbroken”. The High Court has added the word “actual” which as such is not there in Appendix IX. While considering the relevant provisions and as per the rule of interpretation, when the language used is unambiguous, plain and simple, the provision is required to be read as it is and nothing is to be added. Therefore, when in Appendix IX, the eligibility criteria is that no person shall be eligible for promotion unless he has completed service for a continuous service of not less than three years means he has to render/complete service for a continuous period of uninterrupted/unbroken three years service. Therefore, when respondent no.3 has not completed three years of service for a continuous period of not less than three years in the feeder cadre in District Service (Class III) (Ministerial) Grade II, he was not eligible for promotion to the post of Section Officer. The High Court has committed a grave error in holding otherwise. Therefore, the Additional Divisional Commissioner, Aurangabad rightly

allowed the appeal and rightly set aside the order of promotion of respondent no.3 dated 1.2.2008 to the post of Section Officer”.

21. In present case the applicant is claiming the deemed date appointment for claiming the promotion and monetary benefits w.e.f. 25/9/2002. We are of the firm view that as the applicant has drawn salary from the Government serving as the Sales Tax Inspector, it is not permissible to give him deemed date appointment w.e.f. 25/9/2002. Secondly, the period during which the applicant was serving as Sales Tax Inspector cannot be considered as service on the post of Dy. CEO/BDO, Class-I in M.D.S. cadre while computing the 8 years of regular service for the promotion. In view of this discussion, we do not see any illegality in the discretion exercised by the Government for not awarding deemed date appointment and other reliefs to the applicant. Hence, the following order –

ORDER

The O.A. stands dismissed with no order as to costs.

(Anand Karanjkar)
Member(J).

(Shree Bhagwan)
Vice-Chairman.

Dated :- 19/11/2019.

*dnk..

I affirm that the contents of the PDF file order are word to word same as per original Judgment.

Name of Steno : D.N. Kadam

Court Name : Court of Hon'ble V.C. and Member (J).

Judgment signed on : 19/11/2019.

Uploaded on : 20/11/2019.